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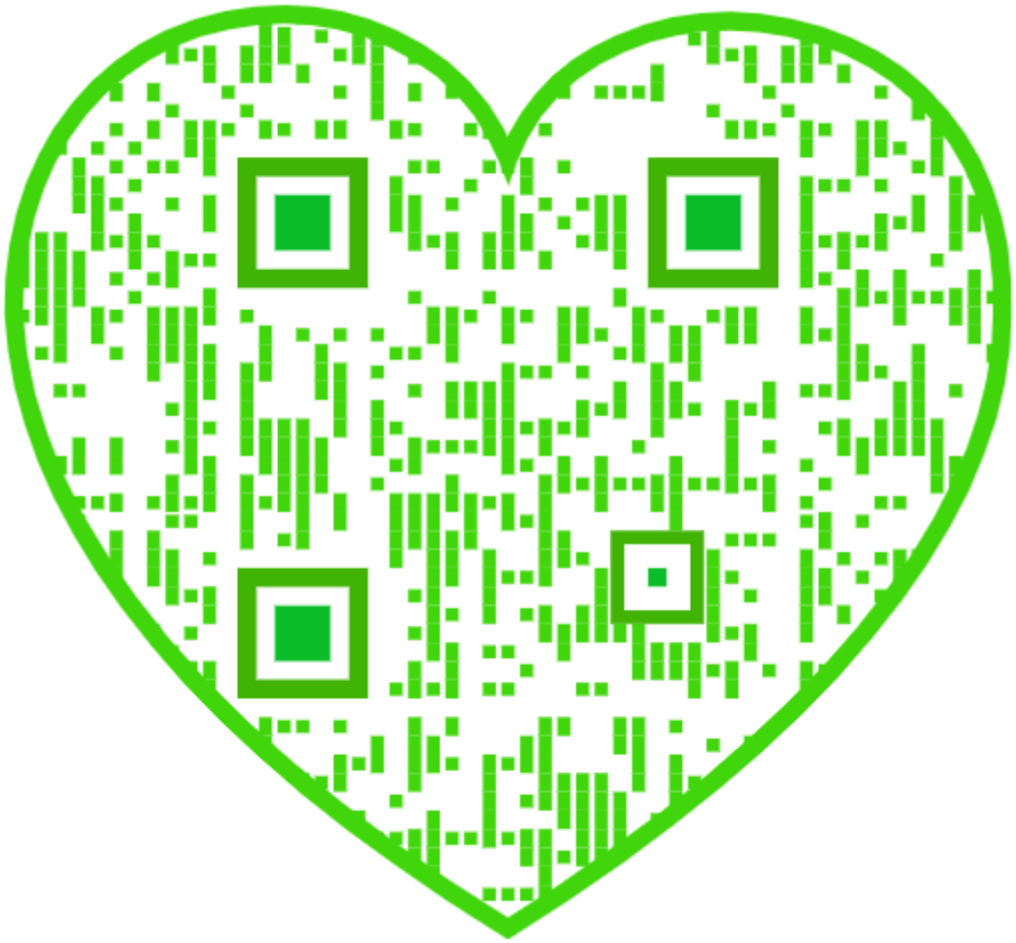

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I. DEFINITION AND CLASSIFICATION.

A. In General. A contempt is a wilful disregard or disobedience of a public authority.[1]

B. Contempt of Court — 1. IN GENERAL. A contempt of court is disobedience to the court, by acting in opposition to the authority, justice, and dignity thereof.[2] Contempts may be direct[3] or constructive,[4] criminal[5] or civil.[6]

2. DIRECT CONTEMPT. A direct contempt is an open insult in the presence[7] of the court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority.[8]

1. Bouvier L. Dict. [*quoted* in *In re* MacKnight, 11 Mont. 126, 135, 27 Pac. 336, 28 Am. St. Rep. 451].

Other definitions are: "Disobedience or disregard of authority." Burrill L. Dict.

"Disobedience to, or interruption of, the orders or proceedings of a court or legislative body." Abbott L. Dict.

"A willful disregard of the authority of a court or legislature." Anderson L. Dict. [*quoted* in *In re* MacKnight, 11 Mont. 126, 135, 27 Pac. 336, 28 Am. St. Rep. 451].

"A willful disregard of the authority of a court of justice, or legislative body, or disobedience to its lawful orders." Black L. Dict.

2. Miller *v.* Knox, 4 Bing. N. Cas. 574, 6 Scott 1, 33 E. C. L. 865; Pract. Reg. 99 [*quoted* in Conover *v.* Wood, 5 Abb. Pr. (N. Y.) 84, 89]; 2 Swift Dig. 358 [*quoted* in Lyon *v.* Lyon, 21 Conn. 185, 199]; Viner Abr. tit. Contempt.

Other definitions are: "A despising of the authority, justice or dignity of the court." Dahnke *v.* People, 168 Ill. 102, 107, 48 N. E. 137, 39 L. R. A. 197.

"Disregard of the authority of the court." *In re* MacKnight, 11 Mont. 126, 135, 27 Pac. 336, 28 Am. St. Rep. 451.

"An offence against the court as an organ of justice." Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290 [*quoted* in State *v.* Frew, 24 W. Va. 416, 448, 49 Am. Rep. 257].

"Any willful disregard of the authority of the court, rightfully exercised." Powell *v.* State, 48 Ala. 154, 156.

"Any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation." 3 Encyc. Laws Eng. p. 313.

Contempt of court involves two ideas: contempt of its power and contempt of its authority — the word "power" involving the ability to enforce obedience to its orders, and the word "authority" its jurisdiction to declare the law, and the rights of the parties. 3 Encyc. Laws Eng. p. 313.

To be in contempt is to be in the condition of one who has committed a contempt of court and has not purged himself. Haldane *v.* Eckford, L. R. 7 Eq. 425, 38 L. J. Ch. 372, 20 L. T. Rep. N. S. 389, 17 Wkly. Rep. 570.

3. See *infra*, I, B, 2.

In courts of equity contempts were formerly classified as ordinary and extraordinary. U. S. *v.* Anonymous, 21 Fed. 761. In modern times they are usually called civil and criminal. Wellesley *v.* Beaufort, 2 Russ. & M. 639, 11 Eng. Ch. 639.

4. See *infra*, I, B, 3.

5. See *infra*, I, B, 4.

6. See *infra*, I, B, 5.

7. As to what constitutes "in the presence" of the court see *infra*, III, J, 2.

8. *Illinois.*— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Kyle *v.* People, 72 Ill. App. 171.

Indiana.— Dodge *v.* State, 140 Ind. 284, 39 N. E. 745; Stewart *v.* State, 140 Ind. 7, 39 N. E. 508; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224; *Ex p.* Wright, 65 Ind. 504; Whittem *v.* State, 36 Ind. 196.

Kansas.— State *v.* Anders, 64 Kan. 742, 68 Pac. 668; State *v.* Henthorn, 46 Kan. 613, 26

3. CONSTRUCTIVE CONTEMPT. A constructive contempt is an act done not in the presence of the court, but at a distance which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice.[9]

4. CRIMINAL CONTEMPT. A criminal contempt is conduct that is directed against the dignity and authority of the court.[10]

5. CIVIL CONTEMPT. Civil contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein.[11]

II. NATURE OF OFFENSE.

Acts punishable as criminal contempts are in the nature of crimes, in that they involve the idea of punishment as a penalty for the commission of unauthorized acts.[12]

Pac. 937; *In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505.

Maine.— Androscoggin, etc., R. Co. *v.* Andrsocoggin R. Co., 49 Me. 392.

West Virginia.— State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407.

England.— 4 Bl. Comm. 283 [*quoted* in Com. *v.* Dandridge, 2 Va. Cas. 408, 418].

Direct contempts are such as are offered to the court while sitting as such. Stuart *v.* People, 4 Ill. 395.

9. *Colorado.*— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Stuart *v.* People, 4 Ill. 395; Kyle *v.* People, 72 Ill. App. 171.

Indiana.— Stewart *v.* State, 140 Ind. 7, 39 N. E. 508; *Ex p.* Wright, 65 Ind. 504; Whittem *v.* State, 36 Ind. 196.

Kansas.— State *v.* Henthorn, 46 Kan. 613, 26 Pac. 937; *In re* Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Minnesota.— State *v.* Ives, 60 Minn. 478, 62 N. W. 831.

10. *Colorado.*— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038.

Kentucky.— Newport *v.* Newport Light Co., 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532; Nienaber *v.* Tarvin, 104 Ky. 149, 46 S. W. 513, 20 Ky. L. Rep. 451; Wages *v.* Com., 13 Ky. L. Rep. 925.

Nevada.— Phillips *v.* Welch, 11 Nev. 187.

New York.— People *v.* Oyer, etc., Ct., 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691; People *v.* McKane, 78 Hun 154, 28 N. Y. Suppl. 981, 60 N. Y. St. 196; *In re* Percy, 2 Daly 530.

Oregon.— State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

South Carolina.— State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Texas.— *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Utah.— Snow *v.* Snow, 13 Utah 15, 43 Pac. 620.

11. *California.*— *In re* Wilson, 75 Cal. 580, 17 Pac. 698.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375.

Kentucky.— Nienaber *v.* Tarvin, 104 Ky. 149, 46 S. W. 513, 20 Ky. L. Rep. 451; Newport *v.* Newport Light Co., 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532; Wages *v.* Com., 13 Ky. L. Rep. 925.

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12. *California.*— *Ex p.* Gould, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57, 21 L. R. A. 751; *Ex p.* Acock, 84 Cal. 50, 23 Pac. 1029; *In re* Fil Ki, 80 Cal. 201, 22 Pac. 146; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *In re* Buckley, 69 Cal. 1, 10 Pac. 69.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

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Missouri.— *Ex p.* Mason, 16 Mo. App. 41.

Nevada.— Phillips *v.* Welch, 11 Nev. 187.

North Carolina.— *In re* Griffin, 98 N. C. 225, 3 S. E. 515.

North Dakota.— Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

III. ACTS OR CONDUCT CONSTITUTING CONTEMPT.[13]

A. In General. Contempt may be shown either by language or manner.[14] Language not in itself contemptuous may become so if uttered in an insolent or defiant manner.[15]

B. Abstracting or Altering Court Records. Abstracting papers and substituting others therefor,[16] or taking papers from court files and refusing or neglecting to return them,[17] is punishable as a contempt.

C. Abuse of Legal Process or Proceeding. Wilful abuse of legal process,[18] such as instituting, or procuring the institution of, unauthorized or fictitious proceedings or suits,[19] obtaining court orders by fraud or deceit,[20] or knowingly

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Brooker *v.* Com., 12 Serg. & R. 175.

Texas.— Contempt of court is not an offense within the meaning of the Texas penal code. Casey *v.* State, 25 Tex. 380.

Virginia.—Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

West Virginia.— McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; State *v.* Ralphsnyder, 34 W. Va. 352, 12 S. E. 721; State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76; Alderson *v.* Kanawha County, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. Rep. 840, 5 L. R. A. 334; State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413; Ruhl *v.* Ruhl, 24 W. Va. 279; Craig *v.* McCulloch, 20 W. Va. 148; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

Wisconsin.— *In re* Murphey, 39 Wis. 286; Haight *v.* Lucia, 36 Wis. 355.

United States.— *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; Hayes *v.* Fischer, 102 U. S. 121, 26 L. ed. 95; New Orleans *v.* New York Mail Steamship Co., 20 Wall. 387, 22 L. ed. 354; *Ex p.* Kearney, 7 Wheat. 38, 5 L. ed. 391; *In re* Perkins, 100 Fed. 950; *In re* Acker, 66 Fed. 290; Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501; U. S. *v.* Berry, 24 Fed. 780; U. S. *v.* Atchison, etc., R. Co., 16 Fed. 853, 5 McCrary 287; *In re* Litchfield, 13 Fed. 863; Searls *v.* Worden, 13 Fed. 716; *In re* Ellerbe, 13 Fed. 530, 4 McCrary 449; Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13; Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss. 490; *In re* Mullee, 17 Fed. Cas. No. 9,911, 7 Blatchf. 23; U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108.

England.—Matter of Pollard, L. R. 2 P. C. 106, 5 Moore P. C. N. S. 111, 16 Eng. Reprint 457.

See 10 Cent. Dig. tit. "Contempt," § 4.

As to nature of proceedings to punish for contempt see *infra*, VII, A.

13. Statutes defining or enumerating the specific acts which constitute contempt are for the most part merely declaratory of the common law. State *v.* Morrill, 16 Ark. 384; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 568; Langdon *v.* Wayne Cir. Judges, 76 Mich. 358, 43 N. W. 310; Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 5 L. ed. 242; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259.

14. Hughes *v.* People, 5 Colo. 436; Wilson's Case, 7 Q. B. 984, 53 E. C. L. 984.

A mere threat to levy execution on property in violation of a court order is not contempt. *In re* McBryde, 99 Fed. 686.

15. Holman *v.* State, 105 Ind. 513, 5 N. E. 556; *Ex p.* Curtis, 3 Minn. 274; Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699; Wilson's Case, 7 Q. B. 984, 53 E. C. L. 984.

In determining whether the language used was or was not a contempt, regard must be had not merely to the very words used, but to the surrounding circumstances; the connection in which they were used, the tone, the look, the manner, the emphasis. *In re* Cooper, 32 Vt. 253.

16. Baldwin *v.* State, 11 Ohio St. 681.

Defacing appeal-bond.— Under the North Carolina statute, the defacing of an appeal-bond executed before a justice of the peace and failure to return the papers to the appeal court by the justice is not punishable as a contempt but is a misdemeanor. Weaver *v.* Hamilton, 47 N. C. 343.

Procuring false satisfaction of a judgment is a contempt. *In re* Feehan, 36 Misc. (N. Y.) 614, 73 N. Y. Suppl. 1126.

17. Barker *v.* Wilford, Kirby (Conn.) 232; Wisconsin, etc., R. Co. *v.* Given, 69 Iowa 581, 29 N. W. 611.

Breaking open sealed papers.—Where books are produced for the inspection of the adverse party, and the parts or pages thereof not relating to the subject-matter of the litigation were ordered to be sealed up in accordance with the usual practice, it is contempt for the adverse party to break open the parts so sealed. Dias *v.* Merle, 2 Paige (N. Y.) 494.

18. Howard *v.* Rawson, 2 Leigh (Va.) 733.

19. Smith *v.* Junction R. Co., 29 Ind. 546; Smith *v.* Brown, 3 Tex. 360, 49 Am. Dec. 748; Matter of Elsam, 3 B. & C. 597, 3 D. & R. 389, 3 L. J. K. B. O. S. 75, 10 E. C. L. 272.

Bringing suit in the name of one without his privity, knowledge, or consent (Yates *v.* Lansing, 9 Johns. (N. Y.) 305, 6 Am. Dec. 290; Butterworth *v.* Stagg, 2 Johns. Cas. (N. Y.) 291), or instituting suit for a divorce for a woman without her consent (Dillon *v.* State, 6 Tex. 55) is contempt.

To obtain the opinion of the court where no real controversy exists is contempt. Chamberlain *v.* Cleveland, 1 Black (U. S.) 419, 17 L. ed. 93; Lord *v.* Veazie, 8 How. (U. S.) 251, 12 L. ed. 1067.

20. Wilmerdings *v.* Fowler, 14 Abb. Pr. N. S. (N. Y.) 249. But see De Comeau *v.*

interposing false pleadings[21] is contempt, where such acts obstruct or tend to impede the due administration of justice.

D. Destruction, Removal, Concealing, or Disposing of Subject-Matter of Suit. It is contempt to wilfully destroy, remove, conceal, or dispose of, the subject-matter of the litigation pending the proceedings.[22] The doctrine applies to both persons and property.[23]

E. Disobedience to Mandate, Order, or Judgment — 1. In General. Disobedience or resistance to, or an attempt to prevent the execution of, a lawful order, judgment, decree, or mandate of a court is an interference with, or an attempt to obstruct, the due administration of justice, and is therefore a contempt.[24]

People, 7 Rob. (N. Y.) 498, holding that where a party by supplementary proceedings procures by deceit an order vacating a prior order he cannot be punished as for contempt if the other party has not been prejudiced by it.

Procuring continuance on ground of feigned sickness is contempt. Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567; Carter *v.* Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

21. **Interposition of verified answer which is false** and which impedes, if it does not defeat, the rights of plaintiff is contempt. Matter of Hall, 85 Hun (N. Y.) 620, 32 N. Y. Suppl. 883, 66 N. Y. St. 201; Martin Cantine Co. *v.* Warshauer, 7 Misc. (N. Y.) 412, 28 N. Y. Suppl. 139, 58 N. Y. St. 569, 23 N. Y. Civ. Proc. 379. *Contra*, Fromme *v.* Gray, 148 N. Y. 695, 43 N. E. 215 [*affirming* 14 Misc. 592, 36 N. Y. Suppl. 1107, 72 N. Y. St. 257, 25 N. Y. Civ. Proc. 116, 2 N. Y. Annot. Cas. 266]; Simon *v.* Aldine Pub. Co., 14 Daly (N. Y.) 279, 8 N. Y. St. 377; Moffatt *v.* Herman, 17 Abb. N. Cas. (N. Y.) 107.

22. *California.*— *In re* Lowenthal, 74 Cal. 109, 15 Pac. 359, 5 Am. St. Rep. 424; *Ex p.* Kellogg, 64 Cal. 343, 30 Pac. 1030.

Kansas.— *In re* Farr, 41 Kan. 276, 21 Pac. 273.

New York.— Greite *v.* Henricks, 71 Hun 11, 24 N. Y. Suppl. 546, 53 N. Y. St. 852; Fenner *v.* Sanborn, 37 Barb. 610.

Texas.— San Antonio St. R. Co. *v.* State, (Civ. App. 1896) 38 S. W. 54.

Wisconsin.— *In re* Milburn, 59 Wis. 24, 17 N. W. 965.

United States.— Wartman *v.* Wartman, 29 Fed. Cas. No. 17,210, Taney 362.

See 10 Cent. Dig. tit. "Contempt," § 42.

Transfer of his property by a husband in anticipation of a divorce and judgment for alimony in favor of the wife is not a contempt. Stuart *v.* Stuart, 123 Mass. 370.

23. People *v.* Kearney, 21 How. Pr. (N. Y.) 74; *In re* Grant, 26 Wash. 412, 67 Pac. 73; Richard *v.* Van Meter, 20 Fed. Cas. No. 11,763, 3 Cranch C. C. 214.

One in custody who escapes or permits himself to be rescued is guilty of contempt. State *v.* Ackerson, 25 N. J. L. 209.

Taking a prisoner out of the state by virtue of extradition proceedings, pending an application for habeas corpus for the prisoner, is not contempt. *Ex p.* Lake, 37 Tex. Crim. App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

Where a minor, being a party to a suit, is by his consent taken out of the court's jurisdiction, the party taking him is not guilty of contempt. Whittem *v.* State, 36 Ind. 196. See also Trimble *v.* Com., 96 Va. 818, 32 S. E. 786.

Where the custody of a child is in controversy in a divorce suit, the refusal of defendant to disclose to the court the whereabouts of such child is contempt. Cottier *v.* People, 61 Ill. App. 17.

24. *California.*— Cosby *v.* Los Angeles County Super. Ct., 110 Cal. 45, 42 Pac. 460; Seventy-Six Land, etc., Co. *v.* Fresno County Super. Ct., 93 Cal. 139, 28 Pac. 813; *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; People *v.* Dwinelle, 29 Cal. 632; *Ex p.* Cohen, 5 Cal. 494.

Connecticut.— William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

Georgia.— Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; Thompson *v.* Turner, 69 Ga. 219.

Illinois.— Lutt *v.* Grimont, 17 Ill. App. 308.

Indiana.— Thistlethwaite *v.* State, 149 Ind. 319, 49 N. E. 156; Shirk *v.* Cox, 141 Ind. 301, 40 N. E. 750; Hawkins *v.* State, 126 Ind. 294, 26 N. E. 43; Mowrer *v.* State, 107 Ind. 539, 8 N. E. 561.

Iowa.— State *v.* Baldwin, 57 Iowa 266, 10 N. W. 645; Dunham *v.* State, 6 Iowa 245.

Kansas.— *In re* Wolf, 52 Kan. 366, 34 Pac. 1048.

Michigan.— Berry *v.* Innes, 35 Mich. 189; People *v.* Kidd, 23 Mich. 440; People *v.* Simonson, 9 Mich. 492.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Mississippi.— *Ex p.* Wimberly, 57 Miss. 437; Watson *v.* Williams, 36 Miss. 331.

Nebraska.— Jenkins *v.* State, 59 Nebr. 68, 80 N. W. 268, 60 Nebr. 205, 82 N. W. 622.

New Hampshire.— Buffum's Case, 13 N. H. 14.

New Jersey.— *In re* Taylor, 62 N. J. L. 131, 40 Atl. 691; West Jersey Traction Co. *v.* Board of Public Works, 58 N. J. L. 536, 37 Atl. 578; Ashby *v.* Ashby, 62 N. J. Eq. 618, 50 Atl. 473; Una *v.* Dodd, 39 N. J. Eq. 173.

New York.— Devlin *v.* Hinman, 40 N. Y. App. Div. 101, 57 N. Y. Suppl. 663, 29 N. Y. Civ. Proc. 127; People *v.* Wright, 22 N. Y.

2. Order to Pay Money.[25] In view of constitutional or statutory provisions forbidding imprisonment for debt,[26] some courts have held that disobedience to an order to pay money pursuant to a judgment or decree, or an order in the nature of a judgment or decree cannot be punished as a contempt.[27] Other authorities are to the effect that, although an order for the payment of money generally cannot be enforced by contempt proceedings, an order for the payment of a specific fund in the possession or under the control of the person may be so enforced.[28]

App. Div. 165, 47 N. Y. Suppl. 894; People *v.* Grant, 41 Hun 351; Foster *v.* Hazen, 12 Barb. 547; Oakley *v.* Cokalete, 20 Misc. 206, 45 N. Y. Suppl. 782; Levy *v.* Stanion, 59 N. Y. Suppl. 306.

North Carolina.— Williamson *v.* Pender, 127 N. C. 481, 37 S. E. 495; Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834; Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488; *In re* Brinson, 73 N. C. 278; Long *v.* Clay, 59 N. C. 350; McLean *v.* Douglass, 28 N. C. 233; *Ex p.* Summers, 27 N. C. 149.

Ohio.— Schultz *v.* State, 32 Ohio St. 276; Randall *v.* Pryor, 4 Ohio 424.

Pennsylvania.— Blackburn *v.* Markle, 12 Serg. & R. 143; Delaney *v.* Philadelphia, 1 Yeates 403.

South Carolina.— Sherman *v.* Cohen, 2 Strobh. 553.

South Dakota.—Freeman *v.* Huron, 8 S. D. 435, 66 N. W. 928.

Utah.— Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 151, 13 Pac. 174.

Washington.— State *v.* Catlin, 21 Wash. 423, 58 Pac. 206.

Wisconsin.— Nieuwankamp *v.* Ullman, 47 Wis. 168, 2 N. W. 131; *In re* Murphey, 39 Wis. 286.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— *Ex p.* Buskirk, 72 Fed. 14, 18 C. C. A. 410; U. S. *v.* Sowles, 16 Fed. 536; *In re* Ellerbe, 13 Fed. 530, 4 McCrary 449; U. S. *v.* Lauderdale County Justices, 10 Fed. 460; Souter *v.* La Crosse R. Co., 22 Fed. Cas. No. 13,180, Woolw. 80; Weiberg *v.* The St. Oloff, 29 Fed. Cas. No. 17,357, 2 Pet. Adm. 428.

England.— *In re* Freston, 11 Q. B. D. 545, 52 L. J. Q. B. 545, 49 L. T. Rep. N. S. 290, 31 Wkly. Rep. 804; *Ex p.* Waters, L. R. 18 Eq. 701, 43 L. J. Bankr. 128, 30 L. T. Rep. N. S. 766, 22 Wkly. Rep. 796; Harvey *v.* Hall, L. R. 11 Eq. 31, 23 L. T. Rep. N. S. 391; Thomas *v.* Gwynne, 8 Beav. 312; Digby *v.* Turner, 28 L. T. Rep. N. S. 296, 21 Wkly. Rep. 471; Bateman *v.* Phillips, 4 Taunt. 157; Gompertz *v.* Best, 1 Y. & C. Exch. 619; McCartney *v.* Simonton, Ir. R. 5 Eq. 594.

Canada.— Pomeroy *v.* Boswell, 7 Grant Ch. 163.

See 10 Cent. Dig. tit. "Contempt," § 58.

Consenting to disobedience.— A person is guilty of contempt who stands by and allows another to remove property which he has been restrained from removing. Stimpson *v.* Putnam, 41 Vt. 238.

25. As to order for payment of alimony see Divorce.

As to inability to comply with order for the payment of money see *infra*, III, E, 8.

26. See the constitutions and statutes of the several states.

Payment to officer of court.— Where the statute provides for the enforcement of judgments by punishment, as for contempt, where the judgment requires payment of money to an officer of the court, contempt proceedings are proper. Gildersleeve *v.* Lester, 68 Hun (N. Y.) 535, 22 N. Y. Suppl. 1028, 52 N. Y. St. 560; Cunningham *v.* Hatch, 3 Misc. (N. Y.) 101, 22 N. Y. Suppl. 701, 23 N. Y. Civ. Proc. 82, 30 Abb. N. Cas. (N. Y.) 31, 51 N. Y. St. 859. *Compare* Betz *v.* Buckel, 24 N. Y. Suppl. 487, 54 N. Y. St. 324, 30 Abb. N. Cas. 278. So where, under the statute, the court has power to require the delivery to a receiver of all assets including money, failure to comply is contempt. Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596. See also Gilmore *v.* Gilmore, 40 Me. 50.

Where execution cannot be awarded.— Some statutes provide for contempt proceedings for failure to comply with order to pay money when execution cannot be awarded. North *v.* North, 39 Mich. 67; Haines *v.* Haines, 35 Mich. 138; Harris *v.* Elliott, 163 N. Y. 269, 57 N. E. 406, 31 N. Y. Civ. Proc. 42; Myers *v.* Becker, 95 N. Y. 486; People *v.* Grant, 41 Hun (N. Y.) 351; Randall *v.* Dusenbury, 41 N. Y. Super. Ct. 456.

27. *Kansas.*— Cunningham *v.* Colonial, etc., Mortg. Co., 57 Kan. 678, 47 Pac. 830.

Missouri.— Coughlin *v.* Ehlert, 39 Mo. 285.

New York.— Fassett *v.* Tallmadge, 14 Abb. Pr. 188; Hosack *v.* Rogers, 11 Paige 603.

South Carolina.— Golson *v.* Holman, 28 S. C. 53, 4 S. E. 811.

Vermont.— *In re* Bingham, 32 Vt. 329.

United States.— Nelson *v.* Hill, 89 Fed. 477; Mallory Mfg. Co. *v.* Fox, 20 Fed. 409.

See 10 Cent. Dig. tit. "Contempt," § 75.

Payment to third person.— A person is not in contempt for not paying money to a person other than the one to whom it is directly payable according to the terms of the order, unless such person is expressly authorized by the person to whom it is payable to receive it. People *v.* King, 9 How. Pr. (N. Y.) 97.

Obligation arising ex delicto.— Disobedience to an order to pay money pursuant to a judgment founded on an obligation arising *ex delicto* may be punished as a contempt. *Ex p.* Hardy, 68 Ala. 303.

28. Leslie *v.* Saratoga Brewing Co., 33 Misc. (N. Y.) 118, 67 N. Y. Suppl. 222. See also Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

A bankrupt who fails to pay over money returned on his schedule of assets as "cash

It is clearly contempt on the part of officers of the court to fail to comply with court orders requiring the payment of money.[29]

3. Validity of Mandate, Order, or Judgment — a. In General. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.[30] But the

on hand" may be punished for contempt. *In re* Dresser, 7 Fed. Cas. No. 4,077.

Disobedience of an order of distribution by an executor or administrator is contempt. *Ex p.* Cohn, 55 Cal. 193; Matter of Pelton, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 642, 32 N. Y. St. 924, 19 N. Y. Civ. Proc. 149; *In re* Bernhard, 48 Hun (N. Y.) 620, 1 N. Y. Suppl. 225, 16 N. Y. St. 240, 14 N. Y. Civ. Proc. 195; *In re* Snyder, 34 Hun (N. Y.) 302; Baker *v.* Baker, 23 Hun (N. Y.) 356; Matter of Kurtzman, 2 N. Y. St. 655; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; Woodhead's Estate, Tuck. Surr. (N. Y.) 92; Golson *v.* Holman, 28 S. C. 53, 4 S. E. 811; Leach *v.* Peabody, 58 Vt. 485, 2 Atl. 737. And a guardian's failure to obey a court order directing payment is contempt. Seaman *v.* Duryea, 11 N. Y. 324; Leiter's Appeal, 10 Wkly. Notes Cas. (Pa.) 225.

Payment of money into court.— Failure to obey an order of court requiring the repayment of certain moneys into court is a contempt. Pritchard *v.* Pritchard, 18 Ont. 173.

A trustee cannot be punished as for a contempt for refusing to obey an order of court directing a payment generally and not from a specific fund. *In re* Radtke, 10 Daly (N. Y.) 119; *Ex p.* French, 3 Ohio Dec. (Reprint) 175, 4 Wkly. L. Gaz. 209. See also Myers *v.* Becker, 95 N. Y. 486 [*affirming* 29 Hun (N. Y.) 567].

29. *Ex p.* Haley, 37 Mo. App. 562; Clark *v.* Bininger, 75 N. Y. 344; People *v.* Anthony, 7 N. Y. App. Div. 132, 40 N. Y. Suppl. 279. See also Steele *v.* Gunn, 3 N. Y. Suppl. 692, 19 N. Y. St. 654.

An assignee for the benefit of creditors who disobeys an order directing the payment of money may be punished as for contempt. *In re* Rowekamp, 11 Ohio Dec. (Reprint) 539, 27 Cinc. L. Bul. 289. See also *In re* Brick, 13 Daly (N. Y.) 312; Briscoe *v.* Pearson, 109 N. C. 117, 13 S. E. 925.

Refusal of a receiver as an officer of the court to comply with an order to pay money into court found to be in his hands is a contempt. Fawkes *v.* Griffin, 18 Ont. Pr. 48.

30. *California.*— Tomsky *v.* San Francisco Super. Ct., 131 Cal. 620, 63 Pac. 1020; *Ex p.* Clark, 126 Cal. 235, 58 Pac. 546, 77 Am. St. Rep. 176, 46 L. R. A. 835; *Ex p.* Truman, 124 Cal. 387, 57 Pac. 223; *Ex p.* Widber, 91 Cal. 367, 27 Pac. 733; Brown *v.* Moore, 61 Cal. 432; People *v.* O'Neil, 47 Cal. 109.

Georgia.— Einstein *v.* Lee, 89 Ga. 130, 15 S. E. 27.

Illinois.— Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Darst *v.* People, 62 Ill. 306; Walton *v.* Develing, 61 Ill. 201; *Ex p.* Thatcher, 7 Ill. 167; Keenan *v.* People, 58 Ill. App. 241; Weigley *v.* People, 51 Ill. App. 51.

Indiana.— McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500.

Iowa.— *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Louisiana.— State *v.* Sommerville, 105 La. 273, 29 So. 705.

Maine.— Call *v.* Pike, 66 Me. 350.

Michigan.— Haines *v.* Haines, 35 Mich. 138.

Minnesota.— State *v.* Wilcox, 24 Minn. 143.

Missouri.— St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341.

Montana.— State *v.* District Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645.

Nevada.— *Ex p.* Gardner, 22 Nev. 280, 39 Pac. 570.

New Jersey.— Forrest *v.* Price, 52 N. J. Eq. 16, 29 Atl. 215; Dodd *v.* Una, 40 N. J. Eq. 672, 5 Atl. 155.

New York.— Kroner *v.* Rielly, 49 N. Y. App. Div. 41, 63 N. Y. Suppl. 527; Fisher *v.* Nash, 47 N. Y. App. Div. 234, 62 N. Y. Suppl. 646; Faulkner *v.* Morey, 22 Hun 379; Perkins *v.* Taylor, 19 Abb. Pr. 146; Kennedy *v.* Weed, 10 Abb. Pr. 62.

North Carolina.— Daniel *v.* Owen, 72 N. C. 340.

Ohio.— *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299.

Pennsylvania.— Com. *v.* Sage, 160 Pa. St. 399, 34 Wkly. Notes Cas. 225, 28 Atl. 863.

South Carolina.— State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

Texas.— *Ex p.* Duncan, (Crim. 1901) 62 S. W. 758.

Utah.— Young *v.* Cannon, 2 Utah 560.

Washington.— State *v.* McFaul, 27 Wash. 286, 67 Pac. 564; State *v.* Winder, 14 Wash. 114, 44 Pac. 125.

West Virginia.— Hebb *v.* Tucker County Ct., 48 W. Va. 279, 37 S. E. 676; Ruhl *v.* Ruhl, 24 W. Va. 279.

United States.— *In re* Monroe, 46 Fed. 52.

England.— Curtis *v.* Bligh, 3 Jur. 1152.

Canada.— McLeod *v.* Noble, 28 Ont. 528.

See 10 Cent. Dig. tit. "Contempt," §§ 63–66.

Want of jurisdiction must be such as is manifest in the inception of the proceeding, and not that which develops through the hearing and determination of the cause. *Ex p.* Wimberly, 57 Miss. 437. Therefore it is no bar to the conclusiveness and sentence for contempt that the court was investigating a matter over which it was finally ascertained to have no jurisdiction. *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

fact that the order is in part void does not justify violation of the valid parts thereof.[31]

b. Entry of Order. In order to be valid the order must have been actually made or the judgment or decree rendered and duly entered of record.[32]

c. Erroneous Judgment or Order. The fact that the mandate, order, or judgment is merely erroneous is no excuse for violating it, where the court possessed jurisdiction of the subject-matter and the parties litigant.[33] So the fact that the order was improvidently granted or irregularly obtained will not excuse disobedience.[34]

d. Uncertain or Indefinite Order. In order to be valid and binding the order must be certain or definite in its terms. The charge of contempt cannot be established for failure to comply with uncertain or indefinite orders, judgments, or mandates.[35] A court order is not uncertain or indefinite, however, because it is alternative in form.[36]

4. Change of Conditions After Issuance of Order. Change of conditions subsequent to the making of a court order may constitute sufficient justification for disregarding such order.[37]

5. Stay or Review of Proceedings. Where it is sought to review an order,

31. *Ex p.* Tinsley, 37 Tex. Crim. 517, 40 S. W. 306.

32. Garis' Appeal, 185 Pa. St. 497, 39 Atl. 1110, 42 Wkly. Notes Cas. (Pa.) 130; Taliaferro *v.* Horde, 1 Rand. (Va.) 242; U. S. *v.* Day, 25 Fed. Cas. No. 14,934; Ballard *v.* Tomlinson, 48 L. T. Rep. N. S. 515, 31 Wkly. Rep. 563.

Intention to make order.— The court has no jurisdiction to punish as a contempt an act of disobedience to an order which the court intended to make, but which in fact was never entered. *Ex p.* Buskirk, 72 Fed. 14, 18 C. C. A. 410.

33. *Georgia.*— Russell *v.* Mohr-Weil Lumber Co., 102 Ga. 563, 29 S. E. 271.

Illinois.— Tolman *v.* Jones, 114 Ill. 147, 28 N. E. 464; French *v.* Commercial Nat. Bank, 79 Ill. App. 110; Keenan *v.* People, 58 Ill. App. 241.

Missouri.— State *v.* Horner, 16 Mo. App. 191.

Nebraska.— Jenkins *v.* State, 59 Nebr. 68, 80 N. W. 268, 60 Nebr. 205, 82 N. W. 622.

New Jersey.— Forrest *v.* Price, 52 N. J. Eq. 16, 29 Atl. 215.

New York.— People *v.* Grant, 13 N. Y. Civ. Proc. 305; Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. 204; Shults *v.* Andrews, 54 How. Pr. 378; Higbie *v.* Edgerton, 3 Paige 253.

South Carolina.— State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

Tennessee.— *In re* Vanvaver, 88 Tenn. 334, 12 S. W. 786.

See 10 Cent. Dig. tit. "Contempt," § 63.

34. Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq. 422; People *v.* Bergen, 53 N. Y. 404; Harris *v.* Clark, 10 How. Pr. (N. Y.) 415; Silliman *v.* Whitmer, 173 Pa. St. 401, 37 Wkly. Notes Cas. (Pa.) 497, 34 Atl. 56.

35. Privett *v.* Pressley, 62 Ind. 491; Rielay *v.* Whitcher, 18 Ind. 458; Moore *v.* Smith, 70 N. Y. App. Div. 614, 74 N. Y. Suppl. 1089; Birchett *v.* Bolling, 5 Munf. (Va.) 442.

Improper designation.— Refusal to deliver property to a receiver where the property is not properly designated is not contempt. Casselear *v.* Simons, 8 Paige (N. Y.) 273.

Omission from order.— Failure to deliver property to receiver is not contempt where order omits such direction. McKelsey *v.* Lewis, 3 Abb. N. Cas. (N. Y.) 61. See also Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180. So an order directing the assignee for the benefit of creditors to distribute funds among the creditors, after deducting certain amounts for specific purposes, is uncertain where it fails to specify the amount to be paid each creditor. Ross *v.* Butler, 57 Hun (N. Y.) 110, 10 N. Y. Suppl. 444, 32 N. Y. St. 212, 19 N. Y. Civ. Proc. 152.

36. *In re* Morris, 45 Hun (N. Y.) 167.

Date of order.— A sheriff is not excused from levying an execution because of the fact that it is not dated. State *v.* Brophy, 38 Wis. 413. So the fact that a decree recited the wrong date of its rendition is no excuse for non-compliance as such mistake could not mislead. Craig *v.* McCullough, 20 W. Va. 148.

37. In Glover *v.* Board of Education, 14 S. D. 139, 84 N. W. 761, a mandamus was issued to a board of education directing it to admit a pupil whom it had suspended for failure to comply with its order requiring vaccination. At the time the court order was issued it appeared that there was no smallpox in the city and hence the order of the board of education was without justification as a sanitary measure. On the day the pupil was admitted to the school in compliance with the writ, the board being officially notified by the state and county health boards that smallpox was then prevalent in the vicinity of the city, again suspended such pupil until such time as he should present proof of vaccination. It was held that the subsequent suspension did not subject the board to contempt, as in violation of such right, since on such emergency arising after the pupil's readmittance the board was justi-

judgment, or decree by appeal, writ of error, certiorari, or other authorized proceeding, and such step amounts to a supersedeas, it is not contempt to refuse to act under the order of the trial court.[38] On the other hand any attempt to carry out the order during the pendency of the proceedings for review will be adjudged contempt.[39] If, however, the action to review does not operate as a supersedeas, execution of the order of the court of first instance is not suspended during the pendency of the proceedings.[40]

6. Demand of Performance. Generally, before one can be punished for contempt in neglecting to comply with an order of court to pay over money or turn over property, there must be a demand for the money or the property.[41]

7. Notice of Order. In order to punish a person for contempt of court for violation of an order, judgment, or decree of court, it must appear that such order, judgment, or decree has been personally served on the one charged,[42] or

fied in suspending him during the continuance of the epidemic until he complied with the reasonable regulation of vaccination.

38. Ruggles *v.* San Francisco Super. Ct., 103 Cal. 125, 37 Pac. 211; *Ex p.* Orford, 102 Cal. 656, 36 Pac. 928; Catlin *v.* Baldwin, 47 Conn. 173; *Ex p.* Thatcher, 7 Ill. 167; Pittsfield Nat. Bank *v.* Bayne, 21 N. Y. Suppl. 561, 50 N. Y. St. 415, 23 N. Y. Civ. Proc. 48; People *v.* Carnley, 3 Abb. Pr. (N. Y.) 215; Sudlow *v.* Pinckney, 1 Dem. Surr. (N. Y.) 158.

39. *Colorado.*— Hamill *v.* Clear Creek County Bank, 21 Colo. 173, 40 Pac. 447.

Florida.— State *v.* Johnson, 13 Fla. 33.

New Jersey.— State *v.* Lambertville, 46 N. J. L. 59; McQuade *v.* Emmons, 38 N. J. L. 397.

New York.—Patchin *v.* Brooklyn, 13 Wend. 664.

Virginia.— McLaughlin *v.* Janney, 6 Gratt. 609.

See 10 Cent. Dig. tit. "Contempt," § 67; and Appeal and Error, VIII, K [2 Cyc. 915].

Disregard of supersedeas afterward vacated is not contempt. State *v.* Blair, 39 W. Va. 704, 20 S. E. 658.

40. Central Nat. Bank *v.* Graham, 118 Mich. 488, 76 N. W. 1042; People *v.* Bergen, 53 N. Y. 404; *In re* Taber, 13 S. D. 62, 82 N. W. 398.

As to operation of appeal or writ of error as a supersedeas see Appeal and Error, VIII, F [2 Cyc. 889].

Knowledge of appeal and supersedeas.— In quo warranto proceedings to test the title to an office the relator was given title by the trial court and thereafter an appeal and supersedeas was issued. Relator, without knowledge of the appeal and supersedeas, broke into the office and assumed the duties. He was held not to be in contempt. Wilson *v.* North Carolina, 169 U. S. 586, 18 S. Ct. 435, 42 L. ed. 865. See also Reg. *v.* Woodyatt, 27 Ont. 113, holding that a magistrate who without knowledge of the issuance of a writ of certiorari enforced a conviction by the issue of a distress warrant was not in contempt.

41. *Illinois.*— Blake *v.* People, 161 Ill. 74, 43 N. E. 590; Haines *v.* People, 97 Ill. 161.

Indiana.— Swift *v.* State, 63 Ind. 81.

Michigan.— Edison *v.* Edison, 56 Mich. 185, 22 N. W. 264.

New York.— Flor *v.* Flor, 73 N. Y. App. Div. 262, 76 N. Y. Suppl. 813; Devlin *v.* Hinman, 40 N. Y. App. Div. 101, 57 N. Y. Suppl. 663, 29 N. Y. Civ. Proc. 127 [*affirmed* in 161 N. Y. 115, 55 N. E. 386]; Matter of Ockershausen, 59 Hun 200, 13 N. Y. Suppl. 396, 37 N. Y. St. 180; McComb *v.* Weaver, 11 Hun 271; Gray *v.* Cook, 24 How. Pr. 432; Union Trust Co. *v.* Gage, 6 Dem. Surr. 358, 15 N. Y. St. 718; Matter of Lane, 3 Redf. Surr. 462 note.

England.— Doddington *v.* Hudson, 1 Bing. 410, 2 L. J. C. P. O. S. 53, 8 Moore C. P. 510, 8 E. C. L. 571; Swinfen *v.* Swinfen, 37 Eng. L. & Eq. 327.

See 10 Cent. Dig. tit. "Contempt," § 78.

By whom demand made.— Under an order of court directing the delivery of property to a receiver the demand to comply therewith should be made by the receiver personally. Panton *v.* Zebley, 19 How. Pr. (N. Y.) 394.

No formal demand is necessary for the payment of money ordered, where it appears that defendant had informed complainant that he would not pay. Potts *v.* Potts, 68 Mich. 492, 36 N. W. 240.

Execution of deed.— Disobeying a decree requiring the execution, acknowledgment, and delivery of a deed is not contempt until the deed has been presented for execution and the party charged has refused to comply with the decree. Berry *v.* Innes, 35 Mich. 189. And it has been held that to put parties in contempt for disobedience of a decree commanding them to execute an instrument of a certain form, a certified copy of the decree and a copy of the instrument proposed should be served a reasonable time for them to examine, before the peremptory demand for the execution is made. McBrair *v.* Hanson, 16 Abb. Pr. (N. Y.) 399 note.

42. *California.*— Hennessy *v.* Nicol, 105 Cal. 138, 38 Pac. 649; Johnson *v.* San Francisco Super. Ct., 63 Cal. 578.

District of Columbia.—Hovey *v.* McDonald, 3 MacArthur 184.

Illinois.— Bonner *v.* People, 40 Ill. App. 628.

Louisiana.— State *v.* Sommerville, 105 La. 273, 29 So. 705.

that he has had actual notice of the making of such order or the rendition of such judgment or decree.[43]

8. Ability to Comply — a. In General. Where it appears that it is or was impossible to comply with the order, without fault on the part of the one charged, there is no contempt.[44] To excuse, however, it must be satisfactorily shown that

New Jersey.— Perrine *v.* Broadway Bank, 53 N. J. Eq. 221, 33 Atl. 404. See also Fairchild *v.* Fairchild, (N. J. 1888) 13 Atl. 599.

New York.— Teho *v.* Baker, 77 N. Y. 33 [*affirming* 16 Hun (N. Y.) 182]; Sandford *v.* Sandford, 40 Hun 540, 9 N. Y. Civ. Proc. 289; McCauley *v.* Palmer, 40 Hun 38; Loop *v.* Gould, 17 Hun 585; Morris *v.* Walsh, 9 Bosw. 636; *In re* Siebert, 30 Misc. 680, 62 N. Y. Suppl. 513; Pittsfield Nat. Bank *v.* Bayne, 21 N. Y. Suppl. 561, 50 N. Y. St. 415, 23 N. Y. Civ. Proc. 48 [*distinguishing* Pitt *v.* Davison, 37 N. Y. 235]; Haynes *v.* Hatch, 16 N. Y. Suppl. 685, 41 N. Y. St. 475; Matter of Smith, 15 N. Y. St. 733; Barnes' Estate, 1 N. Y. Civ. Proc. 59; Howland *v.* Ralph, 3 Johns. 20; Lorton *v.* Seaman, 9 Paige 609; St. John *v.* Sewall, 3 Edw. 248; Holcomb *v.* Jackson, 2 Edw. 620; Sudlow *v.* Pinckney, 1 Dem. Surr. 158. *Compare* Rochester Lamp Co. *v.* Brigham, 1 N. Y. App. Div. 490, 37 N. Y. Suppl. 402, 72 N. Y. St. 467.

Pennsylvania.— Silliman *v.* Whitmer, 173 Pa. St. 401, 37 Wkly. Notes Cas. 497, 34 Atl. 56; *In re* Marcy Tp., 10 Kulp 42; Pierce *v.* Post, 6 Phila. 494, 25 Leg. Int. 28; Keating's Estate, 1 Woodw. 340.

Vermont.— Greenleaf *v.* Leach, 20 Vt. 281.

Virginia.— Horton *v.* Horton, 4 Hen. & M. 403.

Wisconsin.— Witter *v.* Lyon, 34 Wis. 564.

England.— *Re* Cunningham, 55 L. T. Rep. N. S. 766.

Canada.— *In re* Hallack, 15 Can. L. T. 9; Wagner *v.* Mason, 6 Ont. Pr. 187.

See 10 Cent. Dig. tit. "Contempt," § 69.

Service on partnership.— Where an order of the court has been made against partners, the attachment cannot issue against all partners, unless each has been served with the order. *Ex p.* Willand, 11 C. B. 544, 73 E. C. L. 544.

Time of service.— Where the order directs the act to be done within a limited time, notice of the order and the penalty for default must be served in time to give reasonable opportunity to comply. Berry *v.* Donovan, 21 Ont. App. 14. See also Wagner *v.* Mason, 6 Ont. Pr. 187.

43. *Georgia.*— Lewis *v.* Singleton, 61 Ga. 164; State *v.* Noel, T. U. P. Charlt. 43.

Kentucky.— Smith *v.* Caldwell, 2 Ky. Dec. 341.

Louisiana.— State *v.* Sommerville, 105 La. 273, 29 So. 705.

New Mexico.— Territory *v.* Chancey, 7 N. M. 580, 37 Pac. 1108.

New York.— Davis *v.* Davis, 83 Hun 500, 32 N. Y. Suppl. 10, 65 N. Y. St. 132; Aldinger *v.* Pugh, 57 Hun 181, 10 N. Y. Suppl. 684, 32 N. Y. St. 513; Hilliker *v.* Hathorne, 5 Bosw. 710; Pittsfield Nat. Bank *v.* Bayne, 21 N. Y. Suppl. 561, 50 N. Y. St. 415, 23 N. Y. Civ. Proc. 48; People *v.* Dutchess County Canvassers, 20 N. Y. Suppl. 329.

Ohio.— Cassily *v.* John Church Co., 21 Ohio Cir. Ct. 197, 11 Ohio Cir. Dec. 461.

South Dakota.— Freeman *v.* Huron, 8 S. D. 435, 66 N. W. 928.

Wisconsin.— Poertner *v.* Russel, 33 Wis. 193; Mead *v.* Norris, 21 Wis. 310; Ramstock *v.* Roth, 18 Wis. 522.

United States.— The Laurens, 14 Fed. Cas. No. 8,121, Abb. Adm. 302, 14 Fed. Cas. No. 8,122, Abb. Adm. 508; Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss. 490.

England.— Skip *v.* Harwood, 3 Atk. 564, 26 Eng. Reprint 1125; Heywood *v.* Wait, 18 Wkly. Rep. 205.

See 10 Cent. Dig. tit. "Contempt," § 70.

One in court when order was made is bound thereby, although no copy is served upon him. *Ex p.* Cottrell, 59 Cal. 417; O'Callaghan *v.* O'Callaghan, 69 Ill. 552; *In re* Lilliland, 7 Ohio Dec. (Reprint) 659, 4 Cinc. L. Bul. 733. See also *Ex p.* Walker, 25 Ala. 81.

Restoration of papers to files.— Notice of court order commanding an attorney to restore to the court files papers taken therefrom is not required. Wisconsin, etc., R. Co. *v.* Given, 69 Iowa 581, 29 N. W. 611.

44. *Alabama.*— McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523.

California.— *Ex p.* Overend, 122 Cal. 201, 54 Pac. 740.

Illinois.— Moseley *v.* People, 101 Ill. App. 564.

Iowa.— Hogue *v.* Hayes, 53 Iowa 377, 5 N. W. 541.

Kentucky.— Turner *v.* New Farmers' Bank, 102 Ky. 473, 43 S. W. 721, 19 Ky. L. Rep. 1522.

Minnesota.— Register *v.* State, 8 Minn. 214.

Nebraska.— Jenkins *v.* State, 59 Nebr. 68, 80 N. W. 268, 60 Nebr. 205, 82 N. W. 622.

New Jersey.— Walton *v.* Walton, 54 N. J. Eq. 607, 35 Atl. 289.

New York.— Matter of Ockershausen, 59 Hun 200, 13 N. Y. Suppl. 396, 37 N. Y. St. 180; McCartan *v.* Van Syckel, 10 Bosw. 694; Perkins *v.* Taylor, 19 Abb. Pr. 146; Francia *v.* Oddie, 3 Edw. 455; Doran *v.* Dempsey, 1 Bradf. Surr. 490.

Pennsylvania.— Irwin's Estate, 9 Pa. Dist. 282.

England.— Cooke *v.* Tanswell, 1 Moore C. P. 465, 8 Taunt. 131, 4 E. C. L. 74.

See 10 Cent. Dig. tit. "Contempt," § 71.

Compliance to extent of ability.— Where it appears that the order of the court has been complied with as far as the party was able to comply he is not in contempt. Clare *v.* Blakesley, 1 Scott (N. R.) 397, 8 D. P. C. 835, 4 Jur. 992.

If the property can be obtained by the party charged, as papers ordered to be pro-

the party charged cannot obey or perform the thing required.[45] If the order could have been obeyed when made, the party is in contempt, although at the time of the contempt proceedings, he could not comply.[46]

b. Payment of Money. Inability to comply with an order requiring the payment of money resulting from poverty, insolvency, or other cause not attributable to the fault of the party charged will ordinarily be received as a valid excuse from the consequences of contempt;[47] but this inability must clearly appear.[48]

F. Fictitious Bail or Security. Giving or providing bond or bail with fictitious sureties,[49] false justification as surety,[50] or knowingly furnishing worth-

duced, disobedience will be held contempt. Tuttle *v.* Mechanics', etc., Loan Co., 6 Whart. (Pa.) 216.

Where the property ordered to be surrendered is not in the possession of the person charged, and he is therefore unable to comply with the order, failure will not be regarded as contempt. Adams *v.* Haskell, 6 Cal. 316, 65 Am. Dec. 517; Martin *v.* Burgwyn, 88 Ga. 78, 13 S. E. 958; Johnson *v.* Yoeman, 41 Ga. 368; Stockbridge's Assignment, 7 Abb. N. Cas. (N. Y.) 395; Sherry's Estate, 7 Abb. N. Cas. (N. Y.) 390.

45. Wheelock *v.* Noonan, 55 N. Y. Super. Ct. 302, 13 N. Y. St. 317.

46. Tredway *v.* Van Wagenen, 91 Iowa 556, 60 N. W. 130.

Where party voluntarily disables himself to obey the order in such manner that the creation of the disability is in itself a contempt, he will be punished. Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607; Battle's Estate, 13 N. Y. Civ. Proc. 27, 5 Dem. Surr. (N. Y.) 447. So inability to obey a court order which results from a wilful act done with a knowledge that it would result in such inability does not purge contempt. Huckins *v.* State, 61 Nebr. 871, 86 N. W. 485.

47. *Alabama.*— Adair *v.* Gilmore, 106 Ala. 436, 17 So. 544.

Georgia.— Browning *v.* Hadley, 33 Ga. 271.

Illinois.— O'Callaghan *v.* O'Callaghan, 69 Ill. 552; Herrington *v.* Cassem, 82 Ill. App. 594; Schuele *v.* Schuele, 57 Ill. App. 189.

Iowa.— Peel *v.* Peel, 50 Iowa 521.

Nebraska.— Hawthorne *v.* State, 45 Nebr. 871, 64 N. W. 359.

New Jersey.— Walton *v.* Walton, 54 N. J. Eq. 607, 35 Atl. 289.

New Mexico.—*In re* Jaramillo, 8 N. M. 598, 45 Pac. 1110.

New York.— Diffany *v.* Risley, 23 N. Y. App. Div. 371, 48 N. Y. Suppl. 283; Burton *v.* Linn, 21 N. Y. App. Div. 609, 47 N. Y. Suppl. 835; Cochran *v.* Ingersoll, 13 Hun 368; Quintard *v.* Secor, 3 E. D. Smith 614, 1 Abb. Pr. 393; Myers *v.* Trimble, 3 E. D. Smith 607, 1 Abb. Pr. 399; *In re* Kurtzman, 2 N. Y. St. 655; Battle's Estate, 13 N. Y. Civ. Proc. 27, 5 Dem. Surr. 447; *In re* Davidson, 5 Dem. Surr. 224. *Compare* Young *v.* Young, 35 Misc. 335, 71 N. Y. Suppl. 944.

North Carolina.— Smith *v.* Smith, 92 N. C. 304; Boyett *v.* Vaughan, 89 N. C. 27; Kane *v.* Haywood, 66 N. C. 1.

Oregon.— Newhouse *v.* Newhouse, 14 Oreg. 290, 12 Pac. 422.

Pennsylvania.— Kelly's Estate, 2 Pa. Co. Ct. 151; *In re* Hilles, 13 Phila. 340, 37 Leg. Int. 182; Royal's Estate, 16 Phila. 249, 40 Leg. Int. 171.

United States.— Wartman *v.* Wartman, 29 Fed. Cas. No. 17,210, Taney 362.

See 10 Cent. Dig. tit. "Contempt," § 72.

Payments under prior orders.— Failure to pay money pursuant to an order from court will not be regarded as a contempt where it appears that the fund applicable had previously been exhausted by payments under prior court orders. Johnson's Succession, 21 La. Ann. 297.

The voluntary bankruptcy of an attorney after a rule absolute for contempt and before attachment will not shield him from arrest under the attachment. Smith *v.* McLendon, 59 Ga. 523. So an attachment will be ordered against a defendant in ejectment for noncompliance with the consent rule, notwithstanding that since entering into the rule he has been discharged as an insolvent debtor. Den *v.* Hendrickson, 18 N. J. L. 366. And a guardian who mingles his ward's funds with his own, and subsequently becomes insolvent, and hence unable to comply with a decree for the payment of the balance due his ward, is guilty of contempt and may be attached therefor. Leiter's Appeal, 10 Wkly. Notes Cas. (Pa.) 225.

48. Smith *v.* Smith, 92 N. C. 304.

An attorney who wilfully disobeys an order to pay into court money alleged to have been collected by him will be held in contempt unless he shows that the money was not in his possession or that he was unable to comply with the order. Matter of McBride, 6 N. Y. App. Div. 376, 39 N. Y. Suppl. 579.

49. Matter of Hay Foundry, etc., Works, 22 N. Y. App. Div. 87, 47 N. Y. Suppl. 802, 27 N. Y. Civ. Proc. 80; McAveney *v.* Brush, 13 Misc. (N. Y.) 79, 34 N. Y. Suppl. 101, 1 N. Y. Annot. Cas. 414, 68 N. Y. St. 176.

False personation.— Com. *v.* Davis, 1 Wkly. Notes Cas. (Pa.) 18.

50. Nathans *v.* Hope, 100 N. Y. 615, 3 N. E. 77 [*reversing* 5 N. Y. Civ. Proc. 401]; Lawrence *v.* Harrington, 63 Hun (N. Y.) 195, 17 N. Y. Suppl. 649, 43 N. Y. St. 413 [*affirmed* in 133 N. Y. 690, 31 N. E. 627, 45 N. Y. St. 933]; Egan *v.* Lynch, 49 N. Y. Super. Ct. 454; Simon *v.* Aldine Pub. Co., 14 Daly (N. Y.) 279, 12 N. Y. Civ. Proc. 290 [*reversing* 11 N. Y. Civ. Proc. 267]; Matter of Hopper, 9 Misc. (N. Y.) 171, 29 N. Y. Suppl. 715, 60 N. Y. St. 638, 24 N. Y. Civ. Proc. 40; Diamond *v.* Knoepfel, 3 N. Y. St. 291; Norwood *v.* Ray Mfg. Co., 11 N. Y. Civ.

less or insufficient security[51] may be contempt of court,[52] the fact being one to be determined by the particular circumstances.

G. Interference With Persons or Property in Custody of Law. Any interference with property or persons in the custody of the law is contempt.[53] As a receiver is an officer of the court, and his possession is the possession of the court, an attempt to interfere with or disturb his possession without permission of the court subjects the disturber to punishment for contempt.[54]

H. Misconduct of or Affecting Jury — 1. Misconduct Affecting Jury. All

Proc. 273; Keating *v.* Goddard, 8 N. Y. Civ. Proc. 377; Stephenson *v.* Hanson, 6 N. Y. Civ. Proc. 43, 67 How. Pr. (N. Y.) 305.

False justification of a surety which is to be the basis of an order of arrest is contempt. Nuccio *v.* Porto, 72 N. Y. App. Div. 88, 76 N. Y. Suppl. 96. False justification on the part of a surety on a bond is also contempt. Matter of Fitzgerald, 68 N. Y. App. Div. 414, 74 N. Y. Suppl. 486; *In re* Sheppard, 33 Misc. (N. Y.) 724, 68 N. Y. Suppl. 974; People *v.* Tamsen, 17 Misc. (N. Y.) 212, 40 N. Y. Suppl. 1047.

51. Simon *v.* Aldine Pub. Co., 14 Daly (N. Y.) 279; Foley *v.* Stone, 15 N. Y. Civ. Proc. 224, 3 N. Y. Suppl. 288; Nathans *v.* Hope, 5 N. Y. Civ. Proc. 401. But see Schreiber *v.* Raymond, etc., Mfg. Co., 18 N. Y. App. Div. 158, 159, 45 N. Y. Suppl. 442, holding that the statute declaring as contempt any misconduct "by which a right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded or prejudiced." is not violated by giving an insufficient surety bond in an attachment where the only person damaged was not a party to the suit. See also *In re* Wilkes, 30 N. Y. Suppl. 431, 62 N. Y. St. 224.

An attorney who knowingly procures the court's approval of a worthless bond for an order of arrest is guilty of contempt. Nuccio *v.* Porto, 72 N. Y. App. Div. 88, 76 N. Y. Suppl. 96.

52. Giving indemnity against the consequences of contempt involves the party giving it and is a contempt. *Ex p.* Dickson, 8 Ves. Jr. 104.

53. *California.*— *Ex p.* Acock, 84 Cal. 50, 23 Pac. 1029.

Colorado.— Reeves *v.* People, 2 Colo. App. 196, 29 Pac. 1033.

Connecticut.— Huntington *v.* McMahon, 48 Conn. 174.

Illinois.— Yott *v.* People, 91 Ill. 11; Knott *v.* People, 83 Ill. 532; Richards *v.* People, 81 Ill. 551; People *v.* Neill, 74 Ill. 68.

Indiana.— Mowrer *v.* State, 107 Ind. 539, 8 N. E. 561.

Kentucky.— Bush *v.* Chenault, 12 Ky. L. Rep. 249.

Maryland.— Cromwell *v.* Owings, 7 Harr. & J. 55.

New York.— *In re* Woven Tape Skirt Co., 12 Hun 111; Riggs *v.* Whitney, 15 Abb. Pr. 388; Albany City Bank *v.* Schermerhorn, 9 Paige 372, 38 Am. Dec. 551 [*affirmed* in 10 Paige 263]; Matter of Heller, 3 Paige 199.

North Carolina.— McLean *v.* Douglass, 28 N. C. 233.

Ohio.— *In re* Seymour, 4 Ohio S. & C. Pl. Dec. 450; Besuden *v.* E. Besuden Co., 4 Ohio S. & C. Pl. Dec. 144.

Texas.— State *v.* Sparks, 27 Tex. 627.

United States.— Ledoux *v.* La Bee, 83 Fed. 761; Sabin *v.* Fogerty, 70 Fed. 482; Lefavour *v.* Whitman Shoe Co., 65 Fed. 785; American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937; U. S. *v.* Murphy, 44 Fed. 39; *In re* Higgins, 27 Fed. 443; *In re* Steadman, 22 Fed. Cas. No. 13,330. *Compare* Steam Stone Cutter Co. *v.* Windsor Mfg. Co., 3 Fed. 298; U. S. *v.* Towns, 28 Fed. Cas. No. 16,534, 7 Ben. 444.

England.— Cooper *v.* Asprey, 3 B. & S. 932, 9 Jur. N. S. 1198, 32 L. J. Q. B. 209, 8 L. T. Rep. N. S. 355, 11 Wkly. Rep. 641, 113 E. C. L. 932; *In re* Pound, 42 Ch. D. 402, 58 L. J. Ch. 792, 62 L. T. Rep. N. S. 137, 1 Meg. 363, 38 Wkly. Rep. 18; Helmore *v.* Smith, 35 Ch. D. 449, 56 L. J. Ch. 145, 56 L. T. Rep. N. S. 72, 35 Wkly. Rep. 157; *Ex p.* Hayward, 45 L. T. Rep. N. S. 326; Herberts' Case, 3 P. Wms. 116, 24 Eng. Reprint 992; Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214.

See 10 Cent. Dig. tit. "Contempt," § 51.

It is contempt to invoke the interposition of a state court respecting the subject-matter of a suit pending in a federal court. New Orleans *v.* New York Mail Steamship Co., 20 Wall. (U. S.) 387, 22 L. ed. 354. But the bringing of an ejectment suit and replevin in the state court by one who claims title to property held by an assignee in bankruptcy appointed by the United States district court is not contempt. *In re* Litchfield, 13 Fed. 863.

To take a ward of the court from the custody of the person with whom the ward has been residing without permission of the court is in the nature of a criminal contempt. Wellesley *v.* Beaufort, 2 Russ. & M. 639, 11 Eng. Ch. 639.

54. *Georgia.*— Wikle *v.* Silva, 70 Ga. 717.

Illinois.— Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 [*affirming* 30 Ill. App. 258]; Richards *v.* People, 81 Ill. 551.

Kentucky.— Hazelrigg *v.* Bronaugh, 78 Ky. 62; Biggs *v.* Garrard, 6 B. Mon. 484, 44 Am. Dec. 778.

Michigan.— Smith *v.* Wayne Cir. Judge, 84 Mich. 564, 47 N. W. 1092.

New Jersey.— Moore *v.* Mercer Wire Co., (1888) 15 Atl. 737.

New York.— Coffin *v.* Burstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274; Levy *v.* Stanion, 33 N. Y. App. Div. 632, 53 N. Y.

wilful attempts of whatever nature, seeking to improperly influence jurors[55] in the impartial discharge of their duties, whether it be by conversations or discussions[56] or attempts to bribe,[57] and all efforts to influence the action of officers in the selection of the personnel of the jury,[58] obstruct or tend to hinder the due administration of justice, and therefore constitute contempts.[59]

2. Misconduct of Jury. Any misconduct upon the part of a juror which prevents or tends to prevent a fair and impartial consideration of the case on its merits according to the law and evidence is contempt. Such misconduct may result from conversations[60] with the suitors and others, obtaining information out-

Suppl. 472; Sainberg *v.* Weinberg, 25 Misc. 327, 54 N. Y. Suppl. 559; Riggs *v.* Whitney, 15 Abb. Pr. 388; Noe *v.* Gibson, 7 Paige 513; *In re* Hopper, 5 Paige 489.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disn. 336.

Pennsylvania.— Com. *v.* Young, 11 Phila. 606, 33 Leg. Int. 160.

Rhode Island.— Chafee *v.* Quidnick, 13 R. I. 442.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Virginia.— Thornton *v.* Washington Sav. Bank, 76 Va. 432.

United States.— Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447; Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; *In re* Acker, 66 Fed. 290; De Visser *v.* Blackstone, 7 Fed. Cas. No. 3,840, 6 Blatchf. 235; Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513; Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508; Wilmer *v.* Atlanta, etc., R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409. See also U. S. *v.* Murphy, 44 Fed. 39.

England.— Searle *v.* Choat, 25 Ch. D. 723, 53 L. J. Ch. 506, 32 Wkly. Rep. 397; Hawkins *v.* Gathercole, 1 Drew. 12, 16 Jur. 650, 21 L. J. Ch. 617; Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214.

See, generally, Receivers; and 10 Cent. Dig. tit. "Contempt," § 51.

Refusing to pay rent to receiver for period already paid to landlord is not contempt. Krakower *v.* Lavelle, 37 Misc. (N. Y.) 423, 75 N. Y. Suppl. 779.

Suing receiver without leave of appointing court is contempt. Greene *v.* Odell, 43 N. Y. App. Div. 608, 60 N. Y. Suppl. 346. See, generally, Receivers.

"Striking employees" are often held in contempt for preventing or attempting to prevent the operation of railroads whose property is in the hands of a receiver appointed by the court. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803; *In re* Higgins, 27 Fed. 443; *In re* Wabash R. Co., 24 Fed. 217; U. S. *v.* Kane, 23 Fed. 748; *In re* Doolittle, 23 Fed. 544; Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513.

55. Writing and sending to a grand jury an accusatory, threatening, and insulting letter relating to the subject of their investigation is contempt. Matter of Tyler, 64 Cal. 434, 1 Pac. 884. See also Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266.

56. *In re* Gorham, 129 N. C. 481, 40 S. E. 311; Davidson *v.* Manlove, 2 Coldw. (Tenn.) 346.

Discussing a case in court in the presence of some of the jurors who may try it by a litigant may be contempt. Baker *v.* State, 82 Ga. 776, 9 S. E. 743, 14 Am. St. Rep. 192, 4 L. R. A. 128.

An individual who approaches or communicates with the grand jury in reference to any matter which is or may come before them is guilty of contempt. U. S. *v.* Kilpatrick, 16 Fed. 765.

57. Nichols *v.* Judge Super. Ct., (Mich. 1902) 89 N. W. 691; Langdon *v.* Wayne Cir. Judge, 76 Mich. 358, 43 N. W. 310; Gandy *v.* State, 13 Nebr. 445, 14 N. W. 143.

Telling one whose son is on trial for murder that for a specified sum of money he will bribe a juryman is contempt, independent of statute, notwithstanding the offender does not intend or expect to bribe, but merely intended to swindle defendant's father out of the money. Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224.

Tampering, or attempting to tamper, with the grand jury.— Any attempt to control the action of the grand jury is contempt of court, but a mere inquiry of a grand jury as to what had taken place respecting a particular case is not. Harwell *v.* State, 10 Lea (Tenn.) 544.

58. Sinnott *v.* State, 11 Lea (Tenn.) 281.

Pocketing a venire is contempt. Keppele *v.* Williams, 1 Dall. (Pa.) 29, 1 L. ed. 23.

59. Attempting to obtain information respecting the deliberations of the jury, by a newspaper reporter by eavesdropping, is contempt. Orman *v.* State, 24 Tex. App. 495, 6 S. W. 544. So soliciting a juror to give a signal after the jury has retired to indicate whether an agreement is likely, and thereby enable an outsider to make a bet on the matter of agreement to better advantage, is contempt, although nothing is said by the person making the attempt as to how he wishes the jury to decide. State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

60. State *v.* Helvenston, R. M. Charlt. (Ga.) 48; Ruff *v.* Rader, 2 Mont. 211; *In re* Gorham, 129 N. C. 481, 40 S. E. 311; *In re* May, 1 Fed. 737, 2 Flipp. 562.

A federal grand juror who deliberately secures an interview with one interested in procuring an indictment respecting what occurred in the jury room is guilty of contempt, where the jury was instructed to keep its deliberations secret. *In re* Summerhayes, 70 Fed. 769.

side of the court-room,[61] expressing opinion respecting the merits of the case,[62] or separating[63] from the other jurors in violation of the court's injunction.

I. Misconduct of Witness — 1. In General. Witnesses who retire without giving testimony,[64] or who, having been excluded by order of the court, remain in the court-room during the examination of other witnesses are guilty of contempt.[65]

2. Failure of Witness to Appear. Failure of a witness to appear in obedience to the requirements of a legal summons or subpœna, either to give evidence or produce books, papers, etc., is contempt.[66]

3. False Swearing by Witness. False swearing by a witness has the same effect upon the administration of justice as a refusal to answer proper questions and is a direct contempt of the authority of the court.[67]

4. Refusal of Judgment Debtor to Make Discovery. A judgment debtor's refusal to answer questions as to his property when directed by the court so to do may be punished as a contempt.[68]

5. Refusal to Testify or Produce Evidence. Refusal of a witness to be sworn or affirmed,[69] or to answer questions in examinations before the court,[70] grand

61. A juror who acquires information out of the court-room pending a trial is not guilty of contempt if the court has issued no order or injunction in this respect. People *v.* Oyer, etc., Ct., 36 Hun (N. Y.) 277 [*affirmed* in 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691].

62. A juror is in contempt if after being summoned he voluntarily forms and delivers an opinion as to the guilt or innocence of the person, with a view of disqualifying himself from serving. Such act tends to obstruct the due administration of justice. U. S. *v.* Devaughan, 25 Fed. Cas. No. 14,952, 3 Cranch C. C. 84.

63. *Georgia.*— State *v.* Helvenston, R. M. Charlt. 48.

Indiana.— Murphy *v.* Wilson, 46 Ind. 537.

New Jersey.— Crane *v.* Sayre, 6 N. J. L. 110.

New York.— *Ex p.* Hill, 3 Cow. 355.

United States.— Offutt *v.* Parrott, 18 Fed. Cas. No. 10,453, 1 Cranch C. C. 154.

See 10 Cent. Dig. tit. "Contempt," § 39.

64. Howe *v.* Welch, 11 N. Y. Civ. Proc. 444; Reynolds *v.* Parkes, 2 Dem. Surr. (N. Y.) 399.

65. *California.*— People *v.* Boscovitch, 20 Cal. 436.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944.

Ohio.— Dickson *v.* State, 39 Ohio St. 73.

Texas.— Cross *v.* State, 11 Tex. App. 84.

Canada.— Sadlier *v.* Smith, 14 U. C. L. J. N. S. 30.

66. Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820; State *v.* Newton, 62 Ind. 517; Tredway *v.* Van Wagenen, 91 Iowa 556, 60 N. W. 130; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 607, 641, 16 Abb. Pr. (N. Y.) 1; Bleecker *v.* Carroll, 2 Abb. Pr. (N. Y.) 82; 4 Bl. Comm. 284; and, generally, Witnesses.

Legal summons required.— Where evidence of adverse party is sought the summons to subject witness to penalty of contempt for refusal to obey must be issued by the proper authority. White *v.* Morgan, 119 Ind. 338, 21 N. E. 968.

Production of books.— It is contempt to disobey an order of a register in bankruptcy to produce books, etc., relating to the business of the bankrupt. *In re* Allen, 1 Fed. Cas. No. 208, 13 Blatchf. 271. So the local manager of a bank will be in contempt for refusing to obey a subpœna to appear and produce the books of the bank. Hannum *v.* McRae, 17 Ont. Pr. 567 [*affirmed* in 18 Ont. Pr. 185].

67. Berkson *v.* People, 154 Ill. 81, 39 N. E. 1079; Eagan *v.* Lynch, 3 N. Y. Civ. Proc. 236; *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; Stockham *v.* French, 1 Bing. 365, 8 E. C. L. 550. But see Bernheimer *v.* Kelleher, 31 Misc. (N. Y.) 464, 64 N. Y. Suppl. 409, holding that false swearing by a judgment debtor upon his examination in supplementary proceedings touching the disposition of his property is not a contempt for which he can be punished by fine or imprisonment. See, generally, Perjury.

In Louisiana perjury has been held not contempt of court. State *v.* Lazarus, 37 La. Ann. 314.

An attorney who procures false testimony, knowing it to be false, with the intention of deceiving the court, is guilty of contempt. Beattie *v.* People, 33 Ill. App. 651; Gibson *v.* Tilton, 1 Bland (Md.) 352, 17 Am. Dec. 306.

68. Berkson *v.* People, 154 Ill. 81, 39 N. E. 1079; Warren *v.* Rosenberg, 94 Wis. 523, 69 N. W. 339; *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; Uhrig *v.* Uhrig, 15 Ont. Pr. 53. But see Bernheimer *v.* Kelleher, 31 Misc. (N. Y.) 464, 64 N. Y. Suppl. 409.

Judgment debtor's wife will be held in contempt if she fails to disclose in proper proceedings whether she has property of her husband under her control. *In re* O'Brien, 24 Wis. 547.

69. *Ex p.* Stice, 70 Cal. 51, 11 Pac. 459; Heard *v.* Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; Com. *v.* Roberts, 2 Pa. L. J. Rep. 340, 4 Pa. L. J. 126.

Refusal to be sworn on ground of conscientious scruples.— Witness was not a Quaker. Under the statute liberty to affirm was confined to Quakers. It was held contempt. U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

70. *Nevada.*— Maxwell *v.* Rives, 11 Nev. 213.

jury,[71] commissioner,[72] notary public,[73] or other person duly authorized to take testimony, or to permit the inspection of books, papers,[74] etc., produced, is contempt. It is such, however, only where the question is pertinent to the issues or where the evidence sought is material.[75]

J. Misconduct Toward Court — 1. In General. Misconduct in the presence of the court[76] which shows disrespect of its authority, or which obstructs, or has a tendency to interfere with, the due administration of justice is contempt.[77] Thus disorderly conduct in the court-room,[78] or the use of violent, threaten-

New York.— People *v.* Marston, 18 Abb. Pr. 257; Clark *v.* Brooks, 26 How. Pr. 254; Taylor *v.* Wood, 2 Edw. 94.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263.

Pennsylvania.— *In re* Kelly, 200 Pa. St. 430, 50 Atl. 248, 86 Am. St. Rep. 719; Carondelet Ave. Furniture Mfg. Co. *v.* Fairmount Ins. Assoc., 15 Wkly. Notes Cas. 125.

Texas.— Holman *v.* Austin, 34 Tex. 668.

See 10 Cent. Dig. tit. "Contempt," § 34.

Evasive and contumacious conduct on the part of a witness is not contempt under a statute authorizing punishment for refusing or neglecting to answer as a witness. Manzella *v.* Ryan, 73 N. Y. App. Div. 137, 77 N. Y. Suppl. 132.

Proceedings without jurisdiction.— Refusal to answer by a witness is not contempt where the court has no jurisdiction by reason of an insufficient complaint under a special statutory proceeding. *In re* Hall, 10 Mich. 210; *In re* Morton, 10 Mich. 208.

71. *Alabama.*— Newsum *v.* State, 78 Ala. 407.

California.— *In re* Rogers, 129 Cal. 468, 62 Pac. 47.

Massachusetts.— Heard *v.* Pierce, 8 Cush. 338, 54 Am. Dec. 757.

New York.— *In re* Hackley, 24 N. Y. 74, 24 How. Pr. 369; Matter of Taylor, 8 Misc. 159, 28 N. Y. Suppl. 500, 60 N. Y. St. 136.

Utah.— *Ex p.* Harris, 4 Utah 5, 5 Pac. 129.

United States.—U. S. *v.* Caton, 25 Fed. Cas. No. 14,758, 1 Cranch C. C. 150.

See 10 Cent. Dig. tit. "Contempt," § 34.

Grand jury investigating a criminal charge relating to state property in custody of the secretary of state cannot demand inspection of property without court order therefor. Hence a refusal of the secretary of state is not contempt. Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

72. Bradley Fertilizer Co. *v.* Taylor, 112 N. C. 141, 17 S. E. 69; *In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148. See also *Ex p.* Peck, 19 Fed. Cas. No. 10,885, 3 Blatchf. 113.

73. Order to answer.— A mere refusal to answer the question put by an attorney in an examination before a notary is not contempt. The order to answer must be given by the notary. Burnside *v.* Dewstoc, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

74. Refusal to permit a witness to examine certain books ordered into court while the witness is being examined is contempt. Sudlow *v.* Knox, 4 Abb. Dec. (N. Y.) 326, 7 Abb. Pr. N. S. (N. Y.) 411.

Refusal to testify or produce papers is not a criminal contempt, within a statute defining a criminal contempt as a "resistance willfully offered by any person in the presence of a justice to the execution of any lawful order or process made or issued by him." Resistance must be some physical hindrance or obstruction and not mere neglect to execute an order. People *v.* Webster, 14 How. Pr. (N. Y.) 242, 3 Park. Crim. (N. Y.) 503; People *v.* Benjamin, 9 How. Pr. (N. Y.) 419.

75. *California.*— *Ex p.* Zeehandelaar, 71 Cal. 238, 12 Pac. 259.

Kansas.— Davis' Petition, 38 Kan. 408, 16 Pac. 790. *Compare In re* Merkle, 40 Kan. 27, 19 Pac. 401.

Montana.— *In re* MacKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451.

New York.— Matter of Leich, 31 Misc. 671, 65 N. Y. Suppl. 3; Matter of Odell, 6 Dem. Surr. 344, 19 N. Y. St. 259.

Pennsylvania.— Rauschmeyer *v.* Bank, 2 L. T. N. S. 67.

United States.— *In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148; *Ex p.* Peck, 19 Fed. Cas. No. 10,885, 3 Blatchf. 113.

See 10 Cent. Dig. tit. "Contempt," § 35.

76. As to what constitutes "in presence of" court see *infra*, III, J. 2.

77. Baker *v.* State, 82 Ga. 776, 9 S. E. 743, 14 Am. St. Rep. 192, 4 L. R. A. 128; Stewart *v.* State, 140 Ind. 7, 39 N. E. 508; Penn *v.* Brewer, 12 Gill & J. (Md.) 113; U. S. *v.* Gehr, 116 Fed. 520.

Changing lock on court-room door and refusing admittance to judge and court officers is contempt. Dahnke *v.* People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197 [*affirming* 57 Ill. App. 619].

Seizing property in open court by force is contempt. Com. *v.* Wilson, 1 Phila. (Pa.) 80, 7 Leg. Int. (Pa.) 146.

To attempt to break open the desk of a clerk in the register's office is contempt. *Ex p.* Burrows, 8 Ves. Jr. 535.

Taking money under agreement and pretense that taker thereof can influence court's decision in pending case is contempt. *In re* Taylor, (Cal. 1886) 10 Pac. 88; *In re* Buckley, 69 Cal. 1, 10 Pac. 69.

78. Holman *v.* State, 105 Ind. 513, 5 N. E. 556; U. S. *v.* Patterson, 26 Fed. 509.

Carrying deadly weapon.— A member of the bar who appears in court armed with a deadly weapon is guilty of contempt. Sharon *v.* Hill, 24 Fed. 726.

Intoxication.— For one to attend on a court in an intoxicated condition is a contempt. Com. *v.* Clark, 13 Pa. Co. Ct. 439.

ing, or insulting language to the court,[79] witnesses,[80] or opposing counsel[81] is contempt.

2. In Presence of Court. Direct contempt[82] can only be committed in the presence of the court, or so near thereto as to obstruct the administration of justice.[83] Insolent conduct directed toward the court or judge constituting contempt must also occur while the court or judge is engaged in the discharge of a judicial duty.[84] The court is present, however, in every part of the place set apart for its use and for the use of its officers, jurors, and witnesses, and therefore misbehavior in such places is misconduct in the presence of the court.[85]

3. Disturbance of Proceedings of Court. One who disturbs the peace and good order of a cause on trial is guilty of a contempt.[86]

79. *Indiana.*— Dodge *v.* State, 140 Ind. 284, 39 N. E. 745.

Iowa.— Russell *v.* French, 67 Iowa 102, 24 N. W. 741.

Louisiana.— State *v.* Garland, 25 La. Ann. 532.

North Dakota.— State *v.* Crum, 7 N. D. 299, 74 N. W. 992.

Pennsylvania.— *In re* Heverin, 32 Leg. Int. 188.

Vermont.— *In re* Cooper, 32 Vt. 258.

Virginia.— Com. *v.* Dandridge, 2 Va. Cas. 408.

England.— Reg. *v.* Jordan, 36 Wkly. Rep. 589.

See 10 Cent. Dig. tit. "Contempt," § 9.

"You can fine and be damned," directed by an attorney to a judge, is contempt. Hill *v.* Crandall, 52 Ill. 70.

Writing letters to court by attorney or party which are insulting and disrespectful constitutes contempt. State *v.* Waugh, 53 Kan. 688, 37 Pac. 165; *In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747; Matter of Wallace, L. R. 1 P. C. 283, 36 L. J. P. C. 9, 4 Moore P. C. N. S. 140, 15 Wkly. Rep. 533, 16 Eng. Reprint 269; Matter of Ludlow Charities, 2 Myl. & C. 316, 14 Eng. Ch. 316. But see *In re* Griffin, 1 N. Y. Suppl. 7.

80. U. S. *v.* Carter, 25 Fed. Cas. No. 14,740, 3 Cranch C. C. 423.

To call another a liar in court-room, while court is in session, and in hearing of court officers, is contempt. U. S. *v.* Emerson, 25 Fed. Cas. No. 15,050, 4 Cranch C. C. 188.

The writing of letters concerning an action to witnesses and persons calculated to interfere with the administration of justice is a contempt. Welby *v.* Still, 66 L. T. Rep. N. S. 523.

81. Nicholls *v.* McDonald, 4 U. C. L. J. 259.

82. See *supra*, I, B, 2.

83. *Arkansas.*— Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Colorado.— Watson *v.* People, 11 Colc. 4, 16 Pac. 329.

Indiana.— Snyder *v.* State, 151 Ind. 553, 52 N. E. 152.

Michigan.— *In re* Wood, 82 Mich. 75, 45 N. W. 1113.

New York.— Richmond *v.* Dayton, 10 Johns. 393.

North Carolina.— *In re* Oldham, 89 N. C. 23, 45 Am. Rep. 673.

North Dakota.— State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

Pennsylvania.— *In re* Hirst, 9 Phila. 216, 31 Leg. Int. 340.

South Carolina.— State *v.* Applegate, 2 McCord 110; State *v.* Johnson, 2 Bay 385; Lining *v.* Bentham, 2 Bay 1.

Virginia.— Com. *v.* Stuart, 2 Va. Cas. 320.

United States.— U. S. *v.* Anonymous, 21 Fed. 761.

See 10 Cent. Dig. tit. "Contempt," § 9.

84. Winship *v.* People, 51 Ill. 296; Field *v.* Thornell, 106 Iowa 7, 75 N. W. 685, 68 Am. St. Rep. 281; Detournion *v.* Dormenon, 1 Mart. (La.) 136.

Acts of attorney at a meeting held in the court-house in a room adjoining the court-room on a day the court was not in session which was attended by the judge, by request, are not committed in the presence of the court, and therefore do not constitute a direct contempt. Snyder *v.* State, 151 Ind. 553, 52 N. E. 152.

Addressing improper remarks to a justice while engaged in examining a docket to learn about a judgment and execution against defendant is not contempt, as such duty is merely ministerial, not judicial. Fitler *v.* Probasco, 2 Browne (Pa.) 137.

85. People *v.* Barrett, 56 Hun (N. Y.) 351, 9 N. Y. Suppl. 321, 18 N. Y. Civ. Proc. 180, 24 Abb. N. Cas. (N. Y.) 430, 8 N. Y. Crim. 13; Matter of Taylor, 8 Misc. (N. Y.) 159, 28 N. Y. Suppl. 500, 60 N. Y. St. 136; Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971; *Ex p.* Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150; U. S. *v.* Emerson, 25 Fed. Cas. No. 15,050, 4 Cranch C. C. 188; U. S. *v.* Carter, 25 Fed. Cas. No. 14,740, 3 Cranch C. C. 423; *In re* Johnson, 20 Q. B. D. 68, 52 J. P. 230, 57 L. J. Q. B. 1, 58 L. T. Rep. N. S. 160, 36 Wkly. Rep. 51; French *v.* French, 1 Hog. 138.

Court-house steps.— Using contemptuous language to a judge on the court-house steps as he is about to go into the court-room and convene court is contempt. Com. *v.* Dandridge, 2 Va. Cas. 408.

86. Com. *v.* Clark, 13 Pa. Co. Ct. 439; U. S. *v.* Anonymous, 21 Fed. 761.

It is contempt to muster and examine a militia company with martial music so near the court as to disturb its proceedings. State *v.* Coulter, Wright (Ohio) 421; State *v.* Goff, Wright (Ohio) 78.

4. Filing Papers in Court. Contempt may be committed by inserting in pleadings,[87] motions,[88] affidavits,[89] briefs, arguments,[90] applications for rehearing,[91] or other papers[92] filed in court, or in memoranda on the court docket,[93] impertinent, scandalous, insulting, or contemptuous language, reflecting on the integrity of the court.

K. Preventing, Delaying, or Interfering With Execution of Legal Process. The due administration of justice may be obstructed and therefore contempt committed by unlawfully hindering, delaying, or interfering, or attempting so to do, with the proper execution of legal process.[94] Maltreatment of the server of a writ is also contempt.[95]

L. Publications — 1. Relating to Court or Pending Cause. Publications concerning a pending cause,[96] trial, or judicial investigation, calculated to prejudice

87. Sommers *v.* Torrey, 5 Paige (N. Y.) 54, 28 Am. Dec. 411; Herndon *v.* Campbell, 86 Tex. 168, 23 S. W. 980 [*reversing* (Tex. Civ. App. 1893) 23 S. W. 558].

88. Charging in motion for new trial that the judge was "so prejudiced against the defendant that he did not give him a fair and impartial trial," supported by affidavit reiterating the charge, where prejudice is no ground for new trial, is contempt of court. Harrison *v.* State, 35 Ark. 458.

89. Affidavit for change of venue, stating bias or prejudice on part of judge is contempt, where statute does not allow change on this ground. *In re* Jones, 103 Cal. 397, 37 Pac. 385. The rule is otherwise if the statute allows change for bias or prejudice of judge. *Ex p.* Curtis, 3 Minn. 274. See also Works *v.* San Diego County Super. Ct., 130 Cal. 304, 62 Pac. 507; Mullin *v.* People, 15 Colo. 437, 24 Pac. 880, 22 Am. St. Rep. 414, 9 L. R. A. 566; Le Hane *v.* State, 48 Nebr. 105, 66 N. W. 1017.

90. Abuse of trial judge in brief filed in appellate court is a contempt of latter court. Sears *v.* Starbird, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123.

Criticism of contemptuous language concerning trial judge in brief in appellate court was held not contempt of trial court. *In re* Thompson, 46 Kan. 254, 26 Pac. 674; *In re* Dalton, 46 Kan. 253, 26 Pac. 673.

91. McCormick *v.* Sheridan, (Cal. 1888) 20 Pac. 24; *In re* Woolley, 11 Bush (Ky.) 95; State *v.* Grailhe, 1 La. Ann. 183; State *v.* Soulé, 8 Rob. (La.) 500; State *v.* Keene, 11 La. 596.

92. U. S. *v.* Church, 6 Utah 9, 21 Pac. 503, 524.

A wanton attack upon the character of a register in a paper filed before the judge is a contempt of court. *In re* Breck, 4 Fed. Cas. No. 1,823.

93. Memorandum on court docket made by an attorney reflecting on judge's integrity is contempt. *Ex p.* Smith, 28 Ind. 47.

94. *California.*—De Witt *v.* Fresno County Super. Ct. (1897) 47 Pac. 871.

Illinois.— Horr *v.* People, 95 Ill. 169.

Louisiana.— State *v.* Herron, 24 La. Ann. 619.

Massachusetts.— Clark *v.* Parkinson, 10 Allen 133, 87 Am. Dec. 628.

New York.— People *v.* Gilmore, 26 Hun 1; Conover *v.* Wood, 5 Abb. Pr. 84.

Pennsylvania.— Com. *v.* Curtis, 14 Phila. 361, 37 Leg. Int. 83.

United States.— Albertson *v.* The T. I. Nevius, 48 Fed. 927; *In re* Sowles, 41 Fed. 752; *In re* Doolittle, 23 Fed. 544.

See 10 Cent. Dig. tit. "Contempt," §§ 48, 49.

Encouraging and advising disobedience to the commands of a judgment is contempt under a statute forbidding unlawful interference with the proceedings of any action. King *v.* Barnes, 113 N. Y. 476, 21 N. E. 182, 415, 23 N. Y. St. 263 [*affirming* 51 Hun (N. Y.) 550, 4 N. Y. Suppl. 247, 22 N. Y. St. 47, 51, 54].

One who conceals himself to prevent the service of a subpœna in a civil case is not guilty of contempt. Broderick *v.* Genesee Cir. Judge, 125 Mich. 274, 84 N. W. 129.

Withdrawing offer to bid at trustee's sale may constitute contempt. Quidnick Co. *v.* Chafee, 13 R. I. 367.

95. Price *v.* Hutchison, L. R. 9 Eq. 534, 18 Wkly. Rep. 204; Dastoines *v.* Apprice, Cary 91; Rove *v.* West, Cary 38; Emery *v.* Bowen, 5 L. J. Ch. 349.

But mere violent snatching an original writ of summons from the person serving it is not a contempt of the process of the court. Weekes *v.* Whitely, 3 Dowl. P. C. 536, 1 Hurl. & W. 218. And where a person on being served with process shook the officer serving it and ordered him to quit his presence, it was held that it did not amount to a contempt of court and obstruction of its process. Adams *v.* Hughes, 1 B. & B. 24, 5 E. C. L. 482.

Obstructing a messenger in the execution of his warrant is a contempt. *Ex p.* Page, 1 Rose 1.

96. Cause must be pending.— Newspapers and others may, in the public interest, challenge the conduct of judges, jurors, witnesses, parties litigant, and the attorneys after the cause is finally decided.

Arkansas.— *Compare* State *v.* Morrill, 16 Ark. 384.

Colorado.— Cooper *v.* People, 13 Colo. 373, 22 Pac. 790, 6 L. R. A. 430.

Illinois.— Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158.

or prevent fair and impartial action,[97] which seek to influence judicial action by threats or other form of intimidation,[98] which reflect upon the court, counsel, parties, or witnesses, respecting the cause,[99] or which tend to corrupt or embarrass the due administration of justice,[1] constitute contempt. The criminal intent of

Indiana.— Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199.

Iowa.— State *v.* Anderson, 40 Iowa 207; Dunham *v.* State, 6 Iowa 245.

Michigan.— *Compare In re* Chadwick, 109 Mich. 588, 67 N. W. 1071.

Nebraska.— Rosewater *v.* State, 47 Nebr. 630, 66 N. W. 640; Percival *v.* State, 45 Nebr. 741, 64 N. W. 221, 50 Am. St. Rep. 561.

Ohio.— Post *v.* State, 14 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 257.

Oregon.— State *v.* Kaiser, 20 Oreg. 50, 23 Pac. 964, 8 L. R. A. 584.

Wisconsin.— State *v.* Eau Claire County Cir. Ct., 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554.

See 10 Cent. Dig. tit. "Contempt," § 14.

97. *Arkansas.*— State *v.* Morrill, 16 Ark. 384.

California.— *Ex p.* Barry, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248.

Colorado.— People *v.* Stapleton, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; Cooper *v.* People, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430.

Illinois.— People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

Indiana.— Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199.

Louisiana.— State *v.* Judge Cir. Dist. Ct., 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282.

Montana.— State *v.* Faulds, 17 Mont. 140, 42 Pac. 285; *In re* McKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; Territory *v.* Murray, 7 Mont. 251, 15 Pac. 145.

Nebraska.— Percival *v.* State, 45 Nebr. 741, 64 N. W. 221, 50 Am. St. Rep. 568.

New Hampshire.— *In re* Sturoc, 48 N. H. 428, 97 Am. Dec. 626; Tenney Case, 23 N. H. 162.

New Jersey.— *In re* Cheeseman, 49 N. J. L. 115, 6 Atl. 513, 60 Am. St. Rep. 596.

New Mexico.— *In re* Hughes, 8 N. M. 225, 43 Pac. 692.

New York.— *In re* Bronson, 12 Johns. 460; *In re* Darby, 3 Wheel. Crim. 1.

North Carolina.— *In re* Moore, 63 N. C. 397.

Ohio.— Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Pennsylvania.— Bayard *v.* Passmore, 3 Yeates 438; Respublica *v.* Oswald, 1 Dall. 319, 1 Am. Dec. 246, 1 L. ed. 155.

South Dakota.— State *v.* Edwards, 15 S. D. 383, 89 N. W. 1011.

Washington.— State *v.* Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

United States.— Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 92 Fed. 774; U. S. *v.* Duane, 25 Fed. Cas. No. 14,997, Wall. Sr. 102.

England.— Daw *v.* Eley, L. R. 7 Eq. 49, 38 L. J. Ch. 113, 17 Wkly. Rep. 245; *In re* Crown Bank, 44 Ch. D. 649, 59 L. J. Ch. 767, 63 L. T. Rep. N. S. 304, 39 Wkly. Rep. 45; Reg. *v.* Skipworth, 12 Cox C. C. 371.

Canada.— Reg. *v.* Wilkinson, 41 U. C. Q. B. 47.

See 10 Cent. Dig. tit. "Contempt," § 15.

The publication in a newspaper of a true report of the testimony in a divorce case cannot be said to tend to embarrass, impede, or obstruct the administration of justice and is not a contempt, although the court has ordered that no publication be made of the testimony. *In re* Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755. But see Rex *v.* Clement, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458.

98. State *v.* Bee Pub. Co., 60 Nebr. 282, 83 N. W. 204, 50 L. R. A. 195; Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829; Mackett *v.* Herne Bay, 24 Wkly. Rep. 845.

A statement charging defendant with unfair and overreaching conduct in his business, circulated by plaintiff amongst some of their, and his, business correspondents before the hearing of an action, was held to be a contempt. Bowden *v.* Russell, 46 L. J. Ch. 414, 36 L. T. Rep. N. S. 177.

99. *Colorado.*— Bloom *v.* People, 23 Colo. 416, 48 Pac. 519; People *v.* Stapleton, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787.

Illinois.— People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

Iowa.— Field *v.* Thornell, 106 Iowa 7, 75 N. W. 685, 68 Am. St. Rep. 281.

Mississippi.— *Compare Ex p.* Hickey, 4 Sm. & M. 751.

New Mexico.— *In re* Hughes, 8 N. M. 225, 43 Pac. 692.

New York.— *In re* Bronson, 12 Johns. 460; Noah's Case, 3 City Hall Rec. (N. Y.) 13.

Ohio.— State *v.* Post, 6 Ohio S. & C. Pl. Dec. 200, 4 Ohio N. P. 157.

United States.— Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,616, Wall. Sr. 77; U. S. *v.* Duane, 25 Fed. Cas. No. 14,997, Wall. Sr. 102.

England.—Littler *v.* Thomson, 2 Beav. 129, 17 Eng. Ch. 129; Reg. *v.* O'Dogherty, 5 Cox C. C. 348; Tichborne *v.* Tichborne, 39 L. J. Ch. 398, 22 L. T. Rep. N. S. 55, 18 Wkly. Rep. 621; Kitcat *v.* Sharp, 52 L. J. Ch. 134, 48 L. T. Rep. N. S. 64, 31 Wkly. Rep. 227; Hunt *v.* Clarke, 58 L. J. Q. B. 490, 61 L. T. Rep. N. S. 343, 37 Wkly. Rep. 724.

See 10 Cent. Dig. tit. "Contempt," § 15.

1. U. S. *v.* Holmes, 26 Fed. Cas. No. 15,383, 1 Wall. Jr. 1 [*cited* in U. S. *v.* Anonymous, 21 Fed. 761, 768, construing U. S. Rev. Stat. (1878), § 725].

such publications is immaterial.[2] So they need not be published in the place where the court is held; circulation in and about such place is sufficient.[3] So it is not necessary to show that they were read by the jurors or those whose conduct was sought to be influenced by them.[4] Truthful publications relating to judicial proceedings do not, however, constitute contempt.[5]

2. Relating to Grand Jury. Any publication reflecting on the grand jury, tending to bring the members thereof into disrepute and to embarrass or interrupt them in the discharge of their duties is contempt.[6]

M. Tampering With Evidence and Witnesses, or Suppressing Testimony — 1. Arrest of Witness. Procuring the arrest on civil process of the parties or witnesses to an action, while attending upon the trial or going to and returning from the place of trial, is contempt.[7]

2. Bribing Witness. Attempting to bribe a person attending at the trial as a witness is contempt.[8]

3. Preventing Attendance of Witness. It is contempt to prevent the attendance of witnesses who have been duly subpœnaed,[9] or concealing or attempting

Printing a brief before a cause comes on to be heard is a contempt. Anonymous, 2 Atk. 469.

Publication of testimony during trial when forbidden by order of court may be contempt, as resisting court order. Dunham *v.* State, 6 Iowa 245.

2. Telegram Newspaper Co. *v.* Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 840. See also *infra*, V, E.

3. State *v.* Judge Cir. Dist. Ct., 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282; Telegram Newspaper Co. *v.* Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; *In re* Sturoc, 48 N. H. 428, 97 Am. Dec. 626; Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

Newspaper article published at a place remote from that at which the court was then being held, respecting a case pending, reflecting on the action of the court therein, impeaching its integrity, and seeking to intimidate the court in respect to its action in the case, by a threat of popular clamor, constitutes contempt. People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

4. Gazette Co. *v.* Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 155.

5. McClatchy *v.* Sacramento County Super. Ct., 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691.

Legitimate criticism of trials is permitted. Stuart *v.* People, 4 Ill. 395; *In re* Press-Post, 6 Ohio S. & C. Pl. 10, 3 Ohio N. P. 180.

Newspaper article attacking the general practice of police court system, and charging abuses, etc., without specifying any particular case, is not a contempt. *In re* Shannon, 11 Mont. 67, 27 Pac. 352.

6. Allen *v.* State, 131 Ind. 599, 30 N. E. 1093; Fishback *v.* State, 131 Ind. 304, 30 N. E. 1088.

To publish that grand jury or any member thereof is incompetent, while sitting, is contempt. *In re* Van Hook, 3 City Hall Rec. (N. Y.) 64. But to publish defamatory matter concerning a grand juror, not impeaching his conduct or capacity as such, is not contempt. *In re* Spooner, 5 City Hall Rec. (N. Y.) 109. So the publication of a libel on a grand jury, or on any member thereof in relation to any act already done by them in their official capacity, but which has no tendency to directly impede, embarrass, or obstruct the grand jury in the discharge of any of its duties remaining to be performed after the publication is made, cannot be summarily punished as a contempt. Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158.

7. Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598; State *v.* Buck, 62 N. H. 670.

Suing out an attachment for a witness in a civil cause who has not been regularly served with a subpœna is contempt on the part of the attorney applying therefor. Butler *v.* People, 2 Colo. 295.

Serving process on person while attending at court, either as party to case or witness, **is not contempt.** *Ex p.* Schulenburg, 25 Fed. 211; Blight *v.* Fisher, 3 Fed. Cas. No. 1,542, 1 Pet. C. C. 41. But service of summons upon a litigant under protection of an order of the master requiring him to attend the taking of depositions in another state, in suit in state court for same cause of action as suit in federal court, is contempt of latter court. Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 509. See also *In re* Healey, 53 Vt. 694, 38 Am. Rep. 713.

8. Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056.

Bribing person known to be a material witness to not appear in court is contempt. *In re* Brule, 71 Fed. 943.

Offering money to induce a witness to suppress evidence is contempt. *In re* Hooley, 79 L. T. Rep. N. S. 306, 6 Manson 404.

9. *Konsas.*— *In re* Nickell, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315.

Massachusetts.—Com. *v.* Reynolds, 14 Gray 87, 74 Am. Dec. 665.

Michigan.—See Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148.

Ohio.— Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254 [*overruling* Baldwin *v.* State, 11 Ohio St. 681].

to conceal, or inducing or attempting to induce them to go beyond the jurisdiction of the court.[10]

IV. PERSONS LIABLE.

A. In General. The power of courts to punish for contempt extends to all persons who interfere with the proper exercise of their judicial functions, whether such persons be officers of the court,[11] parties litigant, or strangers.[12] A client will not be held in contempt, however, for acts done by his attorney without his direction, knowledge, privity, or procurement.[13]

B. Corporations. A corporation may commit contempt as well as its officers, members, and agents.[14] Thus where a corporation is ordered to refrain

Tennessee.— McCarthy *v.* State, 89 Tenn. 543, 15 S. W. 736.

Utah.— *Ex p.* Whetstone, 9 Utah 156, 36 Pac. 633.

Virginia.— Com. *v.* Feely, 2 Va. Cas. 1.

United States.— See *Ex p.* Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150.

See 10 Cent. Dig. tit. "Contempt," § 27.

To terrify a witness about to be examined is contempt. Partridge *v.* Partridge, Tothill 40.

The use of threatening language to a person who is likely to be a witness in a suit with the purpose of preventing that person from coming forward to give evidence is a contempt. Shaw *v.* Shaw, 8 Jur. N. S. 141, 31 L. J. P. M. 35, 6 L. T. Rep. N. S. 477, 2 Swab. & Tr. 517.

Until witness has been subpœnaed or subpœna has been issued for him, it is not contempt to induce him to absent himself so he could not be subpœnaed. McConnell *v.* State, 46 Ind. 298. See also Schlesinger *v.* Flersheim, 2 D. & L. 737, 14 L. J. Q. B. 97. So subpœnas issued in blank as to names of parties to the case is not a valid process upon which to prosecute a rule for contempt charging one with attempt to bribe another to warn witness to avoid the service of such subpœna. Dobbs *v.* State, 55 Ga. 272. But to keep a material witness out of the way and thereby impede the service of a subpœna is a contempt. Clements *v.* Williams, 2 Scott 814. And removing a person so that he could not be subpœnaed after the subpœna has been issued and in the hands of the sheriff is contempt. Haskett *v.* State, 51 Ind. 176.

10. Whittem *v.* State, 36 Ind. 196; *In re* Whetstone, 9 Utah 156, 36 Pac. 633.

Advising witness to absent himself.— For an attorney to advise a witness to absent himself from court is contempt. *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205.

Concealing or removing books, papers, and documents ordered to be produced which results in defeating the process of court is contempt. Com. *v.* Braynard, Thatch. Crim. Cas. (Mass.) 146; Bonesteel *v.* Lynde, 8 How. Pr. (N. Y.) 226.

Refusal to produce an indentured servant at a hearing of a petition to discharge the indenture is contempt. Green *v.* Hill, 3 Del. Ch. 92.

11. See *infra*, IV, C.

12. *New Jersey.*—State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

New York.— Hull *v.* L'Eplattimer, 49 How. Pr. 500.

Ohio.— State *v.* Post, 6 Ohio S. & C. Pl. Dec. 200, 4 Ohio N. P. 157.

United States.— *In re* Acker, 66 Fed. 290.

England.— Wellesley *v.* Mornington, 11 Beav. 180; Seaward *v.* Paterson, [1897] 1 Ch. 545, 66 L. J. Ch. 267, 76 L. T. Rep. N. S. 215, 45 Wkly. Rep. 610; Avory *v.* Andrews, 51 L. J. Ch. 414, 46 L. T. Rep. N. S. 279, 30 Wkly. Rep. 564.

See 10 Cent. Dig. tit. "Contempt," § 86.

Attorney signing petition containing contemptuous language is guilty of contempt as an individual, although he is a licensed attorney of the court. State *v.* Keene, 11 La. 596.

Infant for refusing to convey and parties interfering to prevent his obeying the order of the court are in contempt. Thomas *v.* Gwynne, 8 Beav. 312; McCartney *v.* Simonton, Ir. R. 5 Eq. 594.

A local board of health was restrained from allowing sewerage to flow into a river after a certain date, which it failed to do, and was held guilty of contempt of court. Spokes *v.* Banbury Local Bd. of Health, 11 Jur. N. S. 1010, 35 L. J. Ch. 105, 13 L. T. Rep. N. S. 453 [*affirming* L. R. 1 Eq. 42, 14 Wkly. Rep. 128].

When a member of a firm fails to transmit a court order to his partner or those in charge he may be held in contempt. Silliman *v.* Whitmer, 173 Pa. St. 401, 37 Wkly. Notes Cas. (Pa.) 497, 34 Atl. 56.

13. Satterlee *v.* De Comeau, 7 Rob. (N. Y.) 666; Harris *v.* Clark, 10 How. Pr. (N. Y.) 415.

14. *Iowa.*—Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

New Jersey.— West Jersey Traction Co. *v.* Board of Public Works, 58 N. J. L. 536, 37 Atl. 578.

New York.— People *v.* Albany, etc., R. Co., 12 Abb. Pr. 171, 20 How. Pr. 358.

United States.— U. S. *v.* Memphis, etc., R. Co., 6 Fed. 237.

England.— A limited company cannot be committed for contempt. *In re* Hooley, 79 L. T. Rep. N. S. 706, 6 Manson 404.

See, generally, CORPORATIONS; and 10 Cent. Dig. tit. "Contempt," § 87.

When the manager of a corporation directs a thing to be done and has full charge thereof he alone will be held for contempt, and it is not necessary to make the company in name

from doing a particular thing every member of the corporation who afterward joins in doing the forbidden act may be held in contempt.[15]

C. Officers of Court. Officers of court,[16] such as attorneys,[17] clerks,[18] court depositaries,[19] officers in charge of witnesses under rule,[20] receivers,[21] or sheriffs,[22] are punishable for contempts committed by them. But an official error made in good faith, not being wilful disobedience to the order of court, is not contempt.[23]

D. Persons Acting in Fiduciary Capacity. Likewise it is equally well settled that persons occupying fiduciary relations, as executors,[24] administrators,[25]

a party. Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147. So where the president alone violates a court order which is directed to the officers and managers of a bank without the knowledge or subsequent approval of the other managers the president alone will be held. Una *v.* Dodd, 39 N. J. Eq. 173. And disobedience of a writ of mandamus by the president of a corporation, where it was shown that he could not by himself without a majority of the board of directors perform the act required by the writ, and the directors not having been served, the refusal was held not to be a contempt. Demorest *v.* Midland R. Co., 10 Ont. Pr. 82. See also Hughson *v.* People, 91 Ill. App. 396.

15. Davis *v.* New York, 8 Duer (N. Y.) 451.

Officers committing contempt under the corporate name are liable. Simon *v.* Aldine Pub. Co., 12 N. Y. Civ. Proc. 290 [*affirmed* in 14 Daly (N. Y.) 279, 8 N. Y. St. 377]. See also People *v.* Dwyer, 1 N. Y. Civ. Proc. 484.

16. A keeper of a county jail of a state who receives United States prisoners and is paid for their maintenance is an officer of the United States court, and therefore may be punished for contempt for inflicting cruel or unusual punishment on such prisoners. *In re* Birdsong, 39 Fed. 599, 4 L. R. A. 628.

For an officer to give information of the issuance of a warrant for the arrest of the keeper of a gambling-house and thereby enable him to escape is contempt. State *v.* O'Brien, 87 Minn. 161, 91 N. W. 297.

17. *Michigan.*— Nichols *v.* Grand Rapids Super. Ct. (1902) 89 N. W. 691.

New Mexico.—Territory *v.* Clancey, 7 N. M. 580, 37 Pac. 1108.

New York.— Nuccio *v.* Porto, 72 N. Y. App. Div. 88, 76 N. Y. Suppl. 96; Reynolds *v.* Parkes, 2 Dem. Surr. 399.

Texas.— Dillon *v.* State, 6 Tex. 55; Smith *v.* Brown, 3 Tex. 360, 49 Am. Dec. 748.

United States.— *Ex p.* Davis, 112 Fed. 139; Anderson *v.* Comptois, 109 Fed. 971, 48 C. C. A. 1, 111 Fed. 998, 50 C. C. A. 76.

England.— *In re* Freston, 11 Q. B. D. 545, 52 L. J. Q. B. 545, 49 L. T. Rep. N. S. 290, 31 Wkly. Rep. 804; Matter of Ludlow Charities, 2 Myl. & C. 316, 14 Eng. Ch. 316.

See 10 Cent. Dig. tit. "Contempt," § 21; and ATTORNEY AND CLIENT, II, C, 3, a [4 Cyc. 921].

An attorney who advises a course which results in contempt is himself guilty of contempt. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

Foreign attorneys permitted by court to appear and try cases are for purpose of contempt to be held officers of court. Chafee *v.* Quidnick Co., 13 R. I. 442.

The mere drafting of a petition by an attorney directed to a trial judge, to be signed by citizens generally not parties to the cause, asking in respectful language for a new trial, is not contempt under a statute providing that summary punishment as at common law can be imposed by courts in case of misbehavior of an officer of the court in his official character. The attorney, although an officer of the court, did not draw the petition as an attorney at law. State *v.* Parsons, 48 W. Va. 275, 37 S. E. 548; State *v.* Hansford, 43 W. Va. 773, 28 S. E. 791.

18. State *v.* Simmons, 1 Ark. 265; *In re* Contempt by Two Clerks, 91 Ga. 113, 18 S. E. 976; *Ex p.* Thatcher, 7 Ill. 167; Territory *v.* Clancey, 7 N. M. 580, 37 Pac. 1108; and CLERKS OF COURTS, VIII, A, 1 [7 Cyc. 219].

19. *In re* Western Mar., etc., Ins. Co., 38 Ill. 289; Southern Development Co. *v.* Houston, etc., R. Co., 27 Fed. 344; and DEPOSITARIES.

20. Cross *v.* State, 11 Tex. App. 84.

21. *Ex p.* Haley, 99 Mo. 150, 12 S. W. 667; and RECEIVERS.

The misappropriation of a fund by a receiver committed to his keeping is contempt. Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

22. *Arkansas.*— *In re* Lawson, 3 Ark. 363.

Georgia.— Hunter *v.* Phillips, 56 Ga. 634.

New York.— *In re* Leggat, 162 N. Y. 437, 56 N. E. 1009, 31 N. Y. Civ. Proc. 6; People *v.* Stone, 10 Paige 606.

South Carolina.— Rice *v.* McClintock, Dudley 354; Thomas *v.* Aitken, Dudley 292.

Texas.— Sparks *v.* State, (Crim. 1900) 60 S. W. 246.

Wisconsin.— State *v.* Brophy, 38 Wis. 413.

See 10 Cent. Dig. tit. "Contempt," § 19; and SHERIFFS AND CONSTABLES.

23. Oswego Second Nat. Bank *v.* Dunn, 63 How. Pr. (N. Y.) 434.

24. *Ex p.* Smith, 53 Cal. 204; *In re* People's Trust Co., 37 Misc. (N. Y.) 239, 75 N. Y. Suppl. 254. But see *In re* Rugg, 3 N. Y. St. 224. And see, generally, EXECUTORS AND ADMINISTRATORS.

25. Everett *v.* Sparks, 107 Ga. 48, 32 S. E. 878, 73 Am. St. Rep. 107; Lobit *v.* Castille, 14 La. Ann. 779; *In re* Monell, 28 Misc. (N. Y.) 308, 59 N. Y. Suppl. 981; and EXECUTORS AND ADMINISTRATORS.

guardians,[26] trustees,[27] referees,[28] etc., may be punished for contempt for failure to properly perform the trust imposed upon them.

V. DEFENSES.[29]

A. Advice of Counsel. Acting under advice of counsel is no defense to a proceeding for contempt.[30] Such fact may, however, be considered by the court in mitigation of the offense.[31]

B. Advice or Consent of Complainant. Where the contempt charged is the result of the advice or consent, direct or implied, of complainant, this is a sufficient justification.[32]

C. Change of Conditions. The intervention of rights arising subsequent to the passing of the order and the rendition of the judgment which fixes the former right will sometimes excuse disobedience to such order or judgment.[33]

D. Ignorance of Law. As a general rule ignorance of the law will not operate as an excuse in a charge of contempt.[34] But where the criminality of an act depends alone upon the intention with which it was done, the ignorance of the party charged is an element to be considered in ascertaining the question of guilt.[35]

E. Want of Intention. Disclaimer of intentional disrespect or design to embarrass the due administration of justice is as a rule no excuse, especially where the facts constituting the contempt are admitted or where a contempt is clearly apparent from the circumstances surrounding the commission of the act.[36]

26. Leiter's Appeal, 10 Wkly. Notes Cas. (Pa.) 225; and GUARDIAN AND WARD.

27. *In re* Rugg, 3 N. Y. St. 224; and TRUSTS.

28. Stafford *v.* Hesketh, 1 Wend. (N. Y.) 71; Thompson *v.* Parker, 3 Johns. (N. Y.) 260; and REFERENCES.

29. As to right to make defense see *infra*, VII, O, 1.

30. *New Hampshire.*— Buffum's Case, 13 N. H. 14.

New Jersey.— West Jersey Traction Co. *v.* Camden, 58 N. J. L. 536, 37 Atl. 578.

New Mexico.—Territory *v.* Clancy, 7 N. M. 580, 37 Pac. 1108.

New York.— Coffin *v.* Burstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274; Billings *v.* Carver, 54 Barb. 40; People *v.* Compton, 1 Duer 512; New York Mail, etc., Transp. Co. *v.* Shea, 23 Misc. 15, 49 N. Y. Suppl. 951; Reynolds *v.* Parkes, 2 Dem. Surr. 399.

North Carolina.—Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834; Green *v.* Griffin, 95 N. C. 50.

Ohio.— Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638; State *v.* Post, 6 Ohio S. & C. Pl. Dec. 200, 4 Ohio N. P. 157.

Texas.—Edrington *v.* Pridham, 65 Tex. 612.

United States.— Frost *v.* McLeod, 113 Fed. 531; Kjellman *v.* Rogers, 106 Fed. 775, 45 C. C. A. 615.

See 10 Cent. Dig. tit. "Contempt," § 82.

31. Hilliker *v.* Hathorne, 5 Bosw. (N. Y.) 710; U. S. *v.* Church of Jesus Christ, 6 Utah 9, 21 Pac. 503, 524; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864; Frost *v.* McLeod, 113 Fed. 531; Roberts *v.* Walley, 14 Fed. 167.

32. Holcombe *v.* Dupree, 50 Ga. 335; Matter of Arkenburgh, 15 Misc. (N. Y.) 416, 38 N. Y. Suppl. 178, 72 N. Y. St. 806; Com. *v.* Ward, 5 Pa. Co. Ct. 479; James *v.* Mayrant, Harp. Eq. (S. C.) 180.

33. Larrabee *v.* Selby, 52 Cal. 506; Mahoney *v.* Van Winkle, 33 Cal. 448; Pyron *v.* Lowe, 8 Ga. 230. See also *supra*, III, E, 4.

But things occurring after a rule absolute has been made to pay over money against an officer who has been adjudged in contempt will not excuse the officer for disobedience. Langley *v.* Wynn, 70 Ga. 430.

34. State *v.* Simmons, 1 Ark. 265.

But a clerk who was ignorant of the statute was excused from the penalty for contempt for failing to transmit cases to the appellate court within the time prescribed. *In re* Contempt by Four Clerks, 111 Ga. 89, 36 S. E. 237; *In re* Contempt by Two Clerks, 91 Ga. 113, 18 S. E. 976.

35. State *v.* Sparks, 27 Tex. 705.

36. *Arkansas.*— State *v.* Simmons, 1 Ark. 265.

Colorado.— Hughes *v.* People, 5 Colo. 436.

Connecticut.—See Huntington *v.* McMahon, 48 Conn. 174.

Illinois.— People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

Indiana.— Thistlethwaite *v.* State, 149 Ind. 319, 49 N. E. 156; Dodge *v.* State, 140 Ind. 284, 39 N. E. 745.

Iowa.— Henry *v.* Ellis, 49 Iowa 205.

Kentucky.— *In re* Woolley, 11 Bush 95.

Louisiana.— Territory *v.* Nugent, 1 Mart. 102, 5 Am. Dec. 702.

Maine.— See Snowman *v.* Harford, 57 Me. 397.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Michigan.—*In re* Chadwick, 109 Mich. 588, 67 N. W. 1071; Wilcox Silver-Plate Co. *v.* Schimmel, 59 Mich. 524, 26 N. W. 692.

Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt.[37]

VI. POWER TO PUNISH.

A. Superior Courts. Independent of authority granted by statute, courts of record of superior jurisdiction, whether civil or criminal, possess inherent power to punish for contempt of court.[38] Such power is essential to the due

Montana.— Territory *v.* Murray, 7 Mont. 251, 15 Pac. 145.

New Hampshire.— *In re* Sturoc, 48 N. H. 428, 97 Am. Dec. 626. See also State *v.* Matthews, 37 N. H. 450; Buffum's Case, 13 N. H. 14.

New Jersey.— Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182.

New York.— People *v.* Freer, 1 Cai. 485. See also People *v.* Compton, 1 Duer 512.

North Carolina.— Herring *v.* Pugh, 126 N. C. 852, 36 S. E. 287.

South Carolina.— Watson *v.* Citizens' Sav. Bank, 5 S. C. 159.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Wisconsin.— State *v.* Brophy, 38 Wis. 413.

United States.— *In re* Terry, 36 Fed. 419, 13 Sawy. 440; *In re* May, 1 Fed. 737, 2 Flipp. 562; Wartman *v.* Wartman, 29 Fed. Cas. No. 17,210, Taney 362.

England.—Reg. *v.* Leicester, [1899] 2 Q. B. 632, 68 L. J. Q. B. 945, 81 L. T. Rep. N. S. 559.

See 10 Cent. Dig. tit. "Contempt," § 174.

Obedience to superior officer.— Where a military officer is charged with contempt for taking parties from the court's custody he cannot be excused by claiming that he did so in obedience to an order of his superior and that the sheriff was not properly guarding them. State *v.* Sparks, 27 Tex. 627.

37. *Arkansas.*— *Ex p.* Woodruff, 4 Ark. 630.

Georgia.— *In re* Contempt by Four Clerks, 111 Ga. 89, 36 S. E. 237; Darby *v.* Wesleyan Female College, 72 Ga. 212; Lightfoot *v.* Freeman, 54 Ga. 215; Heard *v.* Callaway, 51 Ga. 314.

Illinois.— Dinet *v.* People, 73 Ill. 183; Kahlbon *v.* People, 101 Ill. App. 567; Hughson *v.* People, 91 Ill. App. 396.

Indiana.— Allen *v.* State, 131 Ind. 599, 30 N. E. 1093; Fishback *v.* State, 131 Ind. 304, 30 N. E. 1088; Burke *v.* State, 47 Ind. 528.

Kentucky.— *In re* Woolley, 11 Bush 95.

Michigan.— *In re* Chadwick, 109 Mich. 588, 67 N. W. 1071.

Nebraska.— Mackay *v.* State, 60 Nebr. 143, 82 N. W. 372; Rosewater *v.* State, 47 Nebr. 630, 66 N. W. 640; Percival *v.* State, 45 Nebr. 741, 64 N. W. 221, 50 Am. St. Rep. 568.

New York.— Watertown Paper Co. *v.* Place, 51 N. Y. App. Div. 633, 64 N. Y. Suppl. 673; Matter of Wegman, 40 N. Y. App. Div. 632, 57 N. Y. Suppl. 987; Bergh's Case, 16 Abb. Pr. N. S. 266; Weeks *v.* Smith, 3 Abb. Pr. 211; *In re* Fitton, 16 How. Pr. 303; Jackson *v.* Smith, 5 Johns. 115.

North Carolina.— Kron *v.* Smith, 96 N. C. 386, 2 S. E. 463; *In re* Walker, 82 N. C. 95; *Ex p.* Biggs, 64 N. C. 202; *In re* Moore, 63 N. C. 397. See also *In re* Robinson, 117 N. C. 533, 23 S. E. 453, 53 Am. St. Rep. 596.

Ohio.— St. Clair *v.* Piatt, Wright 532; State *v.* Coulter, Wright 421.

Pennsylvania.— Thomas *v.* Cummins, 1 Yeates 40.

Utah.— U. S. *v.* Church of Jesus Christ, 6 Utah 9, 21 Pac. 503–524.

Virginia.— Wells *v.* Com., 21 Gratt. 500.

United States.— *In re* Perkins, 100 Fed. 950; Vose *v.* Internal Imp. Fund, 28 Fed. Cas. No. 17,008, 2 Woods 647.

See 10 Cent. Dig. tit. "Contempt," § 174.

An attorney who proceeds with a trial after an order staying proceedings has been made is not in contempt, where he acted in good faith believing the order was unauthorized. Oakley *v.* Cokalete, 16 N. Y. App. Div. 65, 44 N. Y. Suppl. 1070.

38. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; *Ex p.* Hamilton, 51 Ala. 66; Powell *v.* State, 48 Ala. 154; Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49; Gates *v.* McDaniel, 3 Port. 356.

Arkansas.— State *v.* Morrill, 16 Ark. 384; Cossart *v.* State, 14 Ark. 538; Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

California.— *In re* Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755; People *v.* Turner, 1 Cal. 152. See also *In re* Lowenthal, 74 Cal. 109, 15 Pac. 359, 5 Am. St. Rep. 424.

Colorado.— People *v.* Stapleton, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430; Hughes *v.* People, 5 Colo. 436.

Connecticut.— Huntington *v.* McMahon, 48 Conn. 174; Tyler *v.* Hamersley, 44 Conn. 393, 26 Am. Rep. 471; Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121; Lyon *v.* Lyon, 21 Conn. 185; Holcomb *v.* Cornish, 8 Conn. 375. See also *In re* Clayton, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L. R. A. 66.

Florida.— *Ex p.* Edwards, 11 Fla. 174.

Georgia.— Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691; State *v.* White, T. U. P. Charlt. 123. See also Ohear *v.* Little, 79 Ga. 384, 4 S. E. 914.

Illinois.— Dahnke *v.* People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158; People

administration of justice,[89] and the legislature cannot take it away or abridge

v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Indiana.— Fishback *v.* State, 131 Ind. 304, 30 N. E. 1088; Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820; Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; Holman *v.* State, 105 Ind. 513, 5 N. E. 556; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224; Redman *v.* State, 28 Ind. 205; *Ex p.* Smith, 28 Ind. 47; State *v.* Tipton, 1 Blackf. 166.

Iowa.— Dunham *v.* State, 6 Iowa 245; Skiff *v.* State, 2 Iowa 550.

Kansas.— *In re* Millington, 24 Kan. 214. See also *In re* Wolf, 52 Kan. 366, 34 Pac. 1048.

Kentucky.—Newport *v.* Newport Light Co., 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532; Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480; *In re* Woolley, 11 Bush 95; Johnston *v.* Com., 1 Bibb 598.

Louisiana.— State *v.* Judge Civ. Dist. Ct., 45 La. Ann. 125, 14 So. 310, 40 Am. St. Rep. 282.

Maine.— Morrison *v.* McDonald, 21 Me. 550; Mariner *v.* Dyer, 2 Me. 165.

Maryland.— *Ex p.* Maulsby, 13 Md. 625, Appendix.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Michigan.— Nichols *v.* Judge Super. Ct., (1902) 89 N. W. 691; *In re* Chadwick, 109 Mich. 588, 67 N. W. 1071; Langdon *v.* Wayne Cir. Judges, 76 Mich. 358, 43 N. W. 310.

Minnesota.— State *v.* First Dist. Ct., 52 Minn. 283, 53 N. W. 1157.

Mississippi.—Watson *v.* Williams, 36 Miss. 331; *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Missouri.— *Ex p.* Crenshaw, 80 Mo. 447; Greene County *v.* Rose, 38 Mo. 390; State *v.* Horner, 16 Mo. App. 191.

Montana.— State *v.* Faulds, 17 Mont. 140, 42 Pac. 285; Territory *v.* Murray, 7 Mont. 251, 15 Pac. 145.

Nebraska.—Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267; Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699; Kregel *v.* Bartling, 23 Nebr. 848, 37 N. W. 668.

New Hampshire.— State *v.* Matthews, 37 N. H. 450; Tenney's Case, 23 N. H. 162; State *v.* Copp, 15 N. H. 212.

New Jersey.—Rhinehart *v.* Lance, 43 N. J. L. 311, 39 Am. Rep. 592; *In re* Kerrigan, 33 N. J. L. 344.

New York.—Stephenson *v.* Hanson, 6 N. Y. Civ. Proc. 43, 67 How. Pr. 305; Yates *v.* Lansing, 9 Johns. 395, 6 Am. Dec. 290; *In re* Darby, 3 Wheel. Crim. 1.

North Carolina.— *Ex p.* Moore, 63 N. C. 397; State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161.

North Dakota.— State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

Ohio.— Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254.

Oklahoma.—Smith *v.* Speed, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Oregon.— State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

Pennsylvania.— Respublica *v.* Passmore, 3 Yeates 441, 2 Am. Dec. 388; Jack *v.* Twyford, 10 Pa. Super. Ct. 475.

South Carolina.— Kennesaw Mills Co. *v.* Walker, 19 S. C. 104; State *v.* Applegate, 2 McCord 110.

South Dakota.— *In re* Taber, 13 S. D. 62, 82 N. W. 398; State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Tennessee.— State *v.* Galloway, 5 Coldw. 326, 98 Am. Dec. 404.

Texas.— Taylor *v.* Goodrich, (Civ. App. 1897) 40 S. W. 515.

Vermont.— Rudd *v.* Darling, 64 Vt. 456, 25 Atl. 479; *In re* Cooper, 32 Vt. 253.

Virginia.— Carter *v.* Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310; Wells *v.* Com., 21 Gratt. 500; Com. *v.* Dandridge, 2 Va. Cas. 408.

West Virginia.— State *v.* Few, 24 W. Va. 416, 49 Am. Rep. 257.

Wisconsin.— *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; State *v.* Lanning, 48 Wis. 348, 4 N. W. 390.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; *Ex p.* Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. ed. 405; *Ex p.* Robinson, 19 Wall. 505, 22 L. ed. 205; Anderson *v.* Dunn, 6 Wheat. 204, 5 L. ed. 242; U. S. *v.* Hudson, 7 Cranch 32, 3 L. ed. 259; *In re* Mason, 43 Fed. 510; The Laurens, 14 Fed. Cas. No. 8,121, Abb. Adm. 302; U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401; U. S. *v.* Smith, 27 Fed. Cas. No. 16,342, 3 Wheeler Crim. Cas. 100.

England.— Middlesex Sheriff's Case, 11 A. & E. 273, 39 E. C. L. 164; Rex *v.* Davison, 4 B. & Ald. 329, 23 Rev. Rep. 295, 6 E. C. L. 505; Rex *v.* Clement, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458; *Ex p.* Fernandez, 10 C. B. N. S. 3, 7 Jur. N. S. 571, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3; Griesley's Case, 8 Coke 38*a*; Murray's Case, 1 Wils. C. P. 299.

Canada.— *Ex p.* Lees, 24 U. C. C. P. 214. See 10 Cent. Dig. tit. "Contempt," § 93.

89. *Arkansas.*— State *v.* Morrill, 16 Ark. 384; Cossart *v.* State, 14 Ark. 538; Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

California.— People *v.* Turner, 1 Cal. 152.

Connecticut.—Holcomb *v.* Cornish, 8 Conn. 375.

Georgia.—State *v.* White, T. U. P. Charlt. 123.

Illinois.— Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Indiana.— Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224.

Maine.— Mariner *v.* Dyer, 2 Me. 165.

Mississippi.—Watson *v.* Williams, 36 Miss. 331.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New York.— *In re* Yates, 4 Johns. 317.

it,[40] although it may regulate its use.[41] Statutes conferring the power are simply declaratory of the common law.[42]

B. Inferior Courts — 1. In General. It has been held that in the absence of legislative authority inferior courts have no power to punish for contempt.[43] Statutes, however, have very generally conferred on inferior courts, tribunals, and officers the right to punish as contempts certain enumerated acts.[44]

North Carolina.— State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

United States.— U. S. *v.* Hudson, 7 Cranch 32, 3 L. ed. 259.

See 10 Cent. Dig. tit. "Contempt," § 91.

40. *Arkansas.*— State *v.* Morrill, 16 Ark. 384. See also Ford *v.* State, 69 Ark. 550, 64 S. W. 879.

California.— *In re* Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755; Galland *v.* Galland, 44 Cal. 475, 13 Am. Rep. 167.

Colorado.— People *v.* Stapleton, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; Cooper *v.* People, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430; Hughes *v.* People, 5 Colo. 436.

Georgia.— Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691. *Compare* Harrell *v.* Word, 54 Ga. 649.

Indiana.— Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820; Hawkins *v.* State, 125 Ind. 570, 25 N. E. 818; Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; Holman *v.* State, 105 Ind. 513, 5 N. E. 556; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224.

Kentucky.— Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480; *In re* Woolley, 11 Bush 95.

Michigan.— *In re* Chadwick, 109 Mich. 588, 67 N. W. 1071; Langdon *v.* Wayne Cir. Judges, 76 Mich. 358, 43 N. W. 310.

Montana.— Zimmerman *v.* Zimmerman, 7 Mont. 114, 14 Pac. 665.

Nebraska.— Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699.

North Carolina.— *In re* Gorham, 129 N. C. 481, 40 S. E. 311; *In re* Oldham, 89 N. C. 23, 45 Am. Rep. 673.

Ohio.— Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254; State *v.* Steube, 10 Ohio Dec. (Reprint) 199, 19 Cinc. L. Bul. 181.

Oklahoma.— Smith *v.* Speed, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Oregon.— *Compare* State *v.* Kaiser, 20 Oreg. 50, 23 Pac. 964, 8 L. R. A. 584.

Virginia.— Carter *v.* Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257. See also State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407.

The legislature has the right to limit control over contempts in those courts which are of its own creation. Nichols *v.* Judge Grand Rapids Super Ct., (Mich. 1902) 89 N. W. 691; *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205.

41. State *v.* Morrill, 16 Ark. 384; Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *In re* Gorham, 129 N. C. 481, 40 S. E. 311; *In re* Deaton, 105 N. C. 59, 11 S. E. 244; *In re* Oldham, 89 N. C. 23, 45 Am. Rep. 673; *Ex p.* Schenck, 65 N. C. 353.

42. *Arkansas.*— State *v.* Morrill, 16 Ark. 384.

Connecticut.— Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Illinois.— People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528.

Indiana.— *Ex p.* Smith, 28 Ind. 47.

Michigan.— *In re* Chadwick, 109 Mich. 588, 67 N. W. 1071; Langdon *v.* Wayne Cir. Judges, 76 Mich. 358, 43 N. W. 310.

Nebraska.— Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699.

New York.— People *v.* Dwyer, 1 N. Y. Civ. Proc. 484.

Ohio.— State *v.* Steube, 10 Ohio Dec. (Reprint) 199, 19 Cinc. L. Bul. 181.

United States.— *In re* Ellerbe, 13 Fed. 530, 4 McCrary 449.

Where the constitution prescribes that the power of courts to punish for contempts shall be limited by legislative acts, failure of legislature to enact such law does not destroy the power itself. Swafford *v.* Berrong, 84 Ga. 65, 10 S. E. 593.

43. *In re* Kerrigan, 33 N. J. L. 344; Brooker *v.* Com., 12 Serg. & R. (Pa.) 175; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404; Reg. *v.* Lefroy, L. R. 8 Q. B. 134, 42 L. J. Q. B. 121, 28 L. T. Rep. N. S. 132, 21 Wkly. Rep. 332; McDermott *v.* Beaumont, L. R. 2 P. C. 341, 38 L. J. P. C. 1, 20 L. T. Rep. N. S. 74, 5 Moore P. C. N. S. 466, 17 Wkly. Rep. 352, 16 Eng. Reprint 590.

At common law, the power to punish for contempt was possessed only by courts of record. *In re* Kerrigan, 33 N. J. L. 344.

In the absence of legislative authority the exercise of the power is often permitted to punish direct contempts committed in the immediate presence of the court which obstruct its proceedings. Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; *In re* Cooper, 32 Vt. 253.

44. *California.*— Kuhlman *v.* San Francisco Super. Ct., 122 Cal. 636, 55 Pac. 589.

Georgia.— Swafford *v.* Berrong, 84 Ga. 65, 10 S. E. 593.

Illinois.— Clark *v.* Burke, 163 Ill. 334, 45 N. E. 235; *Ex p.* Thatcher, 7 Ill. 167.

New York.— People *v.* Hicks, 15 Barb. 153; Seeley's Case, 6 Abb. Pr. 217 note.

North Carolina.— State *v.* Aiken, 113 N. C. 651, 18 S. E. 690; *In re* Deaton, 105 N. C. 59, 11 S. E. 244.

United States.— *In re* Monroe, 46 Fed. 52.

2. Justices of the Peace. Justices of the peace are generally given the power to punish for contempts in the face of the court for acts which interrupt the proceedings of the trial.[45]

3. Notaries Public. Notaries public when authorized by statute, may punish for contempt.[46]

4. Probate or Surrogate Courts. When authorized by statute probate or surrogate courts may punish for contempt.[47]

C. Courts of Equity. Courts of equity or chancery, being courts of record and of superior jurisdiction, have the same power as courts of law to punish for contempt.[48]

England.— Richards *v.* Cullerne, 7 Q. B. D. 623.

Canada.— *Re* Pacquette, 11 Ont. Pr. 463.

See 10 Cent. Dig. tit. "Contempt," § 105.

45. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84.

California.— *Ex p.* Latimer, 47 Cal. 131.

Connecticut.—Holcomb *v.* Cornish, 8 Conn. 375.

Georgia.— Swafford *v.* Berrong, 84 Ga. 65, 10 S. E. 593.

Illinois.— Hill *v.* Crandall, 52 Ill. 70; Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177; Kraft *v.* Porter, 76 Ill. App. 328.

Indiana.— Garrigus *v.* State, 93 Ind. 239; Wagner *v.* State, 68 Ind. 42; State *v.* Newton, 62 Ind. 517; Murphy *v.* Wilson, 46 Ind. 537.

Kansas.—*In re* Millington, 24 Kan. 214. See also *In re* Beardsley, 37 Kan. 666, 16 Pac. 153.

Massachusetts.— Clarke *v.* May, 2 Gray 410, 61 Am. Dec. 470.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247.

New Jersey.—A justice sitting in court for trial of small causes has no power to commit to prison as a punishment for a contempt committed in open court. Rhinehart *v.* Lance, 43 N. J. L. 311, 39 Am. Rep. 592.

New York.— People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457; Onderdonk *v.* Ranlett, 3 Hill 323.

Ohio.— Justice has no power to imprison directly for contempt. De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

Pennsylvania.—Justice cannot punish summarily by commitment. Albright *v.* Lapp, 26 Pa. St. 99, 67 Am. Dec. 402.

South Carolina.—State *v.* Applegate, 2 McCord 110; State *v.* Johnson, 1 Brev. 155; Lining *v.* Bentham, 2 Bay 1.

Texas.— *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Vermont.— *In re* Cooper, 32 Vt. 253.

England.— Rex *v.* Revel, 1 Str. 420.

Canada.— Young *v.* Saylor, 23 Ont. 513.

See, generally, Justices of the Peace; and 10 Cent. Dig. tit. "Contempt," § 106.

46. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84.

Indiana.—A notary has no power to punish a witness for contempt in refusing to testify when giving deposition. Burtt *v.* Pyle, 89 Ind. 398.

Kansas.— *In re* Beardsley, 37 Kan. 666, 16 Pac. 153; *In re* Abeles, 12 Kan. 451. *Compare In re* Huron, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822.

Missouri.— *Ex p.* McKee, 18 Mo. 599; *Ex p.* Krieger, 7 Mo. App. 367.

Nebraska.— Dogge *v.* State, 21 Nebr. 272, 31 N. W. 929. But see Courtenay *v.* Knox, 31 Nebr. 652, 48 N. W. 763.

Ohio.— De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197; *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315.

See, generally, Notaries; and 10 Cent. Dig. tit. "Contempt," § 108.

A commitment of a witness for a refusal to testify, issued by a notary public taking depositions in a cause pending in another state, without a *dedimus* from such state, is void. *In re* Nitsche, 14 Mo. App. 213.

47. *Arkansas.*— Welsh *v.* Lloyd, 5 Ark. 367.

Maine.— Bradley *v.* Veazie, 47 Me. 85.

Mississippi.— Watson *v.* Williams, 36 Miss. 331; Moore *v.* Adams County Probate Judge, Walk. 310.

New York.— *In re* Watson, 3 Lans. 408; Saltus *v.* Saltus, 2 Lans. 9; *In re* Husted, 37 Misc. 237, 75 N. Y. Suppl. 252; People *v.* Marshall, 7 Abb. N. Cas. 380; Woodhouse *v.* Woodhouse, 5 Redf. Surr. 131; Doran *v.* Dempsey, 1 Bradf. Surr. 490.

Ohio.— *Ex p.* Lilliland, 7 Ohio Dec. (Reprint) 659, 4 Cinc. L. Bul. 733.

Oklahoma.— *In re* Abbott, 7 Okla. 78, 54 Pac. 319.

Pennsylvania.— Irwin's Estate, 9 Pa. Dist. 282.

Vermont.—A probate court has no authority for the purpose of enforcing a final decree for mere payment of money to imprison for contempt. *In re* Leach, 51 Vt. 630; *In re* Bingham, 32 Vt. 329.

See 10 Cent. Dig. tit. "Contempt," § 104.

48. *Alabama.*— *Ex p.* Walker, 25 Ala. 81.

Florida.— *Ex p.* Edwards, 11 Fla. 174.

Georgia.— Remley *v.* De Wall, 41 Ga. 466; State *v.* White, T. U. P. Charlt. 123.

Illinois.— Leopold *v.* People, 140 Ill. 552, 30 N. E. 348 [*affirming* 41 Ill. App. 293]; Goodwillie *v.* Millimann, 56 Ill. 523; Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177; Bar-

D. Federal Courts. By express terms of federal statute United States courts are authorized to punish contempts.[49]

E. Contempts Against Another Court. One court cannot punish a contempt against another court or judge. The offense is substantially criminal and the power to punish it is vested alone in the court whose judicial authority is challenged.[50]

F. Contempts Against Subordinate Officers. Contempts against subordinate officers appointed by the court are usually regarded as contempts of the authority of the appointing court only.[51]

clay *v.* Barclay, 83 Ill. App. 366 [*affirmed* in 184 Ill. 471, 56 N. E. 821].

Maine.— Mariner *v.* Dyer, 2 Me. 165.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Montana.— Zimmerman *v.* Zimmerman, 7 Mont. 114, 14 Pac. 665.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New Jersey.— Frank *v.* Harold, (1902) 51 Atl. 774.

New York.— People *v.* Compton, 1 Duer 512; Bennett *v.* Leroy, 5 Abb. Pr. 156; Yates *v.* Lansing, 9 Johns. 395, 6 Am. Dec. 290.

North Carolina.— Armstrong *v.* Beaty, 1 N. C. 171.

Ohio.— Randall *v.* Pryor, 4 Ohio 424.

Pennsylvania.— Scott *v.* Jailer, 1 Grant 237.

United States.— Monroe *v.* Bradley, 17 Fed. Cas. No. 9,713, 1 Cranch C. C. 158.

England.— 3 Bl. Comm. 443, 444.

See 10 Cent. Dig. tit. "Contempt," § 101.

49. *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *In re* Perkins, 100 Fed. 950; Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501; *In re* Ellerbe, 13 Fed. 530, 4 McCrary 449; *In re* Pitman, 19 Fed. Cas. No. 11,184, 1 Curt. 186.

Independent of statute, the courts of the United States, under their inherent powers and their right to regulate their own process, possess ample authority to prescribe rules in relation to the collection and disposition of moneys obtained under their process or order, and to compel the observance of such rules by attachment. The Laurens, 14 Fed. Cas. No. 8,122, 1 Abb. Adm. 508. See also U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401.

Punishment under state statutes.— Federal courts have no power to punish for contempts under state statutes. Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

Territorial courts.— U. S. Rev. Stat. § 725, limiting the power of United States courts to punish for contempt, is not applicable to territorial courts which are not United States courts. Territory *v.* Murray, 7 Mont. 251, 15 Pac. 145; Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829. But see *Ex p.* Whetstone, 9 Utah 156, 36 Pac. 633.

50. *Alabama.*— Callan *v.* McDaniel, 72 Ala. 96.

California.— People *v.* Placer County Judge, 27 Cal. 151.

Georgia.— Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

Indiana.— Lockwood *v.* State, 1 Ind. 161.

Kentucky.—Moore *v.* Jessamine Clerk, Litt. Sel. Cas. 104.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Michigan.— Atchison, etc., R. Co. *v.* Jennison, 60 Mich. 232, 27 N. W. 6.

Nebraska.— Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267; Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New York.— Strong *v.* Strong, 5 Rob. 612, 1 Abb. Pr. N. S. 358; Wicker *v.* Dresser, 14 How. Pr. 465.

North Carolina.— *In re* Rhodes, 65 N. C. 58.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Penn *v.* Messinger, 1 Yeates 2; Yard's Case, 10 Pa. Co. Ct. 41; McCain *v.* Jewell, 24 Pittsb. Leg. J. 185.

South Carolina.— James *v.* Smith, 2 S. C. 183.

Tennessee.— Sanders *v.* Metcalf, 1 Tenn. Ch. 419.

Texas.— State *v.* Thurmond, 37 Tex. 340.

United States.— *Ex p.* Bradley, 7 Wall. 364, 19 L. ed. 214; *Ex p.* Tillinghast, 4 Pet. 108, 7 L. ed. 798; Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501; *In re* Litchfield, 13 Fed. 863; Voorhees *v.* Albright, 28 Fed. Cas. No. 16,999.

Canada.— *In re* Clarke, 7 U. C. Q. B. 223.

See 10 Cent. Dig. tit. "Contempt," § 97.

51. *California.*— *Compare* Lezinsky *v.* Contra Costa County Super. Ct., 72 Cal. 510, 14 Pac. 104.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Mississippi.— Marsh *v.* Williams, 1 How. 132.

Missouri.— Coburn *v.* Tucker, 21 Mo. 219. *Compare* State *v.* Barclay, 86 Mo. 55.

Montana.— *In re* Haldorn, 10 Mont. 222, 25 Pac. 101.

New York.— Referee may punish. Milton *v.* Richardson, 21 Misc. 380, 47 N. Y. Suppl. 735; People *v.* Miller, 9 Misc. 1, 29 N. Y. Suppl. 305, 59 N. Y. St. 702.

North Carolina.— La Fontaine *v.* Southern Underwriters' Assoc., 83 N. C. 132. See also Bradley Fertilizer Co. *v.* Taylor, 112 N. C. 141, 17 S. E. 69.

Pennsylvania.— Robb's Petition, 11 Pa. Co. Ct. 442.

Wisconsin.— State *v.* Lonsdale, 48 Wis. 348, 4 N. W. 390; Stuart *v.* Allen, 45 Wis.

G. Superior Court Punishing Inferior Court. Superior courts may enforce their judgments, decrees, mandates, and orders and compel obedience thereto by inferior courts by process of contempt.[52]

H. Judge in Chambers or Vacation. Subject to statutory restrictions,[53] a judge or court may punish for contempt for violation of court orders at chambers[54] or in vacation.[55]

I. Special Judge. A special judge appointed to hear and determine a particular case has jurisdiction to punish a party for violation of a restraining order previously granted by the regular judge.[56]

J. Discretion of Court. An applicant is not entitled as a matter of right to an order for the commitment of a person for contempt.[57] The application is addressed to the discretion of the court.[58]

158; Haight *v.* Lucia, 36 Wis. 355; *In re* Remington, 7 Wis. 643.

United States.— *In re* Perkins, 100 Fed. 950; Johnson *v.* Southern Bldg., etc., Assoc., 99 Fed. 646; *In re* Mason, 43 Fed. 510; *Ex p.* Doll, 7 Fed. Cas. No. 3,968, 7 Phila. (Pa.) 595, 27 Leg. Int. (Pa.) 20; Elting *v.* U. S., 27 Ct. Cl. 158.

See 10 Cent. Dig. tit. "Contempt," § 98.

Grand jury is part of the court and has no power to punish for contempt. Disobedience to its process should be reported to court for hearing and decision. Kelly *v.* Wilson, (Cal. 1886) 11 Pac. 244; *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

52. *Georgia.*— Pittman *v.* Hagins, 91 Ga. 107, 16 S. E. 659.

Kentucky.— Gorham *v.* Luckett, 6 B. Mon. 638.

New Jersey.— State *v.* Hunt, 1 N. J. L. 287.

Wisconsin.— Talbot *v.* White, 1 Wis. 444.

England.— Barton *v.* Sheriff, 2 Moore P. C. 19, 12 Eng. Reprint 909.

See 10 Cent. Dig. tit. "Contempt," § 99.

53. *Alabama.*— Gates *v.* McDaniel, 3 Port. 356.

Indiana.— Taylor *v.* Moffatt, 2 Blackf. 305.

Kansas.— *In re* Barnhouse, 60 Kan. 489, 58 Pac. 480; *In re* Price, 40 Kan. 156, 19 Pac. 751; State *v.* Stevens, 40 Kan. 113, 19 Pac. 365; *In re* Millington, 24 Kan. 214.

Ohio.— Davis *v.* State, 50 Ohio St. 194, 33 N. E. 926.

Oregon.— State *v.* McKinnon, 8 Oreg. 487.

South Carolina.—State *v.* Nathans, 49 S. C. 199, 27 S. E. 52; Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98; Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 408; Klinck *v.* Black, 14 S. C. 241.

Texas.— *Ex p.* Ellis, 37 Tex. Crim. 539, 40 S. W. 275.

England.— A judge sitting in chambers cannot himself punish an insult offered to him, but the court of which such judge is a member may punish such offense. *In re* Johnson, 20 Q. B. D. 68, 52 J. P. 230, 57 L. J. Q. B. 1, 58 L. T. Rep. N. S. 160, 36 Wkly. Rep. 51; *In re* Tyrone Election Petition, Ir. R. 7 C. L. 242. But a judge sitting as a court may make an order of committal wherever he may sit, and even at his residence. Petty *v.* Daniel, 34 Ch. D. 172, 56 L. J. Ch. 192, 55 L. T. Rep. N. S. 745, 35 Wkly. Rep. 151; *In re* Clarke, 11 L. J. Q. B. 75.

Canada.— See Reg. *v.* Wilkinson, 41 U. C. Q. B. 47.

See 10 Cent. Dig. tit. "Contempt," § 100.

54. *District of Columbia.*— Barney *v.* Barney, 6 D. C. 1.

Georgia.— Obear *v.* Little, 79 Ga. 384, 4 S. E. 914.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Montana.— State *v.* Loud, 24 Mont. 428, 62 Pac. 497.

Oklahoma.— Smith *v.* Speed, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402.

South Carolina.— Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98.

See 10 Cent. Dig. tit. "Contempt," § 100.

55. *Georgia.*— Cobb *v.* Black, 34 Ga. 162.

Iowa.— State *v.* Archer, 48 Iowa 310; State *v.* Myers, 44 Iowa 580.

Montana.— State *v.* Loud, 24 Mont. 428, 62 Pac. 497.

Nebraska.— Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

New York.— See Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493; Wicker *v.* Dreser, 4 Abb. Pr. 93, 13 How. Pr. 331.

United States.— See Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

56. Mowrier *v.* State, 107 Ind. 539, 8 N. E. 561. But see Kissel *v.* Lewis, 27 Ind. App. 302, 61 N. E. 209, holding that under the provisions of the Indiana statute the violation of a final decree awarding a permanent injunction rendered by a special judge is not a contempt of the judge so as to give him authority to punish it, but was a contempt of the court of which the special judge was *pro tempore* an official. See, generally, JUDGES.

57. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; Goodenough *v.* Davids, 4 Month. L. Bul. 35. But see Livingston *v.* Swift, 23 How. (N. Y.) 1, holding that where the contempt consists in the disobedience of a process or order of the court affecting or impairing a party's pecuniary rights, the court has no discretion but must impose a fine sufficient to indemnify the party.

58. Joyce *v.* Holbrook, 2 Hilt. (N. Y.) 94, 7 Abb. Pr. (N. Y.) 338; Stephenson *v.* Han-

K. Effect of Appeal. Where an appeal has been taken to a higher court and such court obtains jurisdiction, all contempts committed thereafter relating to such proceeding are punishable by the latter court, but where the steps to have the proceeding reviewed do not constitute a stay or supersedeas and the jurisdiction remains in the trial court, the latter court possesses power to punish contempts growing out of the proceeding.[59]

L. Existence of Other Remedies — 1. IN GENERAL. Some courts will not punish for contempt if there is another remedy to enforce obedience to their orders.[60] Other courts hold that the existence of other remedies does not take away their power to punish for contempt.[61]

2. PUNISHMENT AS CRIMINAL OFFENSE. In the absence of constitutional or statutory restriction, the fact that the contempt is also a crime or misdemeanor, and that the offender can be proceeded against by information or indictment does not take away the power to punish for contempt.[62]

som, 6 N. Y. Civ. Proc. 43; *Ex p.* Beebees, 3 Fed. Cas. No. 1,220, 2 Wall. Jr. 127.

As to review on appeal of discretion of trial court see *infra*, IX, F, 2.

59. *Alabama.*— Gates *v.* McDaniel, 3 Port. 356.

Louisiana.— State *v.* Houston, 37 La. Ann. 852.

Michigan.— Fitzsimmons *v.* Board of Canvassers, 119 Mich. 147, 77 N. W. 632.

Missouri.— State *v.* Dillon, 96 Mo. 56, 8 S. W. 781; State *v.* Campbell, 25 Mo. App. 635.

United States.— Anderson *v.* Comptois, 109 Fed. 971, 48 C. C. A. 1, 111 Fed. 998, 50 C. C. A. 76.

See 10 Cent. Dig. tit. "Contempt," § 129.

As to disobedience of order pending appeal see *supra*, III, E, 5.

As to effect of transfer of cause to appellate court generally see APPEAL AND ERROR, X [2 Cyc. 965].

60. Murphy *v.* Abbott, 13 Ill. App. 68; Gates *v.* People, 6 Ill. App. 383; Wilson *v.* Wright, 9 How. Pr. (N. Y.) 459; McDonald's Estate, 14 Phila. (Pa.) 253, 38 Leg. Int. (Pa.) 34; *In re* Hirst, 9 Phila. (Pa.) 216, 31 Leg. Int. (Pa.) 340.

Enforcement by execution.— In some jurisdictions process for contempt to enforce obedience to a judgment, order, or decree for the payment of money will not lie if payment can be enforced by execution. Barrow *v.* Gilbert, 58 Ga. 70; Goodwillie *v.* Millimann, 56 Ill. 523; Myers *v.* Becker, 95 N. Y. 486; *In re* Dissosway, 91 N. Y. 235; O'Gara *v.* Kearney, 77 N. Y. 423, 57 How. Pr. (N. Y.) 439; Watson *v.* Nelson, 69 N. Y. 536; Seaman *v.* Duryea, 11 N. Y. 324; Walford *v.* Harris, 78 Hun (N. Y.) 346, 29 N. Y. Suppl. 126, 60 N. Y. St. 738; Taber *v.* Jack, 12 N. Y. Suppl. 645, 35 N. Y. St. 832; Matter of Hess, 48 Hun (N. Y.) 586, 1 N. Y. Suppl. 811, 16 N. Y. St. 255; Jacquin *v.* Jacquin, 36 Hun (N. Y.) 378; People *v.* Riley, 25 Hun (N. Y.) 587; Baker *v.* Baker, 23 Hun (N. Y.) 356; Strobridge *v.* Strobridge, 21 Hun (N. Y.) 288; Lansing *v.* Lansing, 4 Lans. (N. Y.) 377; Schulte *v.* Anderson, 48 N. Y. Super. Ct. 133; Randall *v.* Dusenbury, 41 N. Y. Super. Ct. 456 [*affirming* 51 How. Pr. (N. Y.) 367]; *Ex p.* Latson, 1 Duer (N. Y.) 696; Kittel *v.* Steuve, 11 Misc. (N. Y.) 279, 32 N. Y. Suppl. 272, 65 N. Y. St. 447, 24 N. Y. Civ. Proc. 223, 1 N. Y. Annot. Cas. 99; *In re* American, 3 N. Y. St. 356; Perkins *v.* Taylor, 19 Abb. Pr. (N. Y.) 146; Pitt *v.* Davison, 12 Abb. Pr. (N. Y.) 385; Dusenberry *v.* Woodward, 1 Abb. Pr. (N. Y.) 443; Stockbridge's Assignment, 58 How. Pr. (N. Y.) 128; Dawley *v.* Brown, 43 How. Pr. (N. Y.) 17; Gray *v.* Cook, 24 How. Pr. (N. Y.) 432; Union Trust Co. *v.* Gage, 6 Dem. Surr. (N. Y.) 358; Ferguson *v.* Cummings, 1 Dem. Surr. (N. Y.) 433; *In re* Seaman, 7 N. Y. Leg. Obs. 70.

Remedy by action.— A sheriff cannot be punished for contempt, for a mistake in the discharge of his official duty, as the party injured can hold him and his surety liable in damages. Oswego Second Nat. Bank *v.* Dunn, 63 How. Pr. (N. Y.) 434. So attachment for contempt will not issue against one who has dispossessed the sheriff of property seized on final process, since he has a remedy by action against the dispossessor. People *v.* Church, 2 Wend. (N. Y.) 262.

61. *Michigan.*—Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148.

Ohio.— Randall *v.* Pryor, 4 Ohio 424.

Pennsylvania.— Greer *v.* McClelland, 1 Phila. 128, 7 Leg. Int. 202.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— *In re* Delgado, 140 U. S. 586, 11 S. Ct 874, 35 L. ed. 578.

See 10 Cent. Dig. tit. "Contempt," § 111.

62. *California.*— *Ex p.* Acock, 84 Cal. 50, 23 Pac. 1029.

Connecticut.— Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Georgia.— Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691; Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Michigan.— Nichols *v.* Grand Rapids Super. Ct., (1902) 89 N. W. 691.

Minnesota.— State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157.

Montana.— State *v.* Faulds, 17 Mont. 140, 42 Pac. 285.

M. Former Adjudication. Where the matter of contempt has been finally adjudicated and defendant discharged,[63] or where the former punishment inflicted was unauthorized[64] he cannot again be tried for the same contempt. But a discharge because the court or judge had no jurisdiction,[65] or because of illegal arrest[66] or insufficiency of the affidavit is no bar.[67] So conviction for the act constituting the contempt as a crime or misdemeanor does not purge the contempt.[68]

N. Pendency of Other Proceedings. The pendency of other proceedings having in view the enforcement of the violated order, judgment, decree, or mandate will not defeat contempt proceedings.[69]

VII. PROCEEDINGS TO PUNISH.

A. Nature of Proceedings — 1. In General. As a rule a proceeding for contempt is regarded as collateral to the cause in which the contempt arises and independent of the main action.[70] There are cases, however, which hold that a

New York.— People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457; Matter of Jones, 6 N. Y. Civ. Proc. 250.

North Carolina.— *In re* Griffin, 98 N. C. 225, 3 S. E. 515.

North Dakota.— State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

Ohio.— Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199. 60 Am. St. Rep. 691, 36 L. R. A. 254; Steube *v.* State, 3 Ohio Cir. Ct. 383.

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Pennsylvania.—McCain *v.* Jewell, 24 Pittsb. Leg. J. 185.

South Carolina.— State *v.* Williams, 2 Speers 26.

Wyoming.— Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971; *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— *Ex p.* Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150; *In re* Brule, 71 Fed. 943; U. S. *v.* Debs, 64 Fed. 724.

See 10 Cent. Dig. tit. "Contempt," § 116.

If punished for contempt, sentence on criminal charge may be mitigated. People *v.* Keeler, 99 N. Y. 463, 2 N. E. 615 [*reversing* 32 Hun (N. Y.) 563, 3 N. Y. Crim. 348]; People *v.* Mead, 92 N. Y. 415; People *v.* Cole, 2 N. Y. Crim. 108; *In re* McDonald, 2 N. Y. Crim. 82.

63. Eaton Rapids *v.* Horner, 126 Mich. 52, 85 N. W. 264; Yates *v.* People, 6 Johns. (N. Y.) 337; Wilson *v.* Craige, 113 N. C. 463, 18 S. E. 715; Haywood *v.* Hay, 46 U. C. Q. B. 562. But see Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *In re* Yates, 4 Johns. (N. Y.) 317, holding that a person who has been regularly committed and afterward improperly discharged may be recommitted by an order of the court making the first order of commitment. See also People *v.* Barrett, 56 Hun (N. Y.) 351, 9 N. Y. Suppl. 321, 30 N. Y. St. 728, 18 N. Y. Civ. Proc. 230, 24 Abb. N. Cas. (N. Y.) 430, 8 N. Y. Crim. 13.

Where the offender is already in prison a second order will not lie to commit for the same contempt. Mendel *v.* Mendel, 6 N. Y. St. 511. See also Winton *v.* Winton, 53 Hun (N. Y.) 4, 5 N. Y. Suppl. 537, 24 N. Y. St. 656, 16 N. Y. Civ. Proc. 337.

64. Snyder *v.* Van Ingen, 9 Hun (N. Y.) 569.

65. Spalding *v.* People, 7 Hill (N. Y.) 301.

Dismissal of proceeding.— It is no defense to an attachment for contempt that a former citation had issued for the same subject-matter upon the petition of the same party, and that on hearing thereof the same had been dismissed by the court. Vertner *v.* Martin, 10 Sm. & M. (Miss.) 103.

66. Van Wezel *v.* Van Wezel, 1 Edw. (N. Y.) 113.

67. State *v.* Gilpin, 1 Del. Ch. 25.

68. Eagan *v.* Lynch, 3 N. Y. Civ. Proc. 236; State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161.

Acquittal of criminal charge.— The fact that defendant has been acquitted of a criminal charge of forging a deed which he had been ordered to produce in court, and for failure to do so was in contempt of court, will not vacate the order of the court. Brown *v.* Farley, 38 N. J. Eq. 186.

Punishment for a wilful contempt is no legal bar to a criminal prosecution therefor. People *v.* Mead, 92 N. Y. 415, 1 N. Y. Crim. 417; Klugman's Case, 49 How. Pr. (N. Y.) 484. *Compare* State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157.

69. Lyon *v.* Lyon, 21 Conn. 185; U. S. *v.* Burr, 25 Fed. Cas. No. 14,693. But see State *v.* Lee, 1 N. J. L. 451, holding that an attachment to enforce the payment of costs will not be granted, while a civil action is pending for the same purpose. See also Hall *v.* U. S. Reflector Co., 66 How. Pr. (N. Y.) 31, 4 N. Y. Civ. Proc. 148.

Writ of assistance.— Attachment to punish for contempt for disobedience of an order will issue, even though a writ of assistance was issued pending the rule for an attachment. Com. *v.* Reed, 59 Pa. St. 425.

70. *Alabama.*— Hogan *v.* Alston, 9 Ala. 627.

Iowa.— Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

proceeding for contempt to enforce a remedy in a civil action is a proceeding in that action.[71]

2. Criminal or Civil. Generally speaking proceedings against a party to punish him for a contempt of the authority and dignity of the court are considered to be in the nature of criminal proceedings.[72] Authority, however, is not wanting in support of the view that proceedings instituted by private individuals

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; McCain *v.* Jewell, 24 Pittsb. Leg. J. 185.

West Virginia.— State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413; Ruhl *v.* Ruhl, 24 W. Va. 279.

United States.— Durant *v.* Washington County, 8 Fed. Cas. No. 4,191, 1 Woolw. 377; Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss. 490.

See 10 Cent. Dig. tit. "Contempt," § 123.

71. Pitt *v.* Davison, 37 N. Y. 235 [*reversing* 37 Barb. (N. Y.) 97]; People *v.* Bergen, 9 Hun (N. Y.) 202; Leland *v.* Smith, 3 Daly (N. Y.) 309. See also Lyon *v.* Lyon, 21 Conn. 185; Winslow *v.* Nayson, 113 Mass. 411.

Refusal to pay costs.— A proceeding against a party for contempt in refusing to pay certain costs as ordered is a motion in the action. Tucker *v.* Gilman, 14 N. Y. Suppl. 392, 37 N. Y. St. 958, 20 N. Y. Civ. Proc. 397.

72. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303. But see *Ex p.* Hamilton, 51 Ala. 66.

California.— *Ex p.* Gould, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57, 21 L. R. A. 751; *Ex p.* Acock, 84 Cal. 50, 23 Pac. 1029; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *In re* Buckley, 69 Cal. 1, 10 Pac. 69.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567. But *compare* Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Delaware.— State *v.* Gilpin, 1 Del. Ch. 25.

Illinois.— Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038; Hill *v.* Crandall, 52 Ill. 70; Crook *v.* People, 16 Ill. 534; Stuart *v.* People, 4 Ill. 395; Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177; Rawson *v.* Rawson, 35 Ill. App. 505; Beattie *v.* People, 33 Ill. App. 651.

Indiana.— Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820; Whittem *v.* State, 36 Ind. 196.

Iowa.— Grier *v.* Johnson, 88 Iowa 99, 55 N. W. 80; Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

Kentucky.— Roberts *v.* Hackney, 109 Ky. 265, 58 S. W. 810, 59 S. W. 328, 22 Ky. L. Rep. 975.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Michigan.— Langdon *v.* Wayne Cir. Judges, 76 Mich. 358, 43 N. W. 310.

Nebraska.— Hydock *v.* State, 59 Nebr. 297, 80 N. W. 902; Herdman *v.* State, 54 Nebr. 626, 74 N. W. 1097; Cooley *v.* State, 46 Nebr. 603, 65 N. W. 799; Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699; Zimmerman *v.* State, 46 Nebr. 13, 64 N. W. 375; O'Chander *v.* State, 46 Nebr. 10, 64 N. W. 373; Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995; Boyd *v.* State, 19 Nebr. 128, 26 N. W. 925; Gandy *v.* State, 13 Nebr. 445, 14 N. W. 143.

Nevada.— *Ex p.* Sweeney, 18 Nev. 74, 1 Pac. 379; Maxwell *v.* Rives, 11 Nev. 213; Phillips *v.* Welch, 11 Nev. 187.

New Hampshire.— *In re* Bates, 55 N. H. 325; State *v.* Matthews, 37 N. H. 450.

New Jersey.—McClure *v.* Gulick, 17 N. J. L. 340; Magennis *v.* Parkhurst, 4 N. J. Eq. 433.

New York.— People *v.* Oyer, etc., Ct., 101 N. Y. 245, 4 N. E. 259, 54 Am. St. Rep. 691; People *v.* Compton, 1 Duer 512.

North Dakota.— State *v.* Massey, 10 N. D. 154, 86 N. W. 225; State *v.* Crum, 7 N. D. 299, 74 N. W. 992; State *v.* Davis, 2 N. D. 461, 51 N. W. 942.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Hummell's Case, 9 Watts 416; Patterson *v.* Patterson, 1 Wkly. Notes Cas. 374.

South Carolina.—State *v.* Nathans, 49 S. C. 199, 27 S. E. 52; *Ex p.* Thurmond, 1 Bailey 605.

South Dakota— Freeman *v.* Huron, 8 S. D. 435, 66 N. W. 928.

Texas.— Edrington *v.* Pridham, 65 Tex. 612; *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Virginia.— Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40; Com. *v.* Feely, 2 Va. Cas. 1.

West Virginia.— McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; State *v.* Ralphsnyder, 34 W. Va. 352, 12 S. E. 721; State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76; Alderson *v.* Kanawha County Com'rs, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. Rep. 840, 5 L. R. A. 334; State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413; Ruhl *v.* Ruhl, 24 W. Va. 279; Craig *v.* McCulloch, 20 W. Va. 148; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

Wisconsin.— *In re* Murphey, 39 Wis. 286; Haight *v.* Lucia, 36 Wis. 355.

United States.— New Orleans *v.* New York Mail Steamship Co., 20 Wall. 387, 22 L. ed. 354; Accumulator Co. *v.* Consolidation Electric Storage Co., 53 Fed. 796; Goodrich *v.* U. S., 42 Fed. 392; Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501; *In re* Ellerbe, 13 Fed. 530, 4 McCrary 449; Durant *v.* Washington County, 8 Fed. Cas. No. 4,191, 1 Woolw. 377; *In re* Pitman, 19 Fed. Cas. No. 11,184, 1 Curt. 186; U. S. *v.* Wayne, 28 Fed. Cas. No. 16,654, Wall. Sr. 134.

See 10 Cent. Dig. tit. "Contempt," § 124; and *supra*, II.

for the purpose of protecting or enforcing private rights are remedial and civil in their nature.[73]

B. Who May Institute. Proceedings for contempt to enforce a civil remedy and to protect the right of parties litigant should be instituted by the aggrieved parties, or those who succeed to their rights, or someone who has a pecuniary interest in the right to be protected.[74] If, however, the purpose of the proceeding is to vindicate the authority of the court and is criminal in its nature the state is the real prosecutor.[75]

C. Change of Venue. A party accused of contempt is not entitled to a change of venue.[76]

D. Laches in Instituting. Lapse of time since the commission of the contempt is not of itself fatal to punishment.[77] Application to punish should be

73. *Georgia.*— Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767.

Illinois.— People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038; Leopold *v.* People, 140 Ill. 552, 30 N. E. 348; Buck *v.* Buck, 60 Ill. 105; Stearnes *v.* People, 41 Ill. App. 157.

Indiana.— Beck *v.* State, 72 Ind. 250.

Michigan.— People *v.* Simonson, 9 Mich. 492.

New Hampshire.— Buffum's Case, 13 N. H. 14.

New Jersey.— Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182.

New York.— Doyle *v.* Doyle, 4 N. Y. Civ. Proc. 265; Snelling *v.* Watrous, 2 Paige 314.

South Carolina.— *Ex p.* Thurmond, 1 Bailey 605; Daniel *v.* Capers, 4 McCord 237.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Texas.—*Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

United States.— Hendryx *v.* Fitzpatrick, 19 Fed. 810.

See 10 Cent. Dig. tit. "Contempt," § 124.

74. *Illinois.*— Diedrich *v.* People, 37 Ill. App. 604 [*affirmed* in 141 Ill. 665, 30 N. E. 1038].

Michigan.— Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1.

New York.— Hawley *v.* Bennett, 4 Paige 163.

South Carolina.— Kirkpatrick *v.* Ford, 2 Speers 110.

United States.—Secor *v.* Singleton, 35 Fed. 376.

See 10 Cent. Dig. tit. "Contempt," § 127.

A creditor cannot institute proceedings for contempt against one who unlawfully takes possession of property in the hands of a receiver. Moore *v.* Mercer Wire Co., (N. J. 1888) 15 Atl. 305. But see Tindel *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225, holding that where a receiver improperly obtains money deposited in a bank under order of the court and appropriates it to his own use a creditor who is entitled to participate in the fund is the proper party to move an attachment against the receiver and in the absence of such motion the judge on information derived from any source should take steps to compel the return of the money.

One of two joint complainants cannot proceed against his co-complainant by attachment for contempt for appropriating more than his share of the proceeds of a decree rendered in their favor. Jones *v.* Jones, 1 Hen. & M. (Va.) 3.

Party in default.— Where complainant has failed to fully perform his part of a decree of court he cannot prosecute contempt proceedings against defendant for not obeying the decree. Dowden *v.* Junker, 48 N. J. Eq. 554, 22 Atl. 727. But plaintiff who has not fully complied with his part of the decree may put himself in position to prosecute defendant for contempt by subsequently doing the acts required of him. Morris *v.* Walsh, 9 Bosw. (N. Y.) 636, 14 Abb. Pr. (N. Y.) 387.

75. State *v.* Milligan, 4 Wash. 29, 29 Pac. 763; Haight *v.* Lucia, 36 Wis. 355; Durant *v.* Washington County, 8 Fed. Cas. No. 4,191, 1 Woolw. 377.

The court, without complaint, may of its own motion proceed against the offender. Telegram Newspaper Co. *v.* Com., 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159.

76. Bloom *v.* People, 23 Colo. 416, 48 Pac. 519; Crook *v.* People, 16 Ill. 534; State *v.* Newton, 62 Ind. 517; People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457. But see Lamonte *v.* Ward, 36 Wis. 558, holding that under the statute which provides for the removal of "any cause or matter" in certain cases, a contempt proceeding may be removed from the county to the circuit court. See also State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157.

In North Dakota the accused is not entitled to have another judge called in to determine the case upon filing affidavits showing the prejudice of the presiding judge. Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

77. People *v.* Rice, 74 Hun (N. Y.) 179, 26 N. Y. Suppl. 345, 56 N. Y. St. 546; *In re* Hay Foundry, etc., Works, 22 N. Y. App. Div. 87, 47 N. Y. Suppl. 802, 27 N. Y. Civ. Proc. 80; People *v.* Gilleland, 7 Johns. (N. Y.) 555; Brockway *v.* Wilber, 5 Johns. (N. Y.) 356; Dale *v.* Rosevelt, 1 Paige (N. Y.) 25.

Limitations.— In Illinois it has been held that where the act constituting the contempt is by the terms of the statute made a misdemeanor the prosecution therefor is barred

made, however, within a reasonable time.[78] If injury results from delay the application will be denied.[79]

E. Abatement of Proceedings. If the proceedings in which the contempt arose are abated or finally disposed of ordinarily defendant will be discharged.[80] It has been held, however, that an attachment for contempt for violating an injunction if commenced before, may be prosecuted after, the injunction is dissolved.[81] It has also been held that the dismissal of a creditor's bill after an interlocutory order has been made does not prevent the enforcement of the interlocutory order by attachment.[82]

F. Entitlement. No rule as to the proper entitlement of the proceeding is deducible from the authorities. The practice in some jurisdictions is to prosecute a matter of contempt in the cause or proceeding out of which it arose and not as a separate proceeding with a title of its own.[83] The practice in other jurisdictions is to entitle the proceeding in the name of the state or people, or in the name of the state or people at the relation of a party.[84] The logical practice

within the period prescribed for misdemeanors. Beattie *v.* People, 33 Ill. App. 651. But see Cake *v.* Bird, (Pa. 1888) 15 Atl. 774, holding that it is too late to plead the statute of limitations after the evidence has been taken on both sides and the question considered and decided by the court.

78. Morgie *v.* Cheney, 1 Hill (S. C.) 145.

79. Jourden *v.* Hawkins, 17 Johns. (N. Y.) 35; McCormick *v.* Jerome, 15 Fed. Cas. No. 8,721, 3 Blatchf. 486; Rex *v.* Surry, 9 East 467; James *v.* Downes, 18 Ves. Jr. 522.

80. *California.*— *Ex p.* Rowe, 7 Cal. 175.

Maryland.— *Ex p.* Maulsby, 13 Md. 625.

Massachusetts.— *In re* Clark, 12 Cush. 320.

Michigan.— *In re* Hall, 10 Mich. 210.

Minnesota.— *Compare In re* Fanning, 40 Minn. 4, 41 N. W. 1076.

South Carolina.— Robertson *v.* Bingley, 1 McCord Eq. 333. But *compare* Johnson *v.* Wideman, Dudley 70. See also State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

See 10 Cent. Dig. tit. "Contempt," § 135.

Death of one defendant.— Pending an abatement of a suit by death of one defendant process of contempt may be executed against the other. Brown *v.* Andrews, 1 Barb. (N. Y.) 227.

Expiration of judge's term of office.— Proceedings for contempt do not abate upon the expiration of the term of office of the judge, but may be continued before his successor. Holstein *v.* Rice, 15 Abb. Pr. (N. Y.) 307, 24 How. Pr. (N. Y.) 135.

Reversal on appeal.— Where an order for a temporary injunction is reversed an order punishing one for contempt in disobeying such injunction falls with it. Krone *v.* Kings County El. R. Co., 50 Hun (N. Y.) 431, 3 N. Y. Suppl. 149, 20 N. Y. St. 780. So on a reversal of an order directing a judgment debtor to deliver certain property to a receiver appointed in supplementary proceedings an order adjudging the debtor guilty of contempt in not delivering the property also falls. Smith *v.* McQuade, 13 N. Y. Suppl. 63.

Satisfaction of judgment.— Where defendant is in contempt for failure to comply with a judgment, the satisfaction of the judgment is a bar to a prosecution for the contempt. *Ex p.* Tittel, 67 Cal. 261, 7 Pac. 678. But where the contempt consists in the disregard of a writ of mandamus issued to compel performance, the purchase of the judgment will not relieve from punishment for the contempt in refusing to obey the writ. State *v.* King, 29 Kan. 607.

81. Crook *v.* People, 16 Ill. 534. See also Stubbs *v.* Ripley, 39 Hun (N. Y.) 626, holding that the subsequent settlement and discontinuance of an action begun in disobedience of an injunction does not relieve defendant from liability for his contempt, although it may serve to palliate or mitigate the offense.

82. Price *v.* Church, Clarke (N. Y.) 358.

83. *California.*— *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

Iowa.— Cameron *v.* Kapinos, 89 Iowa 561, 56 N. W. 677; Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551.

Kentucky.— See Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480.

Massachusetts.— Winslow *v.* Nayson, 113 Mass. 411.

New York.— Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Brown *v.* Andres, 1 Barb. 227.

Vermont.— Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817; Curtis *v.* Gordon, 62 Vt. 340, 20 Atl. 820.

See 10 Cent. Dig. tit. "Contempt," §§ 138, 139.

Before the attachment issues the proceedings should be entitled as in the suit in which the contempt arises, but after the attachment issues they should be entitled in the name of the state or people. *In re* Bronson, 12 Johns. (N. Y.) 460; People *v.* Ferris, 9 Johns. (N. Y.) 160; Folger *v.* Hoogland, 5 Johns. (N. Y.) 235; Stafford *v.* Brown, 4 Paige (N. Y.) 360; U. S. *v.* Wayne, 28 Fed. Cas. No. 16,654, Wall. Sr. 134. See also *Ex p.* Spooner, 5 City Hall Rec. (N. Y.) 109; Bevan *v.* Bevan, 3 T. R. 601.

84. *Delaware.*— Rice *v.* Small, 1 Del. Ch. 68.

Illinois.— Rawson *v.* Rawson, 35 Ill. App. 505.

would seem to be to give the proceeding the title of the cause out of which the alleged contempt arose, if the object is to compel performance of an act as a remedy for a party;[85] but if the object is punishment alone the proceeding should be in the name of the state.[86]

G. Preliminary Affidavit or Statement — 1. Necessity — a. Direct Contempt. Where the contempt is direct,[87] in the immediate presence of the court, summary punishment may be inflicted, without affidavit, notice, rule to show cause, or other process.[88] A formal entry showing the proceedings constitutes the full record.[89]

North Dakota.— See State *v.* Crum, 7 N. D. 299, 74 N. W. 992.

Ohio.— State *v.* Clements, 1 Ohio Dec. (Reprint) 278, 7 West. L. J. 538.

Oregon.— State *v.* Downing, 40 Oreg. 308, 58 Pac. 863, 66 Pac. 917.

West Virginia.— McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413; Ruhl *v.* Ruhl, 24 W. Va. 279; State *v.* Harpers' Ferry Bridge Co., 16 W. Va. 864.

Wisconsin.— Haight *v.* Lucia, 36 Wis. 355.

See 10 Cent. Dig. tit. "Contempt," §§ 138, 139.

Amendment.— That the proceedings were begun in the name of the parties to the original cause, and afterward amended so as to be entitled in the name of the people, was held no error. Stearns *v.* Joy, 41 Ill. App. 157. See also State *v.* Downing, 40 Oreg. 308, 58 Pac. 863, 66 Pac. 917.

Waiver of objections.— An order to show cause why defendant should not be punished for contempt, which was not styled in the name of the state, is good where defendant voluntarily submitted himself to the order. *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

85. Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; State *v.* Nathans, 49 S. C. 199, 27 S. E. 52; Freeman *v.* Huron, 8 S. D. 435, 66 N. W. 928.

86. Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

87. As to what is direct contempt see *supra*, I, B, 2.

88. *Alabama.*— Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49.

Arkansas.— Harrison *v.* State, 35 Ark. 458.

California.— *Ex p.* Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; *Ex p.* Robinson, 71 Cal. 608, 12 Pac. 794.

Connecticut.— *In re* Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242; Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; Holcomb *v.* Cornish, 8 Conn. 375.

Illinois.— Tolman *v.* Jones, 114 Ill. 147, 28 N. E. 464; Lancaster *v.* Lane, 19 Ill. 242.

Indiana.— Holman *v.* State, 105 Ind. 513, 5 N. E. 556; Whittem *v.* State, 36 Ind. 196.

Iowa.— State *v.* Jordon, 72 Iowa 377, 34 N. W. 285.

Kansas.— State *v.* Anders, 64 Kan. 742, 68 Pac. 668.

Kentucky.— *In re* Woolley, 11 Bush 95.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Massachusetts.— Thwing *v.* Dennie, Quincy 338.

Michigan.— *In re* Wood, 82 Mich. 75, 45 N. W. 1113.

Missouri.— Greene County *v.* Rose, 38 Mo. 390.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New Jersey.— *In re* Cheeseman, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596; State *v.* Camden, 5 N. J. L. J. 184.

New York.— Robbins *v.* Gorham, 25 N. Y. 588; People *v.* Kelley, 24 N. Y. 74, 24 How. Pr. 369; Barnes *v.* Albany County Ct. Sess., 82 Hun 242, 31 N. Y. Suppl. 373, 63 N. Y. St. 821; Falkenberg *v.* Frank, 20 Misc. 692, 46 N. Y. Suppl. 675; People *v.* Miller, 9 Misc. 1, 29 N. Y. Suppl. 305, 59 N. Y. St. 702; *In re* McAdam, 4 Silv. Supreme 469, 7 N. Y. Suppl. 454, 27 N. Y. St. 352 [*affirming* 5 N. Y. Suppl. 387]. See also People *v.* Barrett, 56 Hun 351, 9 N. Y. Suppl. 321, 30 N. Y. St. 728, 18 N. Y. Civ. Proc. 180, 230, 24 Abb. N. Cas. 430, 8 N. Y. Crim. 13.

North Carolina.— *In re* Oldham, 89 N. C. 23, 45 Am. Rep. 673; *Ex p.* Summers, 27 N. C. 149.

North Dakota.— State *v.* Crum, 7 N. D. 299, 74 N. W. 992.

Ohio.— Lowe *v.* State, 9 Ohio St. 337.

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Texas.— Crow *v.* State, 24 Tex. 12.

Virginia.— Com. *v.* Dandridge, 2 Va. Cas. 408.

West Virginia.— State *v.* Gibson, 33 W. Va. 97, 10 S. E. 58.

Wisconsin.— *In re* Rosenberg, 90 Wis. 561, 63 N. W. 1065, 64 N. W. 299.

United States.— *In re* Terry, 128 U. S. 289, 9 S. Ct. 77, 52 L. ed. 405; King *v.* Ohio, etc., R. Co., 14 Fed. Cas. No. 7,800, 7 Biss. 529; U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108.

England.— *Ex p.* Fernandez, 10 C. B. N. S. 3, 7 Jur. N. S. 571, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3.

See 10 Cent. Dig. tit. "Contempt," § 141.

Where a witness asks time to file a written explanation before he is punished for contempt it should be allowed. State *v.* Duffy, 15 Iowa 425.

89. Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820. See also State *v.* Andens, 64 Kan. 742, 68 Pac. 668.

b. Constructive Contempt. As a rule the proceedings to punish for contempts committed out of the presence of the court should be instituted by a statement or some writing or affidavit presented to the court setting forth the facts constituting the contempt.[90] It has been held, however, that the court may act of its own motion and make the accusation.[91]

2. SUFFICIENCY — a. In General. The statement or affidavit, being jurisdictional, should show on its face sufficient facts constituting the contempt.[92] Usu-

90. *California.*— *Ex p.* Rickert, 126 Cal. 244, 58 Pac. 549; Batchelder *v.* Moore, 42 Cal. 412.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; Thomas *v.* People, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569.

Illinois.— Chaplin *v.* People, 57 Ill. App. 577.

Indiana.— Saunderson *v.* State, 151 Ind. 550, 52 N. E. 151; Whittem *v.* State, 36 Ind. 196. See also Snyder *v.* State, 151 Ind. 553, 52 N. E. 152.

Kansas.— *In re* Nickell, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315; *In re* McKenna, 47 Kan. 738, 28 Pac. 1078; *In re* Harmer, 47 Kan. 262, 27 Pac. 1004; State *v.* Vincent, 46 Kan. 618, 26 Pac. 939; State *v.* Henthorn, 46 Kan. 613, 26 Pac. 937; *In re* Blush, 5 Kan. App. 879, 48 Pac. 147.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Maryland.— Murdock's Case, 2 Bland 461, 20 Am. Dec. 381.

Michigan.— *In re* Wood, 82 Mich. 75, 45 N. W. 1113; Verplank *v.* Hall, 21 Mich. 469.

Minnesota.— State *v.* Ives, 60 Minn. 473, 62 N. W. 831.

Missouri.— Greene County *v.* Rose, 38 Mo. 390.

Nebraska.— Herdman *v.* State, 54 Nebr. 626, 74 N. W. 1097; Le Hane *v.* State, 48 Nebr. 105, 66 N. W. 1017; Hawthorne *v.* State, 45 Nebr. 871, 64 N. W. 359.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New York.— Bradbury *v.* Bliss, 23 N. Y. App. Div. 606, 48 N. Y. Suppl. 912; Rinelander *v.* Dunham, 2 N. Y. Civ. Proc. 32; People *v.* Adams, 6 Hill 236.

North Dakota.— State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

Ohio.—Lowe *v.* State, 9 Ohio St. 337; State *v.* Thompson, 2 Ohio Dec. (Reprint) 30, 1 West. L. Month. 158.

Oregon.— State *v.* Kaiser, 20 Oreg. 50, 23 Pac. 964, 8 L. R. A. 584.

Pennsylvania.—Com. *v.* Snowden, 1 Brewst. 218.

South Carolina.— State *v.* Blackwell, 10 Rich. 35.

Utah.— Young *v.* Cannon, 2 Utah 560.

Washington.— *In re* Coulter, 25 Wash. 526, 65 Pac. 759.

West Virginia.— State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407; State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Wyoming.— Wilson *v.* Territory, 1 Wyo. 155.

United States.— Hillmon *v.* Mutual L. Ins. Co., 79 Fed. 749.

See 10 Cent. Dig. tit. "Contempt," § 143.

91. State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257. See also Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1; People *v.* Oyer, etc., Ct., 27 How. Pr. (N. Y.) 14.

92. *California.*— Hedges *v.* Yuba County Super. Ct., 67 Cal. 405, 7 Pac. 767; Batchelder *v.* Moore, 42 Cal. 412.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Indiana.— State *v.* Rockwood, 159 Ind. 94, 64 N. E. 592; Worland *v.* State, 82 Ind. 49; Haskett *v.* State, 51 Ind. 176; McConnell *v.* State, 46 Ind. 298.

Iowa.— Jordon *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

Michigan.— Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148.

Nebraska.— Herdman *v.* State, 54 Nebr. 626, 74 N. W. 1097; Cooley *v.* State, 46 Nebr. 603, 65 N. W. 799.

New Jersey.— State *v.* Raborg, 5 N. J. L. 545.

New York.— Ward *v.* Arenson, 10 Bosw. 589; King *v.* Barnes, 2 N. Y. Suppl. 121, 15 N. Y. St. 684; People *v.* Washington County, 2 Cai. 97.

North Dakota.— State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

Pennsylvania.— Chew's Estate, 3 Wkly. Notes Cas. 392.

South Dakota.— State *v.* Sweetland, 3 S. D. 503, 54 N. W. 415.

Utah.— Young *v.* Cannon, 2 Utah 560.

Washington.—State *v.* Allen, 14 Wash. 684, 45 Pac. 644. See also State *v.* Canutt, 26 Wash. 68, 66 Pac. 130.

See 10 Cent. Dig. tit. "Contempt," § 144.

Impertinent matter.— Affidavit in contempt proceeding which is irrelevant and impertinent will be stricken out. May *v.* Ball, 67 S. W. 257, 24 Ky. L. Rep. 241, 68 S. W. 398.

The sufficiency of the information may be tested by motion to discharge the rule. Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199.

Form of affidavit in whole, in part, or in substance is set out in:

California.— *Ex p.* Barry, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248.

Colorado.— People *v.* El Paso County Dist. Ct., 19 Colo. 343, 35 Pac. 731.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Oregon.— State *v.* Conn, 37 Oreg. 596, 62 Pac. 289; State *v.* McKinnon, 8 Oreg. 487; State *v.* Downing, 4 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

Washington.— State *v.* Canutt, 26 Wash. 68, 66 Pac. 130.

ally a substantial and general statement will answer to give the court jurisdiction to proceed.[93]

b. Information and Belief. Although statements or affidavits made on information and belief have been held sufficient,[94] the better practice requires the material allegations to be made of personal knowledge.[95]

3. Amendment. Statements and affidavits may in a proper case be amended.[96]

4. Waiver of Defects. Formal defects in the statement or affidavit are cured by subsequent proceedings, as by appearance, giving bail, pleading, or by judgment.[97]

H. Rule to Show Cause, Attachment, or Other Process — 1. Necessity. Before a person can be found guilty of a contempt not committed in the presence of the court he must have due and reasonable notice of the proceeding.[98] A rule

93. *California.*— *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

Iowa.—Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

Minnesota.— State *v.* Hennepin County Dist. Ct., 65 Minn. 146, 67 N. W. 796.

Nebraska.—Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

Nevada.— Strait *v.* Williams, 18 Nev. 430, 4 Pac. 1083; Phillips *v.* Welch, 12 Nev. 158.

New York.— People *v.* Albany County Ct. Sess., 82 Hun 242, 31 N. Y. Suppl. 373, 63 N. Y. St. 821.

See 10 Cent. Dig. tit. "Contempt," § 146.

Ability to comply need not be alleged. Andrews *v.* Andrews, 62 Vt. 495, 20 Atl. 817; Curtis *v.* Gordon, 62 Vt. 340, 20 Atl. 820. See also *In re* Meggett, 105 Wis. 291, 81 N. W. 419.

Ignoring subpœna.— An affidavit for attachment for a witness for failing to respond to a subpœna must state that the witness was a material witness. *In re* Spencer, MacArthur & M. (D. C.) 433; Rutherford *v.* Holmes, 66 N. Y. 368. See also McGehee *v.* State, 4 Tex. App. 94.

Violating injunction.— The affidavit need not set out a copy of the injunction violated; a reference to it is sufficient. Silvers *v.* Traverse, 82 Iowa 52, 47 N. W. 888, 11 L. R. A. 804. Nor is it necessary on the violation of an injunction to set forth the pendency of the proceeding in which it issued, or the provision of the order. It is sufficient to allege the acts done in violation of it. *Ex p.* Fong Yen Yo, (Cal. 1888) 19 Pac. 500; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. Rep. 263. But service of the writ of injunction should be alleged, where the contempt consists in the violation of it. State *v.* Gilpin, 1 Del. Ch. 25.

94. *In re* Acock, 84 Cal. 50, 23 Pac. 1029; Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

95. *Michigan.*— *In re* Wood, 82 Mich. 75, 45 N. W. 1113.

Nebraska.— Herdman *v.* State, 54 Nebr. 626, 74 N. W. 1097; Ludden *v.* State, 31 Nebr. 429, 48 N. W. 61.

New York.— Sargeant *v.* Warren, 22 N. Y. Wkly. Dig. 473.

Oregon.— State *v.* Conn, 37 Oreg. 596, 62 Pac. 289.

South Dakota.—Freeman *v.* Huron, 8 S. D. 435, 66 N. W. 928.

United States.— *In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76.

See 10 Cent. Dig. tit. "Contempt," § 145.

96. State *v.* Hungerford, 8 Wis. 345; *In re* Chadwick, 5 Fed. Cas. No. 2,570, 1 Lowell 439.

The amendment must again be sworn to. State *v.* Lavery, 31 Oreg. 77, 49 Pac. 852; State *v.* Hungerford, 8 Wis. 345.

97. Zimmerman *v.* State, 46 Nebr. 13, 64 N. W. 375; People *v.* Albany County Ct. Sess., 147 N. Y. 290, 41 N. E. 700, 69 N. Y. St. 667 [*reversing* 82 Hun (N. Y.) 242, 31 N. Y. Suppl. 373]; People *v.* Dutchess County Canvassers, 20 N. Y. Suppl. 329; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917. See also *In re* Nichols, 54 N. Y. 62.

Defects of substance.— An affidavit for an attachment for contempt in violating an injunction, which fails to state that defendant is guilty of violating the injunction, is not cured by defendant giving bail. State *v.* Gallup, 1 Kan. App. 618, 42 Pac. 406.

98. *Alabama.*— Gates *v.* McDaniel, 3 Port. 356.

Connecticut.— Sherwood *v.* Sherwood, 32 Conn. 1; Lyon *v.* Lyon, 21 Conn. 185.

Georgia.— Hurst *v.* Whitly, 47 Ga. 366.

Illinois.— People *v.* Hallett, 3 Ill. 566.

Indiana.— Whittem *v.* State, 36 Ind. 196.

Iowa.— Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

Kansas.— Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

Kentucky.— Clay *v.* Fayette County Quarter Sess. Ct., 4 Ky. Dec. 189; Bush *v.* Chenault, 12 Ky. L. Rep. 249.

Mississippi.— Lewis *v.* Miller, 13 Sm. & M. 110.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New Jersey.— McDermott *v.* Butler, 10 N. J. L. 158; Flommerfelt *v.* Zellers, 7 N. J. L. 31.

New York.— Isaacs *v.* Isaacs, 61 How. Pr. 369; Stafford *v.* Brown, 4 Paige 360.

Ohio.— Lowe *v.* State, 9 Ohio St. 337.

Pennsylvania.— New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 13.

Texas.— *Ex p.* Ireland, 38 Tex. 344.

Vermont.— *Ex p.* Langdon, 25 Vt. 680.

United States.— American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937; Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss.

to show cause, an attachment, or other process should issue.[99] The usual course is to issue a rule to show cause why an attachment should not issue.[1] In a proper case, however, an attachment may issue in the first instance without the granting of an order to show cause,[2] as where all the evidence is before the court and the offense is clear,[3] where the case is urgent and the contempt flagrant,[4] where the proceeding is against a non-resident, and it is shown that he is about to go beyond the court's jurisdiction,[5] or where the party is present in court, or appears to the rule to show cause why an attachment should not issue and submits to answer interrogatories.[6]

490; Gray *v.* Chicago, etc., R. Co., 10 Fed. Cas. No. 5,713, Woolw. 63; Worcester *v.* Truman, 30 Fed. Cas. No. 18,043, 1 McLean 483.

England.— Mander *v.* Falche, [1891] 3 Ch. 488, 61 L. J. Ch. 3, 64 L. T. Rep. N. S. 791, 40 Wkly. Rep. 31.

See 10 Cent. Dig. tit. "Contempt," § 151.

Waiver by appearance.— The fact that the formal rule was not served upon defendant is not fatal where he was present in court and allowed to make defense. State *v.* Hansford, 43 W. Va. 773, 28 S. E. 791. So where the party is in court and has personal notice of the order with which he refuses to comply, notice of a motion for attachment is not necessary. *Ex p.* Walker, 25 Ala. 81.

99. *Georgia.*— Mize *v.* Baisden, 69 Ga. 751; Smith *v.* McLendon, 59 Ga. 523; Hurst *v.* Whitely, 47 Ga. 366; Brannon *v.* Central Bank, 18 Ga. 361.

Indiana.— Snyder *v.* State, 151 Ind. 553, 52 N. E. 152; Saunderson *v.* State, 151 Ind. 550, 52 N. E. 151; Stewart *v.* State, 140 Ind. 7, 39 N. E. 508; Whittem *v.* State, 36 Ind. 196.

Kansas.— State *v.* Andens, 64 Kan. 742, 68 Pac. 668.

Louisiana.— State *v.* Keene, 11 La. 596.

Minnesota.— State *v.* Ives, 60 Minn. 478, 62 N. W. 831.

New Jersey.— *In re* Haines, 67 N. J. L. 442, 51 Atl. 929.

New York.— People *v.* Rice, 74 Hun 179, 26 N. Y. Suppl. 345, 56 N. Y. St. 546; Matter of Smethurst, 4 N. Y. Super. Ct. 724, 4 How. Pr. 369; Hammersley *v.* Parker, 1 Barb. Ch. 25; People *v.* Wheeler, 7 Paige 433.

South Carolina.— Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

Texas.— *Ex p.* Ireland, 38 Tex. 344.

Virginia.— Com. *v.* Dandridge, 2 Va. Cas. 408.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

United States.— *In re* Chadwick, 5 Fed. Cas. No. 2,570, 1 Lowell 439; The Laurens, 14 Fed. Cas. No. 8,122, Abb. Adm. 508; Worcester *v.* Truman, 30 Fed. Cas. No. 18,043, 1 McLean 483.

See 10 Cent. Dig. tit. "Contempt," § 150.

Distringas.— The court has power to make an order directing a writ of distringas to issue, compelling a corporation to appear and answer as to the contempt alleged to have been committed by it. Hills *v.* Peekskill Sav. Bank, 30 Hun (N. Y.) 546.

1. *Georgia.*— Wheeler *v.* Thomas, 57 Ga. 161; Wheeler *v.* Harrison, 57 Ga. 24.

Minnesota.— State *v.* Ives, 60 Minn. 478, 62 N. W. 831.

New Jersey.— *In re* Haines, 67 N. J. L. 442, 51 Atl. 929; McDermot *v.* Butler, 10 N. J. L. 158; Dowden *v.* Junker, 48 N. J. Eq. 554, 22 Atl. 727.

New York.— Jackson *v.* Mann, 2 Cai. 92; McCredie *v.* Senior, 4 Paige 378.

Pennsylvania.— Trimble *v.* Barnard, 15 Wkly. Notes Cas. 127; Frey's Estate, 4 Wkly. Notes Cas. 415; McKinney's Estate, 2 Wkly. Notes Cas. 156; Shaffer *v.* Davies, 1 Wkly. Notes Cas. 374; *In re* May, 10 Lanc. Bar 22.

Texas.— Crow *v.* State, 24 Tex. 12.

Virginia.— Com. *v.* Dandridge, 2 Va. Cas. 408; Morris *v.* Creel, 1 Va. Cas. 333.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

See 10 Cent. Dig. tit. "Contempt," § 152.

Renewal of rule.— The court may order the rule to show cause to be renewed, where the original could not be served in time. Waddington *v.* Chamberlin, 2 Cai. (N. Y.) 251.

2. *Illinois.*— Petrie *v.* People, 40 Ill. 334.

Indiana.— Kernodle *v.* Cason, 25 Ind. 362.

Mississippi.— Lewis *v.* Miller, 13 Sm. & M. 110.

Missouri.— *Ex p.* Haley, 37 Mo. App. 562.

New Jersey.— *In re* Haines, 67 N. J. L. 442, 51 Atl. 929; *In re* Cheeseman, 49 N. J. L. 155, 6 Atl. 513, 60 Am. Rep. 596.

North Carolina.— Baker *v.* Blount, 3 N. C. 359.

Pennsylvania.— Respublica *v.* Newell, 3 Yeates 407, 2 Am. Dec. 381; Respublica *v.* Oswald, 1 Dall. 319, 1 L. ed. 155, 1 Am. Dec. 246.

Virginia.— Com. *v.* Dandridge, 2 Va. Cas. 408.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

United States.— Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss. 490; Monroe *v.* Bradley, 17 Fed. Cas. No. 9,713, 1 Cranch C. C. 158; Monroe *v.* Harkness, 17 Fed. Cas. No. 9,715, 1 Cranch C. C. 157.

See 10 Cent. Dig. tit. "Contempt," § 152.

3. State *v.* Soule, 8 Rob. (La.) 500; Andrews *v.* Andrews, 2 Johns. Cas. (N. Y.) 109, Col. & C. (N. Y.) 121; Bullock *v.* McDonough, 2 Pearson (Pa.) 195.

4. *In re* Stacy, 10 Johns. (N. Y.) 328; Thomas *v.* Cummins, 1 Yeates (Pa.) 1.

5. Thornton *v.* Davis, 23 Fed. Cas. No. 13,998, 4 Cranch C. C. 500.

6. *In re* Nichols, 54 N. Y. 62; Taylor *v.* Baldwin, 14 Abb. Pr. (N. Y.) 166; Com. *v.* Dandridge, 2 Va. Cas. 408; The Laurens, 14

2. SUFFICIENCY — a. Rule to Show Cause. The rule to show cause should inform defendant of the nature of the contempt alleged.[7] If the statute or rule of court requires it, the facts constituting the contempt should be set out.[8]

b. Attachment. The attachment, to be valid, should be sufficient in form and substance.[9] It is good, if it shows on its face that it was issued in a proceeding in which the court has jurisdiction,[10] and contains the matters prescribed by statute or rule of court.[11]

3. SERVICE — a. Rule to Show Cause. As a general rule personal service of the rule to show cause should be made on the party.[12] Under some circumstances, however, service on the party's attorney of record,[13] or service by leaving

Fed. Cas. No. 8,122, Abb. Adm. 508; U. S. *v.* Green, 26 Fed. Cas. No. 15,256, 3 Mason 482.

7. Brannon *v.* Central Bank, 18 Ga. 361; Pitt *v.* Davison, 37 Barb. (N. Y.) 97 [*reversed* in 37 N. Y. 235].

A demurrer does not lie to the rule to show cause. Continental Nat. Bldg., etc., Assoc. *v.* Scott, 40 Fla. 386, 24 So. 473.

The word "attach" was used in an order to show cause in the place of "punish," and as it did not appear that the defendant was misled the order was held to be sufficient. People *v.* Kenny, 2 Hun (N. Y.) 346.

Failure to appear before master.— Where the order is to the party to show cause why he should not be punished for failure to obey an order to appear before a master, it should recite sufficient of the alleged contempt to inform him of the misconduct charged. Hammersley *v.* Parker, 1 Barb. Ch. (N. Y.) 25, 3 N. Y. Leg. Obs. 344.

Form of order to show cause in whole, in part, or in substance is set out in People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; *In re* Woolley, 11 Bush (Ky.) 95; State *v.* Judge Civil Dist. Ct., 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282; State *v.* Bourne, 21 Oreg. 218, 27 Pac. 1048.

8. Stewart *v.* State, 140 Ind. 7, 39 N. E. 508. But information reciting in a general way is sufficient. Hawkins *v.* State, 125 Ind. 570, 25 N. E. 818.

9. Murphy *v.* Abbott, 13 Ill. App. 68; People *v.* Mead, 92 N. Y. 415, 1 N. Y. Crim. 417; *Ex p.* Rust, 38 Tex. 344. See also State *v.* Matthews, 37 N. H. 450; State *v.* Gulick, 17 N. J. L. 435; People *v.* Tamsen, 15 Misc. (N. Y.) 364, 37 N. Y. Suppl. 407, 25 N. Y. Civ. Proc. 141; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *In re* Vanderbilt, 4 Johns. Ch. (N. Y.) 57.

Recital of disobeyed order.— An attachment for disobeying an order in supplementary proceedings should recite the order disobeyed. Smith *v.* Weeks, 60 Wis. 94, 18 N. W. 778.

Showing that prejudice resulted.— An attachment for failure to pay costs is sufficient, although it does not state that the refusal defeated, impaired, or prejudiced the rights of the adverse party. Tucker *v.* Gilman, 14 N. Y. Suppl. 392, 37 N. Y. St. 958, 20 N. Y. Civ. Proc. 397.

Form of attachment in whole, in part, or in substance is set out in:

Colorado.— Hughes *v.* People, 5 Colo. 436.

Illinois.— People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; People *v.* Pearson, 4 Ill. 270.

Michigan.— *In re* Wood, 82 Mich. 75, 45 N. W. 1113.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

Texas.— Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 163, 7 S. W. 381.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

10. Dunford *v.* Weaver, 84 N. Y. 445.

11. State *v.* Clemants, 1 Ohio Dec. (Reprint) 278, 6 West. L. J. 538.

12. Flommerfelt *v.* Zellers, 7 N. J. L. 31; Bate Refrigerating Co. *v.* Gilett, 24 Fed. 696; Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,617, Wall. Sr. 141.

On board.— Service of a rule to show cause on a board of assessors should be on the members of the board. State *v.* Tax Assessors, 53 N. J. L. 156, 20 Atl. 966. But where an order to show cause was filed in the office of the clerk of a board of county canvassers, and was in fact seen and read by the clerk, the objection that it was not personally served is not available. People *v.* Dutchess County Canvassers, 20 N. Y. Suppl. 329.

Refusal to receive the order to show cause is sufficient proof of a personal demand as required by the statute to authorize the issuance of an attachment for arrest. Graham *v.* Bleakie, 2 Daly (N. Y.) 55.

Time of service.— The notice must be served in time to give defendant an opportunity to appear on the return-day. Stafford *v.* Brown, 4 Paige (N. Y.) 360. Service of rule to show cause on defendant twenty days before the return-day and receipt of copy acknowledged is sufficient. People *v.* Hallett, 3 Ill. 566.

13. Pitt *v.* Davison, 37 N. Y. 235, 3 Abb. Pr. N. S. (N. Y.) 398, 34 How. Pr. (N. Y.) 355; Rochester Lamp Co. *v.* Brigham, 1 N. Y. App. Div. 490, 37 N. Y. Suppl. 402, 72 N. Y. St. 467; Zimmerman *v.* Zimmerman, 14 N. Y. Suppl. 444, 26 Abb. N. Cas. (N. Y.) 366; Robb *v.* Pepper, 11 Wkly. Notes Cas. (Pa.) 497.

Concealment to prevent service.— Service on attorney of record ordered where defendant concealed himself. Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490, 493; Golden Gate Consol Hydraulic Min. Co. *v.*

a copy at the party's last and usual place of abode will be considered a sufficient service.[14]

b. Attachment. Service of an attachment must be made in the manner and within the time provided by statute or required by rule of court.[15]

4. Return. The attachment is properly made returnable before the judge by whom issued.[16]

5. Hearing. Ordinarily where a *prima facie* case is made, either upon affidavit or other satisfactory proof, the rule *nisi* is granted as of course.[17] The proof, however, should show the specific acts which constitute the contempt,[18] and that all preliminary steps have been substantially observed.[19] Defendant may controvert the facts set up in the affidavit or motion, or explain, palliate, or set up any legal ground as a reason why the court ought not to award the attachment;[20] but the validity of the order disobeyed cannot be assailed if defendant has had an opportunity to be heard upon it.[21]

I. Appearance — 1. In General. On an order to show cause defendant may appear in person[22] or by attorney.[23]

Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628; *In re* Farr, 41 Kan. 276, 21 Pac. 273.

14. Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,617, Wall. Sr. 141.

Variance in copy served.— A variance between the original notice and the copy left in service will not affect the service, if the variance is not such as to mislead defendant as to the object of the proceedings. Lyon *v.* Lyon, 21 Conn. 185.

15. Watts *v.* Robertson, 4 Hen. & M. (Va.) 442.

Officer of court.— An attachment served and arrest made by a United States marshal out of the district of the court is illegal. *In re* Allen, 1 Fed. Cas. No. 208, 13 Blatchf. 271. See also *In re* Heister, 8 Ohio Dec. (Reprint) 41, 5 Cinc. L. Bul. 286; U. S. *v.* Montgomery, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,799.

Service in court.— An attachment of a witness cannot be legally served in court. Davis *v.* Sherron, 7 Fed. Cas. No. 3,652, 1 Cranch C. C. 287; U. S. *v.* Schofield, 27 Fed. Cas. No. 16,230, 1 Cranch C. C. 130.

Service on attorney.— Service may be made on attorney by direction of court where defendant conceals himself. Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

16. Kelly *v.* McCormick, 28 N. Y. 318. See also *In re* Smethurst, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369, 3 Code Rep. (N. Y.) 55; Shepherd *v.* Dean, 3 Abb. Pr. (N. Y.) 424, 13 How. Pr. (N. Y.) 173.

17. *Ex p.* Schenck, 63 N. C. 601; *Ex p.* Moore, 63 N. C. 397.

18. Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754; Fobes *v.* Meeker, 3 Edw. (N. Y.) 452; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76.

19. U. S. *v.* Caldwell, 2 Dall. 333, 1 L. ed. 404, 25 Fed. Cas. No. 14,708; The Laurens, 14 Fed. Cas. No. 8,122, Abb. Adm. 508.

20. Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,616, Wall. Sr. 77; *Ex p.* Humphrey, 12 Fed. Cas. No. 6,867, 2 Blatchf. 228.

21. Wandling *v.* Thompson, 41 N. J. L. 142. See also Sickles *v.* Borden, 22 Fed. Cas. No. 12,833, 4 Blatchf. 14, holding that on motion for attachment for violation of an injunction, the objection that it was broader in its terms than the order under which it issued cannot be raised. And for violation of injunction against infringements of patents, proof that the patentee was not the first inventor of the thing cannot be heard. Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190.

Fictitious nature of suit.— On motion for an attachment for a witness for failure to obey a subpœna to appear and be examined before a commissioner, the question whether the suit in which the deposition is to be used is real or fictitious will not be inquired into. *Ex p.* Judson, 14 Fed. Cas. No. 7,561, 3 Blatchf. 89.

The rights of the parties claiming a fund in the hands of a sheriff will not be settled on a motion or attachment against the sheriff for failure to pay over the money. Wilson *v.* Wright, 9 How. Pr. (N. Y.) 459.

22. In Mississippi it has been held that a party charged with contempt should appear and answer in person and not by attorney. Vertner *v.* Martin, 10 Sm. & M. (Miss.) 103. See also People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528, holding that where a party is under a rule to show cause why an attachment should not issue against him, he should appear in his own proper person if he relies upon excuse only. And see People *v.* Freer, 1 Cai. (N. Y.) 485.

23. Gordan *v.* Buckles, 92 Cal. 481, 28 Pac. 490; *Ex p.* Gordon, 92 Cal. 478, 28 Pac. 489, 27 Am. St. Rep. 154; People *v.* Van Wyck, 2 Cai. (N. Y.) 333. See also *In re* Clarke, 125 Cal. 388, 58 Pac. 22, holding that the presence of defendant in person at the hearing is unnecessary where he has made a written showing in response to an order to show cause. And see Pitt *v.* Davison, 37 N. Y. 235 [*reversing* 37 Barb. (N. Y.) 97].

After being brought into court on attachment a party may be represented by attorney in subsequent proceedings, although not personally present. Watrous *v.* Kearney, 79 N. Y. 496.

2. As Waiver of Objections. Appearing and answering without objection cures irregularities in the commencement of the proceedings.[24]

J. Arraignment. In the absence of statutory requirement, formal arraignment of defendant is not necessary.[25]

K. Bail. As a rule one arrested on process for contempt may be admitted to bail.[26]

L. Interrogatories — 1. Necessity of Filing. The authorities bearing upon the matter of filing interrogatories are not uniform in their holdings. At common law and by statute in some jurisdictions interrogatories must be filed except where the offense is admitted.[27] Authority is not wanting, however, to the effect that a conviction may be had without filing interrogatories.[28] Other authorities hold that interrogatories are not necessary where an opportunity for explanation and defense is given,[29] where the contempt is for disobedience of an order to pay money,[30] or where the court is in possession of the facts and the alleged contempt is expressly admitted and the defense is merely a question of law.[31] It has also been held that the court may dispense with an examination on interrogatories

24. *Indiana.*— Hawkins *v.* State, 125 Ind. 570, 25 N. E. 818.

Iowa.— Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551. See also Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

New York.— *In re* Nichols, 54 N. Y. 62; Wilson *v.* Greig, 12 N. Y. Wkly. Dig. 73.

North Carolina.— Herring *v.* Pugh, 126 N. C. 852, 36 S. E. 287.

Washington.— State *v.* Ditmar, 19 Wash. 324, 53 Pac. 350.

West Virginia.— State *v.* Frew, 24 W. Va. 416, 49 Am. Rep. 257.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

England.— *Compare* Mander *v.* Falcke, [1891] 3 Ch. 488, 61 L. J. Ch. 3, 64 L. T. Rep. N. S. 791, 40 Wkly. Rep. 31, holding that as notice of motion to commit defendant for breach of an injunction must be served personally two clear days before the day named for the hearing, the appearance of the person upon the hearing of the motion does not operate as a waiver of the irregularity.

See 10 Cent. Dig. tit. "Contempt," § 162.

As to effect of appearance generally see Appearances, V [3 Cyc. 514].

25. Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

26. *Georgia.*— Kingsbery *v.* Ryan, 92 Ga. 108, 17 S. E. 689.

Indiana.— Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820; Whittem *v.* State, 36 Ind. 196.

Iowa.— State *v.* Buchanan County Dist. Ct., 84 Iowa 167, 50 N. W. 677; State *v.* Archer, 48 Iowa 310.

Maine.— Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Missouri.— The sheriff has no power to take a recognizance for the appearance of a person arrested for contempt. State *v.* Howell, 11 Mo. 613.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New York.— People *v.* Lownds, 1 Hall 225; People *v.* Tefft, 3 Cow. 340; Herring *v.* Tylee, 1 Johns. Cas. 31; Matter of Vanderbilt, 4 Johns. Ch. 57. But see Matter of Percy, 2 Daly 530; People *v.* Mead, 1 N. Y. Crim. 417.

North Carolina.— Baker *v.* Blount, 3 N. C. 359.

Ohio.— Morris *v.* Marcy, 4 Ohio 83.

Pennsylvania.— Com. *v.* McClure, 10 Wkly. Notes Cas. 466.

South Carolina.— *Ex p.* Thurmond, 1 Bailey 605. But see Lott *v.* Burrel, 2 Mill 167.

Wisconsin.— Haight *v.* Lucia, 36 Wis. 355.

United States.— U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108.

See 10 Cent. Dig. tit. "Contempt," § 167.

27. Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1; Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

28. Hummell's Case, 9 Watts (Pa.) 416.

Order to show cause.— Interrogatories are not necessary on the hearing of an order to show cause. New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Pitt *v.* Davison, 37 N. Y. 235, 3 Abb. Pr. N. S. (N. Y.) 398, 34 How. Pr. (N. Y.) 355; Taylor *v.* Baldwin, 14 Abb. Pr. (N. Y.) 166. The court, however, may permit the moving party to file interrogatories and require specific answer to be made thereto. Witter *v.* Lyon, 34 Wis. 564.

29. Watson *v.* Fitzsimmons, 5 Duer (N. Y.) 629; Clapp *v.* Lathrop, 23 How. Pr. (N. Y.) 423; *Ex p.* Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150.

30. Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50; *Ex p.* Thurmond, 1 Bailey (S. C.) 605.

Refusal of executor to pay money.— The rule that a surrogate cannot imprison without filing written interrogatories and giving the party an opportunity of answering does not apply to a commitment for contempt on an executor's neglect and refusal to pay money as directed in a decree. *In re* Watson, 5 Lans. (N. Y.) 466.

31. Smith *v.* Waalkes, 109 Mich. 16, 66 N. W. 679; State *v.* Ackerson, 25 N. J. L. 209; People *v.* Anthony, 7 N. Y. App. Div.

where the affidavits of complainant are of such credit as not to be affected by the denial of defendant under oath.[32] There is further authority to the effect that a person brought into court for contempt may submit his contempt without interrogatories or he may demand the filing of interrogatories.[33]

2. SCOPE. The interrogatories must be limited to those offenses which are set forth in the application for the attachment.[34]

3. TIME OF FILING. Unless the time for filing interrogatories is provided by statute or rule of court, it may be fixed by order,[35] and if they are not filed within the time specified the proceedings may be dismissed.[36]

4. AMENDMENT. The interrogatories may be amended or additional interrogatories filed for the purpose of explaining an ambiguity and obtaining a fuller answer.[37]

M. Answer, Plea, or Counter-Affidavit — 1. IN GENERAL. The trial for contempt not committed in the presence of the court, if not had on interrogatories,[38] may be on answer, plea, counter-affidavit or some form of pleading presented as a defense by the one charged.[39]

2. CONCLUSIVENESS OF ANSWER. At common law, where the answer of the accused squarely met and denied the alleged contempt, such answer was conclusive and no further evidence could be received, and this rule has been followed in many cases.[40] Authority, however, is not wanting in support of the chancery

132, 40 N. Y. Suppl. 279; People *v.* Cartwright, 11 Hun (N. Y.) 362; State *v.* Brophy, 38 Wis. 413.

32. Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *In re* Yates, 4 Johns. (N. Y.) 317.

33. State *v.* Matthews, 37 N. H. 450; Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,616, Wall. Sr. 77.

Court may order an examination on interrogatories. State *v.* Soulé, 8 Rob. (La.) 500; People *v.* Ball, 5 Cow. (N. Y.) 415; Higbie *v.* Brown, 1 Barb. Ch. (N. Y.) 320.

34. Brown *v.* Andrews, 1 Barb. (N. Y.) 227; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76.

In a proceeding for contempt in a civil action against members of a corporation which was restrained from making a certain grant, interrogatories to defendant as to whether or not such corporation passed a certain vote to effect such grant, and whether or not defendants voted for the passage thereof are competent. People *v.* Compton, 1 Duer (N. Y.) 512.

35. Herring *v.* Tylee, 1 Johns. Cas. (N. Y.) 31.

36. Jewett *v.* Dringer, 27 N. J. Eq. 271; People *v.* Ten Eyck, 2 Wend. (N. Y.) 617. See also Allen City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

37. State *v.* Matthews, 37 N. H. 450; People *v.* Brown, 6 Cow. (N. Y.) 41; Herring *v.* Tylee, 1 Johns. Cas. (N. Y.) 31.

38. See *supra*, I, B, 3.

39. *California.*— *In re* Buckley, 69 Cal. 1, 10 Pac. 69.

Kansas.— State *v.* Anders, 64 Kan. 742, 68 Pac. 668.

Nebraska.—Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

New York.— People *v.* Murphy, 1 Daly 462.

United States.— Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,616, Wall. Sr. 77; *Ex p.* Humphrey, 12 Fed. Cas. No. 6,867, 2 Blatchf. 228.

See 10 Cent. Dig. tit. "Contempt," § 171.

Affidavits should not be excluded unless irrelevant, where the statute provides that the court may receive affidavits. People *v.* Murphy, 1 Daly (N. Y.) 462.

Compelling answer.— Where defendant has submitted himself to a personal examination under a court rule he cannot be compelled to put in an answer. Merritt *v.* Blackwell, 1 Edw. (N. Y.) 466.

Cross-motion.— Defendant may make a cross-motion to dissolve the injunction where the proceeding is for attachment for violation of the injunction. Field *v.* Hunt, 13 Abb. Pr. (N. Y.) 320, 22 How. Pr. (N. Y.) 329.

40. *Illinois.*— Oster *v.* People, 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462; Buck *v.* Buck, 60 Ill. 105; Crook *v.* People, 16 Ill. 534; Welch *v.* People, 30 Ill. App. 399.

Indiana.— Shirk *v.* Cox, 141 Ind. 301, 40 N. E. 750; Stewart *v.* State, 140 Ind. 7, 39 N. E. 508; Fishback *v.* State, 131 Ind. 304, 30 N. E. 1088; Wilson *v.* State, 57 Ind. 71; Burke *v.* State, 47 Ind. 528; State *v.* Earl, 41 Ind. 464.

Kansas.— State *v.* Vincent, 46 Kan. 618, 620, 26 Pac. 939.

Maryland.— Murdock's Case, 2 Bland 461, 20 Am. Dec. 381.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New York.— Jackson *v.* Smith, 5 Johns. 115.

North Carolina.— *In re* Moore, 63 N. C. 397.

North Dakota.— Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

Pennsylvania.— Thomas *v.* Cummins, 1 Yeates 40; Com. *v.* Snowden, 1 Brewst. 218.

South Carolina.— *In re* Corbin, 8 S. C. 390.

rule,[41] which permits inquiry to be made into the truth of the answer filed by the accused.[42]

N. Evidence — 1. In General. In case of a direct contempt the court may determine all the necessary facts without other evidence of what occurred in court than the court's judicial knowledge.[43] In case of a contempt not committed in the presence of the court, the evidence admissible should only be such as would be admissible on the trial of an indictment for the same offense.[44]

2. Burden of Proof. Defendant is entitled to the presumption of innocence and the complainant must prove him guilty.[45] If, however, an affirmative defense is set up the burden is upon defendant to sustain it.[46]

3. Sufficiency. A clear case of contempt of court must be established by the evidence.[47] Proceedings in contempt being in their nature criminal in character

United States.— *In re* Perkins, 100 Fed. 950; *In re* May, 1 Fed. 737, 2 Flipp. 562; Vose *v.* Internal Imp. Fund, 28 Fed. Cas. No. 17,008, 2 Woods 647.

See 10 Cent. Dig. tit. "Contempt," § 172.

As to intention as element of offense see *supra*, V, E.

Evasive answer.— The affidavit filed in answer to a rule to show cause is to be taken as true, but if it be evasive and does not meet the charge alleged, the court will require him to answer interrogatories. *Ex p.* Strong, 5 City Hall Rec. (N. Y.) 8.

41. Buck *v.* Buck, 60 Ill. 105; Nohle Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742; *In re* Underwood, 2 Humphr. (Tenn.) 46; U. S. *v.* Anonymous, 21 Fed. 761.

42. Territory *v.* Murray, 7 Mont. 251, 15 Pac. 145; Crow *v.* State, 24 Tex. 12; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864; U. S. *v.* Debs, 64 Fed. 724; U. S. *v.* Anonymous, 21 Fed. 761.

Defendant is not confined to his own answers to interrogatories, but may examine witnesses to exculpate himself. Magennis *v.* Parkhurst, 4 N. J. Eq. 433.

Discretion of court.— Where the matter rests in the discretion of the surrogate, he is not bound to accept as true the uncorroborated assertions of a defaulting executor. *In re* Snyder, 103 N. Y. 178, 8 N. E. 479.

43. Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Other contempts.— But in the trial of a contempt committed in the presence of the court it is not competent for the judge to take judicial notice of and consider the fact that defendant had been guilty of another contempt of the same court for which he had been tried and found guilty. Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638. And see William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121, holding that in a proceeding for the violation of a temporary injunction, evidence of other acts of contempt than those charged is in general inadmissible, but may be admitted where the accused seeks to mitigate his offense by showing that he acted under innocent mistake for the purpose of showing the spirit in which the acts charged were committed.

44. *In re* Bates, 55 N. H. 325.

Admissions.— Statements of a witness before a referee in proceedings supplementary to execution may be used as admissions against him in contempt proceedings. Parks *v.* Johnson, 86 Iowa 475, 53 N. W. 285.

Answer as evidence.— In a proceeding for contempt the sworn answers of the party are evidence in his favor. *In re* Pitman, 19 Fed. Cas. No. 11,184, 1 Curt. 186. See also Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

Facts occurring after the filing of the motion are not proper evidence. Matter of Amerman, 3 N. Y. St. 356.

Intent.— Evidence is admissible as to the meaning and intent of a publication. Henry *v.* Ellis, 49 Iowa 205.

45. Harris *v.* Clark, 10 How. Pr. (N. Y.) 415.

Refusal to explain.— Where an officer accused of contempt in giving information of the issuance of a criminal warrant refuses to explain suspicious circumstances he cannot claim the benefit of the absolute presumption of innocence accorded persons under the statute accused of crime who refuse to testify. State *v.* O'Brien, 87 Minn. 161, 91 N. W. 297.

46. Call *v.* Pike, 65 Me. 217 (holding that where a witness refuses to give his deposition, and relies on the personal disqualification of the magistrate, the burden is on him to show the disqualification); Baker *v.* Stephens, 10 Abb. Pr. N. S. (N. Y.) 1 (holding that where one moves to set aside an attachment for irregularities or defects in the proceedings he must show affirmatively the defect or omission, in order to throw upon the other party the burden of showing that the proceedings are regular). See also Fenlon *v.* Dempsey, 50 Hun (N. Y.) 131, 2 N. Y. Suppl. 763, 19 N. Y. St. 231, 15 N. Y. Civ. Proc. 393, 22 Abb. N. Cas. (N. Y.) 114, holding that where the contempt consists in a refusal of the officers of a corporation to produce certain books, which are required by law to be kept by a corporation, there is a presumption that they have been kept, and the burden is upon the officers refusing to produce the books to show that they have not been kept or are not under their control.

47. *Georgia.*— Dobbs *v.* State, 55 Ga. 272.

Michigan.— Verplank *v.* Hall, 21 Mich. 469.

New Jersey.— Probasco *v.* Probasco, 30 N. J. Eq. 61; Magennis *v.* Parkhurst, 4 N. J. Eq. 433.

the strict rule of construction applicable to a criminal prosecution obtains therein,[48] and presumptions and intendments will not be indulged to sustain a conviction.[49] The guilt must be established by clear and satisfactory evidence; a mere preponderance is not enough.[50] The accusations must be supported by evidence sufficient to convince the mind of the trior beyond a reasonable doubt of the actual guilt of the accused.[51]

O. Hearing and Determination — 1. RIGHT TO HEARING. One charged with constructive contempt must be given an opportunity to make explanation or defense.[52] Judgment rendered without a hearing or an opportunity to defend is void.[53]

2. TIME OF HEARING. Unless restrained by provisions of statute[54] the court

New York.— Slater *v.* Merritt, 75 N. Y. 268; Dinsmoor *v.* Commercial Travellers' Assoc., 60 Hun 576, 14 N. Y. Suppl. 676, 38 N. Y. St. 624.

North Carolina.— *In re* Patterson, 99 N. C. 407, 6 S. E. 643.

South Dakota.— Burdick *v.* Marshall, 8 S. D. 308, 66 N. W. 462.

United States.— Woodruff *v.* North Bloomfield Gravel Min. Co., 45 Fed. 129; *In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148; King *v.* Ohio, etc., R. Co., 14 Fed. Cas. No. 7,800, 7 Biss. 529.

See 10 Cent. Dig. tit. "Contempt," § 187.

48. See *supra*, VII, A, 2.

49. Hydock *v.* State, 59 Nebr. 296, 80 N. W. 902; Wilcox *v.* State, 46 Nebr. 402, 64 N. W. 1072; Hawes *v.* State, 46 Nebr. 149, 64 N. W. 699; Zimmerman *v.* State, 46 Nebr. 13, 64 N. W. 375; O'Chander *v.* State, 46 Nebr. 10, 64 N. W. 373.

50. *California.*— *In re* Taylor, (1886) 10 Pac. 88; *In re* Buckley, 69 Cal. 1, 10 Pac. 69.

Connecticut.— Sherwood *v.* Sherwood, 32 Conn. 1.

Minnesota.— Benbow *v.* Kellom, 52 Minn. 433, 54 N. W. 482.

New Hampshire.— *In re* Bates, 55 N. H. 325; Hall *v.* Young, 37 N. H. 134.

New Jersey.— State *v.* Raborg, 5 N. J. L. 545; Probasco *v.* Probasco, 30 N. J. Eq. 61.

New York.— Sutton *v.* Davis, 64 N. Y. 633; Jackson *v.* Virgil, 3 Johns. 138.

Tennessee.— Harwell *v.* State, 10 Lea 544.

West Virginia.— State *v.* Ralphsnyder, 34 W. Va. 352, 12 S. E. 721; State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

See 10 Cent. Dig. tit. "Contempt," § 187.

51. Weeks *v.* Smith, 3 Abb. Pr. (N. Y.) 211; Potter *v.* Low, 16 How. Pr. (N. Y.) 549; State *v.* Davis, 50 W. Va. 100, 40 S. E. 331; U. S. *v.* Jose, 63 Fed. 951; Accumulator Co. *v.* Consolidated Electric Storage Co., 53 Fed. 793; Birdsell *v.* Hagerstown, etc., Mfg. Co., 3 Fed. Cas. No. 1,436, 1 Hughes 59; *In re* Judson, 14 Fed. Cas. No. 7,563, 3 Blatchf. 148.

52. *Connecticut.*— Welch *v.* Barber, 52 Conn. 147, 52 Am. Rep. 567.

Georgia.— Wheeler *v.* Thomas, 57 Ga. 161.

Indiana.— Whittem *v.* State, 36 Ind. 196.

Iowa.— Russell *v.* French, 67 Iowa 102, 24 N. W. 741; Wise *v.* Chaney, 67 Iowa 73, 24 N. W. 599; Hogue *v.* Hayes, 53 Iowa 377, 5 N. W. 541; State *v.* Duffy, 15 Iowa 425. But see Hardin *v.* Silvari, 114 Iowa 157, 86 N. W. 223.

Kansas.— State *v.* Anders, 64 Kan. 742, 68 Pac. 668; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

Louisiana.— State *v.* Judges Civil Dist. Ct., 32 La. Ann. 1256.

Maryland.— Binney's Case, 2 Bland 99.

Minnesota.— State *v.* Willis, 61 Minn. 120, 63 N. W. 169; State *v.* Ives, 60 Minn. 478, 62 N. W. 831.

Missouri.— Glover *v.* American Casualty Ins., etc., Co., 130 Mo. 173, 32 S. W. 302.

New Jersey.— Holt's Case, 55 N. J. L. 384, 27 Atl. 909.

New York.— Slater *v.* Merritt, 75 N. Y. 268; Saltus *v.* Saltus, 2 Lans. 9; Albany City Bank *v.* Schermerhorn, 9 Paige 372, 38 Am. Dec. 551.

Ohio.— Post *v.* State, 14 Ohio Cir. Ct. 111, 7 Ohio Cir. Dec. 257; Effinger *v.* State, 11 Ohio Cir. Ct. 389.

Tennessee.—Rutherford *v.* Metcalf, 5 Hayw. 58.

Texas.— Crow *v.* State, 24 Tex. 12.

Utah.— U. S. *v.* Church of Jesus Christ, 6 Utah 9, 21 Pac. 523.

Vermont.— Ward *v.* Ward, 70 Vt. 430, 41 Atl. 435.

West Virginia.— Hebb *v.* Tucker County Ct., 48 W. Va. 279, 37 S. E. 676; State *v.* Gibson, 33 W. Va. 97, 10 S. E. 58.

United States.— *Ex p.* Savin, 131 U. S. 267, 9 S. Ct. 699, 33 L. ed. 150; *In re* Acker, 66 Fed. 290.

England.— Matter of Pollard, L. R. 2 P. C. 106, 5 Moore P. C. N. S. 111, 16 Eng. Reprint 457.

See 10 Cent. Dig. tit. "Contempt," § 193.

Hearing by counsel.— In Alabama it has been held that there is no provision of law which secures to the accused the right to be heard by counsel. *Ex p.* Hamilton, 51 Ala. 66.

Opportunity to exculpate.— Where the proceeding is to punish for contempt in failing to obey a *subpœna duces tecum*, and it is not clear that defendant, being an illiterate person, knew the contents of the subpœna, the court should notify her of the effect of her disobedience and give her an opportunity to produce the document before striking out her answer. Frazer *v.* Lynch, 88 Cal. 621, 26 Pac. 344.

53. Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Holt's Case, 55 N. J. L. 384, 27 Atl. 909.

54. People *v.* Rice, 57 Hun (N. Y.) 62, 10 N. Y. Suppl. 270, 32 N. Y. St. 7, holding that

may fix the time or term of court at which the hearing of the contempt proceeding is to occur.[55]

3. REFERENCE. Particular questions or issues upon which to take testimony may, within the discretion of the court, be referred to a referee, master, or other designated person.[56]

4. MATTERS DETERMINED ON HEARING. The inquiry is limited to the issues. Incidental or collateral questions cannot be considered or determined.[57] Thus where the alleged contempt consists in the failure to comply with the terms of a court order or decree, inquiry into the merits of the order or decree will not be allowed.[58]

P. Trial by Jury. By the great weight of authority one charged with contempt is not entitled as of right to a trial by jury.[59] The court, however, may in

where the proceeding for contempt is statutory and the mode pointed out by statute, the proceeding cannot be held at a special term.

55. State *v.* Collins, 62 N. H. 694; Langerman *v.* McAdam, 6 Misc. (N. Y.) 374, 26 N. Y. Suppl. 755, 56 N. Y. St. 400; Boudinot *v.* Symmes, 3 Fed. Cas. No. 1,695, Wall. C. C. 139.

Coming in of reference.— The court may fix a time for hearing on the coming in of a reference, without regard to the rule providing for time to file exceptions. *In re* Steinert, 24 Hun (N. Y.) 246.

Contemnor in custody.— Where the party is in custody on an attachment, he will be entitled to a hearing before any other matter is presented to the court. Binney's Case, 2 Bland (Md.) 29.

56. *New York.*— Aldinger *v.* Pugh, 57 Hun 181, 10 N. Y. Suppl. 684, 32 N. Y. St. 513, 19 N. Y. Civ. Proc. 91; People *v.* Alexander, 3 Hun 211, 5 Thomps. & C. 297; Davies *v.* Davies, 20 Abb. N. Cas. 170; Albany City Bank *v.* Schermerhorn, 9 Paige 372, 38 Am. Dec. 551. But see Conover *v.* Wood, 5 Abb. Pr. 84.

Tennessee.— Robins *v.* Frazier, 5 Heisk. 100.

Wisconsin.— *In re* Day, 34 Wis. 638.

United States.— Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76; *In re* South Side R. Co., 22 Fed. Cas. No. 13,190, 7 Ben. 391.

England.— Hammond *v.* Shelley, 2 Ch. Cas. 100; Harvey *v.* Harvey, 2 Ch. Cas. 82; Anonymous, Mosely 85.

See 10 Cent. Dig. tit. "Contempt," § 194; and REFERENCES.

Proceedings at reference.— Where a reference has been made to a master to examine defendant on interrogatories, and take and report proofs, this does not authorize the master to receive *ex parte* affidavits, without a special clause to that effect in the reference. Cumming *v.* Waggoner, 7 Paige (N. Y.) 603.

57. *Connecticut.*— William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

Iowa.— State *v.* Baldwin, 57 Iowa 266, 10 N. W. 645.

Massachusetts.— Hamlin *v.* New York, etc., R. Co., 170 Mass. 548, 49 N. E. 922.

New York.— People *v.* Feitner, 53 N. Y. App. Div. 181, 65 N. Y. Suppl. 935; Cunningham *v.* Pell, 6 Paige 655; People *v.* Spalding, 2 Paige 326; Matter of Vanderbilt, 4 Johns. Ch. 57.

West Virginia.— State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

See 10 Cent. Dig. tit. "Contempt," § 192.

The title to property attached in the hands of a receiver cannot be settled in a proceeding to punish the officer for contempt in making the attachment. Albany City Bank *v.* Schermerhorn, 1 Clarke (N. Y.) 297. See also *In re* Day, 34 Wis. 638.

58. Koehler *v.* Farmers', etc., Bank, 14 N. Y. Civ. Proc. 71; People *v.* Spalding, 2 Paige (N. Y.) 326; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

59. *Alabama.*— *Ex p.* Hamilton, 51 Ala. 66.

Arkansas.— Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Connecticut.— Huntington *v.* McMahon, 48 Conn. 174.

Georgia.— Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

Indiana.— Garrigus *v.* State, 93 Ind. 239.

Iowa.— McDonnell *v.* Henderson, 74 Iowa 619, 38 N. W. 512; Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551; *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Kansas.— State *v.* Durein, 46 Kan. 695, 27 Pac. 148.

Kentucky.— Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480; Wages *v.* Com., 13 Ky. L. Rep. 925.

Michigan.—*In re* Chadwick, 109 Mich. 588, 67 N. W. 1071.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Missouri.— Hart *v.* Robinett, 5 Mo. 11.

Nebraska.— Gandy *v.* State, 13 Nebr. 445, 14 N. W. 143.

New Hampshire.— State *v.* Matthews, 37 N. H. 450.

New Jersey.— State *v.* Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

New York.— People *v.* Rice, 80 Hun 437, 30 N. Y. Suppl. 457, 62 N. Y. St. 289; Albany City Bank *v.* Schermerhorn, 9 Paige 372, 38 Am. Dec. 551.

North Carolina.— *In re* Deaton, 105 N. C. 59, 11 S. E. 244.

North Dakota.— Noble Tp. *v.* Aasen, 10

its discretion avail itself of a jury and have their verdict upon a disputed and doubtful matter of fact.[60]

Q. Judgment or Order — 1. Necessity. Before a person can be punished for a contempt, it must appear that there has been an adjudication and conviction or judgment adjudging the party guilty of a contempt of court.[61]

2. Time of Rendition — a. Direct Contempt. In direct contempt judgment may be given forthwith.[62] But the passing of sentence may be deferred in order to enable explanation of the actions to the court to advise it as to the measure of punishment.[63]

b. Constructive Contempt. Judgment in case of constructive contempt may be pronounced, according to the circumstances, immediately at the conclusion of the hearing, unless forbidden by statute.[64]

3. Requisites and Validity — a. In General. The judgment should state upon its face the cause of contempt.[65] It has been held, however, that if the facts con-

N. D. 264, 86 N. W. 742; State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

Ohio.— Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149.

Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.

Pennsylvania.— Respublica *v.* Oswald, 1 Dall. 319, 1 L. ed. 155, 1 Am. Dec. 246.

South Dakota.— State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

Texas.— Crow *v.* State, 24 Tex. 12.

Virginia.— Carter *v.* Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

United States.— Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91; *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801; King *v.* Ohio, etc., R. Co., 14 Fed. Cas. No. 7,800, 7 Biss. 529; U. S. *v.* Duane, 25 Fed. Cas. No. 14,997, Wall. Sr. 102.

See 10 Cent. Dig. tit. "Contempt," § 188; and Juries.

60. Thompson *v.* Turner, 69 Ga. 219; Baker *v.* Gordon, 86 N. C. 116, 41 Am. Rep. 448.

61. *Connecticut.*— Sherwood *v.* Sherwood, 32 Conn. 1.

Florida.— Palmer *v.* Palmer, 28 Fla. 295, 9 So. 657.

Illinois.— Andrews *v.* Knox County, 70 Ill. 65.

Kansas.— *In re* Farr, 41 Kan. 276, 21 Pac. 273; Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

Michigan.— *In re* Simons, 49 Mich. 511.

Mississippi.— *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Missouri.— *Ex p.* O'Brien, 127 Mo. 477, 30 S. W. 158.

New York.— Matter of Crosher, 11 N. Y. Suppl. 504, 25 Abb. N. Cas. 89.

Texas.— *Ex p.* Kearby, 35 Tex. Crim. 634, 34 S. W. 962.

Wisconsin.— *In re* Blair, 4 Wis. 522.

See 10 Cent. Dig. tit. "Contempt," § 195.

But where a commitment is made until property is delivered as ordered, it is not necessary that a judgment finding the person guilty of contempt of court appear. Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 11 S. E. 599.

62. Crane *v.* Sayre, 6 N. J. L. 110.

63. *In re* Tift, 11 Fed. 463.

64. Sloan *v.* Johnson, 86 Iowa 750, 53 N. W. 268; McGlasson *v.* Johnson, 86 Iowa 477, 53 N. W. 267; Jackson *v.* Smith, 5 Johns. (N. Y.) 115; Thomas *v.* Cummins, 1 Yeates (Pa.) 1.

A judgment which purports to have been rendered on a day when the court held no session is void. *Ex p.* Rust, 38 Tex. 344.

Suspension of judgment.— The court may properly suspend final action or order adjudging a party guilty, to enable the offender to comply with the original order or to perform some act as a substitute for compliance. People *v.* Bergen, 53 N. Y. 404. See also Billingsley *v.* People, 86 Ill. App. 283, holding that a judgment committing a person which does not give the person committed the right to purge himself by the performance of the decree is erroneous.

65. *Ex p.* Carroll, (Cal. 1893) 34 Pac. 518; *Ex p.* Field, 1 Cal. 187; People *v.* Turner, 1 Cal. 152; *In re* Deaton, 105 N. C. 59, 11 S. E. 244; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404 *Contra, Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Commitment by notary.— Where a witness is committed by a notary for refusing to answer a question, the return of the officer must show that the notary had authority to take the deposition. Burnside *v.* Dewstoe, 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197.

Statutory requirements relative to the recitals of the judgment or order must be observed. Swenarton *v.* Shupe, 40 Hun (N. Y.) 41. So under a statute requiring the court on adjudging one guilty of contempt, without written accusation, to enter a judgment specifying the conduct constituting the contempt, the language claimed to be insulting and scandalous should be set out in the judgment, and the designation that it was "insulting and scandalous" is not sufficient. *In re* Elliott, 9 Kan. App. 265, 59 Pac. 673; *In re* Moxcey, 9 Kan. App. 262, 59 Pac. 672.

In New York an order adjudging a party guilty of a civil contempt must show that the misconduct defeated, impaired, impeded, or prejudiced the rights or remedies of the other party. Socialistic Co-operative Pub.

stituting the contempt are set forth with particularity in the affidavits and reports filed, the order adjudging the contempt need not state the facts.[66] The punishment inflicted should also be clearly and specifically stated.[67] And a judgment directing the performance of any acts necessary to purge the contempt should state the manner in which these acts shall be performed.[68]

b. Alternative Judgment or Order. The judgment or order must be definite and certain in its terms.[69] Alternative judgments or orders are not allowed either in civil or criminal contempts.[70]

c. Partial Invalidity. The fact that the judgment may be void in part does not render the whole judgment a nullity.[71]

4. Opening and Vacating. The general rule is that after the expiration of the term of court at which the judgment or order was granted imposing a fine the court has no power to alter or change it.[72] But an order of court which is not a

Assoc. *v.* Kuhn, 51 N. Y. App. Div. 583, 64 N. Y. Suppl. 933; Mendel *v.* Mendel, 42 Hun (N. Y.) 660, 4 N. Y. St. 556; Rugg *v.* Spencer, 59 Barb. (N. Y.) 383; Wolfe *v.* Knight, 15 Misc. (N. Y.) 438, 37 N. Y. Suppl. 210, 72 N. Y. St. 790; Wolf *v.* Buttner, 6 Misc. (N. Y.) 119, 26 N. Y. Suppl. 52, 57 N. Y. St. 861; Weston *v.* Watts, 15 N. Y. St. 123; Duffus *v.* Brown, 12 N. Y. St. 454. But an order to punish a witness for refusal to answer pertinent questions need not recite that the proceedings had been prejudiced by such refusal. Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493.

Form of judgment or order in whole, in part, or in substance is set out in:

Colorado.— Shore *v.* People, 26 Colo. 516, 59 Pac. 49.

Illinois.— McDonald *v.* People, 86 Ill. App. 558; Billingsley *v.* People, 86 Ill. App. 233.

Kansas.— *In re* Elliott, 9 Kan. App. 265, 59 Pac. 673; *In re* Moxcey, 9 Kan. App. 262, 59 Pac. 672.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

Texas.— *Ex p.* Ireland, 38 Tex. 344.

Vermont.— Stimpson *v.* Putnam, 41 Vt. 238.

United States.— *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216.

66. *Alabama.*— Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49.

California.— *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110.

Maryland.— *Ex p.* Maulsby, 13 Md. 625, Appendix.

West Virginia.— State *v.* Miller, 23 W. Va. 801.

United States.— Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13.

See 10 Cent. Dig. tit. "Contempt," § 200.

67. Billingsley *v.* People, 86 Ill. App. 233.

An order imposing a fine and imprisonment must designate someone to whom such fine should be paid and the time of imprisonment should be limited by the provision, "Or until discharged according to law." McDonald *v.* People, 86 Ill. App. 558.

68. Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551. See also Bergin *v.* Diering, 70 Hun (N. Y.) 381, 24 N. Y. Suppl. 35, 53 N. Y. St. 894, holding that an order adjudging defendant guilty of a civil contempt which does not describe the acts which constitute the contempt, nor what defendant shall do to purge himself from contempt, nor adjudge that any particular acts were done or omitted which amounted to a contempt, nor that such acts impaired the rights of any party to the action, will be reversed.

69. Taylor *v.* Newblock, 5 Okla. 647, 49 Pac. 1114, holding that a judgment is void for uncertainty which orders that defendant be committed to the county jail until a further order of the court. But see *Ex p.* Harris, 4 Utah 5, 5 Pac. 129, holding that under the statute authorizing the court to punish by fine or imprisonment, and where the contempt consists in omission to perform an act, to imprison until the act is performed, a judgment in a proceeding for contempt, for refusing to answer a question, imposing a fine of twenty-five dollars and ordering the person imprisoned until he answers the question or is released is legal, and is not uncertain or indefinite. See also Shore *v.* People, 26 Colo. 516, 59 Pac. 49.

70. Clements *v.* Tillman, 79 Ga. 451, 5 S. E. 194, 11 Am. St. Rep. 441; Turner *v.* Smith, 90 Mich. 309, 51 N. W. 282; *In re* Seaman, 7 N. Y. Leg. Obs. 70; *In re* Deaton, 105 N. C. 59, 11 S. E. 244.

Where the question whether the acts committed are a contempt are to be decided by another court or depend upon facts yet to be determined, the order punishing for contempt may be in the alternative. *In re* Spofford, 62 Fed. 443.

71. Overend *v.* San Francisco Super. Ct., 131 Cal. 280, 63 Pac. 372; *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110.

Where a judgment is not responsive to the motion to show cause that part of it is void. State *v.* Willis, 61 Minn. 120, 63 N. W. 169. See also Jackson *v.* State, 21 Tex. 668, holding that where the jury in a prosecution against an attorney embrace two grounds in their verdict, one a contempt, and the other malpractice, and the court enters judgment, the judgment in so far as it was founded on contempt is erroneous.

72. Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13. See also *infra*, VIII, E, 1.

Final judgment.—Where the court imposes a fine and imprisonment for five days and

final order may be renewed or annulled at the same or a subsequent term upon motion.[73]

R. Commitment — 1. Necessity of Order. To authorize imprisonment a warrant or order stating the cause of commitment and its term must be issued.[74]

2. Entitlement of Order. While the better practice is to have the mittimus entitled and issued in the regular contempt proceeding it is not fatal that it was issued under the title of the cause in which the contempt is charged.[75]

3. Rendition and Entry of Order. The order need not be in writing and sealed,[76] but should be entered upon the court's minutes.[77]

4. Requisites and Validity of Order — a. In General. The order or warrant of commitment must be definite and certain,[78] must show an adjudication that a

further ordered an imprisonment at the rate of one day for each two dollars of the fine, if not paid, it was a final judgment, and it had no authority at the end of five days' imprisonment to enter another judgment for the fine, and have execution issued. *In re* Barry, 94 Cal. 562, 29 Pac. 1109; Barry *v.* San Francisco Super. Ct., 91 Cal. 486, 27 Pac. 763.

Second motion to set aside.— Under the code giving the surrogate court power to reconsider its decisions, but limiting the exercise and power to the same manner to which it is exercised by a court of record, a surrogate court having issued an order to commit defendant for contempt and denied a motion to set aside the commitment, defendant cannot, after failing to appeal from the order, demand that the court consider a second motion to set aside the commitment, and cannot bring the cause before the supreme court by appeal from an order denying such second motion. Matter of Hayward, 44 N. Y. App. Div. 265, 60 N. Y. Suppl. 636.

73. Wakefield *v.* Moore, 65 Ga. 268.

Thus an order adjudging defendant guilty of contempt, and leaving the amount of pecuniary fine to be determined, gives the court power to make a subsequent order fixing the fine and ordering commitment until the same should be paid. Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13.

Nunc pro tunc entry.— Omissions in the record of what was actually done, but which was not entered on the record, by mistake or neglect, may be made by *nunc pro tunc* orders. *Ex p.* Buskirk, 72 Fed. 14, 18 C. C. A. 410.

74. *Connecticut.*— Sherwood *v.* Sherwood, 32 Conn. 1.

Kansas.— See *In re* Farr, 41 Kan. 276, 21 Pac. 273.

New York.— Plattshurgh First Nat. Bank *v.* Fitzpatrick, 80 Hun 75, 30 N. Y. Suppl. 15, 61 N. Y. St. 766.

Texas.— *Ex p.* Kearby, 35 Tex. Crim. 531, 34 S. W. 635.

United States.— *Ex p.* Burford, 4 Fed. Cas. No. 2,149, 1 Cranch C. C. 456.

See 10 Cent. Dig. tit. "Contempt," § 203.

An arrest under a bench warrant of a person indicted for criminal contempt is not a commitment. People *v.* Mead, 1 N. Y. Crim. 417.

A person imprisoned under an illegal commitment cannot be held by subsequently making out a legal commitment. *In re* Shanks, 15 Abb. Pr. N. S. (N. Y.) 38. So where one on appearing and purging the contempt is discharged without day he cannot be again committed on the attachment proceeding. *In re* Brown, 4 Colo. 438. But a party committed for contempt until he comply with the order of the court, if released on bail, may be recommitted. U. S. *v.* Sowles, 16 Fed. 536.

75. *In re* Hannberger, 10 Ohio Cir. Dec. 561.

76. *Ex p.* Percy, 2 Daly (N. Y.) 530, holding that where the contempt is committed in the presence of the court, an order of the court is a sufficient commitment. But see *Ex p.* Kearby, 35 Tex. Crim. 634, 34 S. W. 962, holding that an oral order of commitment is insufficient.

Defendant's presence is not necessary when the final order of commitment is made. Barclay *v.* Barclay, 83 Ill. App. 366 [*affirmed* in 184 Ill. 471, 56 N. E. 821]. See also Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

77. *Ex p.* Paris, 18 Fed. Cas. No. 10,714, 3 Woodb. & M. 227.

78. *Alabama.*— *Ex p.* Walker, 25 Ala. 81.

California.— People *v.* Turner, 1 Cal. 152. See also *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110.

Illinois.— People *v.* Pirfenbrink, 96 Ill. 68; Kahlbon *v.* People, 101 Ill. App. 567.

Iowa.— State *v.* Myers, 44 Iowa 580.

New York.— Flor *v.* Flor, 73 N. Y. App. Div. 262, 76 N. Y. Suppl. 813.

Texas.— *Ex p.* Smith, 40 Tex. Crim. 179, 49 S. W. 396; *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Utah.— See *In re* Whitmore, 9 Utah 441, 35 Pac. 524.

England.— Yoxley's Case, 1 Salk. 351.

See 10 Cent. Dig. tit. "Contempt," § 205.

Opportunity to comply with order.— The fact that the court gave the party an opportunity to comply with the terms of the order before commitment should issue did not affect the validity of the order of commitment. *In re* Blumenthal, 22 Misc. (N. Y.) 704, 50 N. Y. Suppl. 49 [*affirming* 22 Misc. (N. Y.) 764, 48 N. Y. Suppl. 1101].

Variance.— A mittimus for contempt which is at variance with the order disobeyed is fatally defective. People *v.* Bergen, 6 Hun (N. Y.) 267.

contempt has been committed,[79] and must set forth such facts as show jurisdiction.[80] All mandatory statutory requirements respecting the form and contents of the warrant or order must be substantially observed.[81] If the order or warrant is issued to commit for failure to pay a fine imposed for contempt, the amount of the fine should be specified.[82] Unnecessary words and phrases inserted will not render the commitment void but may be treated as surplusage.[83]

b. Alternative Order. An alternative order of commitment is void.[84]

c. Setting Forth Facts Constituting Contempt. The warrant of commitment should state the facts upon which the order is founded.[85] Authority is not wanting, however, in support of the view that the particular facts which constitute the alleged contempt need not be set forth.[86] Under a code provision authorizing imprisonment, where the contempt charged consists in the failure to perform an act or duty which is within the power of the offender to perform the warrant must specify the act or duty required to be performed,[87] and must further set

Form of order of commitment in whole, in part, or in substance is set out in:

Maine.— Morrison *v.* McDonald, 21 Me. 550.

Massachusetts.— Cartwright's Case, 114 Mass. 230.

New York.— People *v.* Sheriff, 7 Abb. Pr. 96.

South Carolina.— *In re* Stokes, 5 S. C. 71.

Texas.— *Ex p.* Robertson, 27 Tex. App. 623, 11 S. W. 669, 11 Am. St. Rep. 207.

Vermont.— Stimpson *v.* Putnam, 41 Vt. 238.

79. *Ex p.* Van Sandau, 1 De Gex 55, 8 Jur. 193, 15 L. J. Bankr. 13, 1 Phil. 445, 19 Eng. Ch. 445.

80. Overend *v.* San Francisco Superior Ct., 131 Cal. 280, 63 Pac. 372; Seaman *v.* Duryea, 11 N. Y. 324; Butterfield *v.* O'Connor, 3 Ohio Dec. (Reprint) 34, 2 Wkly. L. Gaz. 192; Com. *v.* Perkins, 124 Pa. St. 36, 16 Atl. 525, 2 L. R. A. 223.

But where the record of the proceedings upon which the order of commitment is based shows that the court had jurisdiction it is not essential that the order should recite the facts. Tolman *v.* Leonard, 6 App. Cas. (D. C.) 224.

The order need not set out prior proceedings and all the preliminaries to warrant imprisonment. State *v.* Becht, 23 Minn. 411; *In re* Muller, 67 Hun (N. Y.) 34, 21 N. Y. Suppl. 678, 51 N. Y. St. 27; *In re* Davison, 13 Abb. Pr. (N. Y.) 129; People *v.* Kelly, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309; People *v.* Nevins, 1 Hill (N. Y.) 154.

81. *In re* Farr, 41 Kan. 276, 21 Pac. 273.

Where by statute the evidence upon which the action is founded must be in writing and filed, an order of commitment made when the evidence is not of record, is void. Dorgan *v.* Granger, 76 Iowa 156, 40 N. W. 697.

82. Jernee *v.* Jernee, 54 N. J. Eq. 657, 35 Atl. 458.

An order of commitment imposing a fine stating the amount, with interest from a certain date, is sufficient as to amount. *In re* Bernhard, 1 N. Y. Suppl. 225, 16 N. Y. St. 240, 14 N. Y. Civ. Proc. 195.

83. *In re* Bernhard, 48 Hun (N. Y.) 620, 1 N. Y. Suppl. 225, 16 N. Y. St. 240, 14 N. Y. Civ. Proc. 195; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290.

84. Swett *v.* Thorkildsen, 115 Mich. 314, 73 N. W. 370. But see People *v.* Sickles, 59 Hun (N. Y.) 342, 13 N. Y. Suppl. 101, 36 N. Y. St. 548, holding that the inserting of an alternative provision in the order of commitment, where the court had no power to make it and where no harm was caused the party, will not invalidate the order of commitment.

It is defective if put in the alternative or conditional form as to imprison defendant "unless he shall pay" the fine imposed. Falkenburg *v.* Frank, 19 Misc. (N. Y.) 418, 43 N. Y. Suppl. 1137.

85. *California.*— Overend *v.* San Francisco Super. Ct., 131 Cal. 280, 63 Pac. 372; *Ex p.* Rowe, 7 Cal. 181.

Illinois.— Rawson *v.* Rawson, 35 Ill. App. 505.

Iowa.— Goetz *v.* Stutsman, 73 Iowa 693, 36 N. W. 644; State *v.* Folsom, 34 Iowa 583.

Missouri.— *Ex p.* McKee, 18 Mo. 599.

Nebraska.— Wilcox *v.* State, 46 Nebr. 402, 64 N. W. 1072.

New York.— People *v.* Albany County Ct. Sess., 147 N. Y. 290, 41 N. E. 700; De Witt *v.* Dennis, 30 How. Pr. 131; *In re* Seaman, 7 N. Y. Leg. Obs. 70.

Ohio.— *Ex p.* Woodworth, 6 Ohio S. & C. Pl. Dec. 19, 29 Cinc. L. Bul. 315; *In re* Sims, 4 Ohio S. & C. Pl. Dec. 473, 4 Cinc. L. Bul. 457.

Pennsylvania.— Wilson *v.* Keely, 124 Pa. St. 36, 16 Atl. 528, 23 Wkly. Notes Cas. 193.

Wisconsin.— Poertner *v.* Russell, 33 Wis. 193.

England.— Reg. *v.* Lambeth County Ct. Judge, 36 Wkly. Rep. 475.

See 10 Cent. Dig. tit. "Contempt," § 208.

Where a witness is committed for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment. Wilcox *v.* State, 46 Nebr. 402, 64 N. W. 1072.

86. *Ex p.* Nugent, 18 Fed. Cas. No. 10,375, Brunn. Col. Cas. 296, 1 Hayw. & H. 287. See also Matter of Fernandez, 6 H. & N. 717, 7 Jur. N. S. 529, 30 L. J. C. P. 321, 4 L. T. Rep. N. S. 296, 9 Wkly. Rep. 559; *In re* McAleece, Ir. R. 7 C. L. 146.

87. People *v.* Grant, 50 Hun (N. Y.) 243, 3 N. Y. Suppl. 142, 20 N. Y. St. 48; *Ex p.* Whitmore, 9 Utah 441, 35 Pac. 524; *Ex p.*

forth that it is in the power of the offender to comply with the provisions of the order.[88]

d. Limiting Time of Imprisonment. The order or warrant of commitment must limit the term of imprisonment.[89] It has been held, however, that if the contempt consists of an omission to do that which it is in the power of the offender to do, it is not required that the commitment state the duration of the imprisonment.[90] So a witness who refuses to answer a proper question may be committed "until he may answer." [91]

VIII. PUNISHMENT.

A. Object. Punishment may be (1) to vindicate the dignity of the court from the disrespect shown to it or its orders, and (2) to compel the performance of some order or decree which is in the power of the party to perform and which he refuses to obey.[92]

B. Nature — 1. In General. In the absence of legal restrictions, the court may imprison or fine the offender or do both, or may discharge him absolutely or conditionally.[93] But a statute providing that where a witness refuses to testify

Harris, 4 Utah 5, 5 Pac. 129; State *v.* Milligan, 3 Wash. 144, 28 Pac. 369; State *v.* Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

88. *Ex p.* Cohen, 6 Cal. 318; People *v.* Connor, 15 Abb. Pr. N. S. (N. Y.) 430; *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Failure to pay judgment.— The warrant of commitment of one for failure to pay a judgment need not recite that defendant was able to pay. *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222.

89. *District of Columbia.*— *In re* Marsh, MacArthur & M. 32. But see Tolman *v.* Leonard, 6 App. Cas. 224.

Illinois.— Kahlbon *v.* People, 101 Ill. App. 567; Clark *v.* Parker, 70 Ill. App. 233.

Iowa.— State *v.* Myers, 44 Iowa 580.

New Jersey.— State *v.* Camden, 5 N. J. L. J. 184.

New York.—*In re* Shank, 15 Abb. Pr. N. S. 38.

Oklahoma.— Taylor *v.* Newblock, 5 Okla. 647, 49 Pac. 1114.

Pennsylvania.— Com. *v.* Roberts, 2 Pa. L. J. Rep. 340, 4 Pa. L. J. 126.

Rhode Island.— *In re* Hammel, 9 R. I. 248.

Texas.— *Ex p.* Kearby, 35 Tex. Crim. 531, 34 S. W. 635.

Vermont.— *In re* Leach, 51 Vt. 630.

England.— Rex *v.* James, 5 B. & Ald. 894, 7 E. C. L. 486.

See 10 Cent. Dig. tit. "Contempt," § 206.

Beginning of term.— Where the sentence is imprisonment for a certain length of time, it is not necessary that the sentence should state when the term is to begin. Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Until further order of court.— An order of commitment until further order of court is void for uncertainty. People *v.* Pirfenbrink, 96 Ill. 68; Yeates *v.* People, 6 Johns. (N. Y.) 337 [*reversing* 4 Johns. N. Y.) 317]; *Ex p.* Curtis, 10 Okla. 660, 63 Pac. 963; *Ex p.* Alexander, 2 Am. L. Reg. 44. But an order committing a person for contempt until he shall comply with an order of the court or until discharged by the court is neither uncertain nor indefinite. Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91. See also *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

90. People *v.* Anthony, 7 N. Y. App. Div. 132, 40 N. Y. Suppl. 279; *In re* McAdam, 7 N. Y. Suppl. 454, 27 N. Y. St. 352, 4 Silv. Supreme (N. Y.) 469 [*affirming* 5 N. Y. Suppl. 387]; People *v.* Tamsen, 17 Misc. (N. Y.) 212, 40 N. Y. Suppl. 1047; Anonymous, 18 Abb. N. Cas. (N. Y.) 216; *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

91. People *v.* Fancher, 4 Thomps. & C. (N. Y.) 467. But the commitment of a witness until she should make answer to such legal and proper interrogatories as shall be propounded to her is invalid. The commitment should be until she should be willing to answer the questions propounded. People *v.* Davidson, 35 Hun (N. Y.) 471.

92. Cartwright's Case, 114 Mass. 230; Stimpson *v.* Putnam, 41 Vt. 238; Texas *v.* White, 22 Wall. (U. S.) 157, 22 L. ed. 819; *In re* Perkins, 100 Fed. 950.

Committal for contempt is authorized only with reference to the interest of administration of justice and not for the vindication of the judge as a person. McLeod *v.* St. Aubyn, [1899] A. C. 549, 68 L. J. P. C. 137, 81 L. T. Rep. N. S. 158, 48 Wkly. Rep. 173. See also Kissell *v.* Lewis, 27 Ind. App. 302, 61 N. E. 209.

93. *California.*— *Ex p.* Abbott, 94 Cal. 333, 29 Pac. 622.

Colorado.— Bloom *v.* People, 23 Colo. 416, 48 Pac. 519.

Illinois.— Leopold *v.* People, 140 Ill. 552, 30 N. E. 348 [*affirming* 41 Ill. App. 293]; French *v.* Commercial Nat. Bank, 79 Ill. App. 110.

Louisiana.— State *v.* Keene, 11 La. 596; Territory *v.* Nugent, 1 Mart. 102, 5 Am. Dec. 702.

the judge may commit the offender to jail, etc., does not authorize a fine.[94] And under a statute which provides that when the court orders the payment of money to the injured party this shall stand "instead of a fine," the imposition of a criminal fine, in addition to the requirement of payment to the injured party, is unauthorized.[95]

2. IMPRISONMENT — a. In General. Imprisonment to compel compliance with the mandate of a court order, decree, etc., is generally authorized if it is within the power of the offender to perform.[96]

Michigan.— *In re* Smith Middlings Purifying Co., 86 Mich. 149, 48 N. W. 864.

Nebraska.— Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

New York.— King *v.* Barnes, 113 N. Y. 476, 21 N. E. 182, 23 N. Y. St. 263; Watson *v.* Nelson, 69 N. Y. 536; Pitt *v.* Davison, 37 N. Y. 235; Wheelock *v.* Noonan, 55 N. Y. Super. Ct. 302, 13 N. Y. St. 317; People *v.* Compton, 1 Duer 512; *In re* Hahlin, 53 How. Pr. 501.

Pennsylvania.— Com. *v.* Newton, 1 Grant 453; Com. *v.* Curtis, 14 Phila. 361, 37 Leg. Int. 83.

South Carolina.—*Ex p.* Thurmond, 1 Bailey 605.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Utah.— *In re* Whitmore, 9 Utah 441, 35 Pac. 524.

Wisconsin.— *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

United States.— *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; Texas *v.* White, 22 Wall. 157, 22 L. ed. 819; *Ex p.* Robinson, 19 Wall. 505, 22 L. ed. 205; U. S. *v.* Hudson, 7 Cranch 32, 3 L. ed. 259; *In re* Acker, 66 Fed. 290; Bound *v.* South Carolina R. Co., 57 Fed. 485; Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13.

England.— Plating Co. *v.* Farquharson, 17 Ch. D. 49, 45 J. P. 568, 50 L. J. Ch. 406, 44 L. T. Rep. N. S. 489, 29 Wkly. Rep. 510; *In re* Clements, 46 L. J. Ch. 375, 36 L. T. Rep. N. S. 332; Hunt *v.* Clarke, 58 L. J. Q. B. 490, 61 L. T. Rep. N. S. 343, 37 Wkly. Rep. 724.

See 10 Cent. Dig. tit. "Contempt," § 246 *et seq.*

Criminal contempts, in the absence of statutory regulations, are governed by the common law, and may be punished by either fine or imprisonment or both. Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Annulment of deed.— Where a sale under a fieri facias was fraudulent by reason of collusion between the sheriff and the purchaser, it was held that under the Georgia statute the court could not punish such purchaser in a summary proceeding for contempt by annulling the deed of the land. Harrell *v.* Word, 54 Ga. 649.

94. Press Pub. Co. *v.* Associated Press, 41 N. Y. App. Div. 493, 58 N. Y. Suppl. 708.

95. Haines *v.* Haines, 35 Mich. 138.

96. *Alabama.*— *Ex p.* Walker, 25 Ala. 81.

California.— Dewey *v.* Merced County Super. Ct., 81 Cal. 64, 22 Pac. 333; *Ex p.* Latimer, 47 Cal. 131.

Georgia.— Ryan *v.* Kingsbery, 89 Ga. 228, 15 S. E. 302; Carlton *v.* Carlton, 44 Ga. 216.

Illinois.— Barclay *v.* Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Wightman *v.* Wightman, 45 Ill. 167.

Indiana.— State *v.* Tipton, 1 Blackf. 166.

Iowa.— Eikenberry *v.* Edwards, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360; *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Kansas.— *In re* Burrows, 33 Kan. 675, 7 Pac. 148.

Maryland.— Buckingham *v.* Peddicord, 2 Bland 447.

Massachusetts.— Frankel *v.* Frankel, 173 Mass. 214, 53 N. E. 398, 70 Am. St. Rep. 266.

Michigan.— Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1.

Minnesota.— State *v.* Becht, 23 Minn. 411.

Missouri.— *Ex p.* Renshaw, 6 Mo. App. 474.

New Jersey.— Frank *v.* Harold, (1902) 51 Atl. 774.

New York.— People *v.* Fancher, 2 Hun 226; People *v.* Rogers, 2 Paige 103.

North Carolina.—Williamson *v.* Pender, 127 N. C. 481, 37 S. E. 495; Cromartie *v.* Bladen, 85 N. C. 211; Kane *v.* Haywood, 66 N. C. 1.

Ohio.— *In re* Concklin, 5 Ohio Cir. Ct. 78.

South Carolina.— Kennesaw Mills Co. *v.* Walker, 19 S. C. 104; Lott *v.* Burrel, 2 Mill 167.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Utah.— *Ex p.* Harris, 4 Utah 5, 5 Pac. 129.

Virginia.— Lane *v.* Lane, 4 Hen. & M. 437.

West Virginia.— State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413.

Wisconsin.— *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re* Milburn, 59 Wis. 24, 17 N. W. 965; *In re* Pierce, 44 Wis. 411.

Wyoming.— *Ex p.* Bergman, 3 Wyo. 396, 26 Pac. 914.

United States.— Delgado *v.* Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. ed. 578 [*affirming* 5 N. M. 646, 25 Pac. 948]; *In re* Allen, 1 Fed. Cas. No. 208, 13 Blatchf. 271; Monroe *v.* Bradley, 17 Fed. Cas. No. 9,713, 1 Cranch C. C. 158.

See 10 Cent. Dig. tit. "Contempt," § 251.

As to ability to comply with order see *supra*, III, E, 8.

Commitment is not a sentence for contempt but is an execution of the order, hence a statute limiting imprisonment to contempts committed in the presence of the court is not a limitation. Com. *v.* Perkins, 124 Pa. St. 36, 23 Wkly. Notes Cas. (Pa.) 193, 16 Atl. 525, 2 L. R. A. 223; Com. *v.* Reed, 59 Pa. St. 425.

b. Non-Payment of Fine or Costs. Unless expressly forbidden by statute, where a fine is imposed for a criminal contempt, or a fine or penalty as an indemnity to the party injured for neglect or refusal to obey a court order or decree made for the benefit of such party in a civil action, or where the payment of costs and expenses is adjudged, imprisonment may be inflicted until the judgment for contempt is satisfied.[97]

3. Indemnity to Injured Party — a. In General. Fines for contempt by way of indemnity to the injured party are sometimes imposed.[98] The power of the court to award indemnity to the injured party rests, however, upon statute.[99] Thus a party in contempt cannot be required to pay damages sustained by the injured party, under a statute restricting the punishment to a specified fine or imprisonment for a limited time.[1]

b. Extent of Indemnity — (i) *In General.* In determining the measure of indemnity the extent of injury and proper redress to those whose rights have been impaired or delayed will be considered.[2] The amount of indemnity cannot,

97. *California.*— Matter of Tyler, 64 Cal. 434, 1 Pac. 884; *Ex p.* Crittendon, 62 Cal. 534.

Illinois.— Newton *v.* Locklin, 77 Ill. 103; Brown *v.* People, 19 Ill. 613.

Iowa.— Lanpher *v.* Dewell, 56 Iowa 153, 9 N. W. 101.

Kansas.— *In re* Burrows, 33 Kan. 675, 7 Pac. 148.

Michigan.— Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1.

Nevada.— *Ex p.* Sweeney, 18 Nev. 74, 1 Pac. 379.

New Jersey.— Crane *v.* Sayre, 6 N. J. L. 110.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

New York.— *In re* Morris, 45 Hun 167; Steele *v.* Gunn, 3 N. Y. Suppl. 692, 19 N. Y. St. 654; Stephenson *v.* Hanson, 6 N. Y. Civ. Proc. 43, 67 How. Pr. 305; Patrick *v.* Warner, 4 Paige 397.

Texas.— Edrington *v.* Pridham, 65 Tex. 612; *Ex p.* Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Wyoming.— Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

United States.— Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13; *In re* Allen, 1 Fed. Cas. No. 208, 13 Blatchf. 271; Monroe *v.* Bradley, 17 Fed. Cas. No. 9,713, 1 Cranch C. C. 158.

See 10 Cent. Dig. tit. "Contempt," § 268.

A statute forbidding imprisonment for failure to pay interlocutory costs is not applicable to contempt cases. Livingstone *v.* Fitzgerald, 2 Barb. (N. Y.) 396.

Where the party has cleared his contempt he will be discharged, although liable to pay the costs of the contempt, and cannot be held in prison until the costs are paid. Jackson *v.* Mawby, 1 Ch. D. 86, 24 Wkly. Rep. 92, 45 L. J. Ch. 53.

98. *Illinois.*— French *v.* Commercial Nat. Bank, 79 Ill. App. 110.

Kentucky.— Bush *v.* Chenault, 12 Ky. L. Rep. 249.

Michigan.— Chapel *v.* Hull, 60 Mich. 167, 26 N. W. 874.

New York.— Socialistic Co-operative Pub. Assoc. *v.* Kuhn, 51 N. Y. App. Div. 579, 64 N. Y. Suppl. 930; Hommel *v.* Buttling, 46 N. Y. App. Div. 206, 61 N. Y. Suppl. 811; Fall Brook Coal Co. *v.* Hecksher, 42 Hun 534; King *v.* Flynn, 37 Hun 329; Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11; Martin Cantine Co. *v.* Warshauer, 7 Misc. 412, 28 N. Y. Suppl. 139, 58 N. Y. St. 569, 23 N. Y. Civ. Proc. 379; Wolf *v.* Buttner, 6 Misc. 119, 26 N. Y. Suppl. 52, 57 N. Y. St. 861; *In re* Morris, 13 N. Y. Civ. Proc. 56; Stephenson *v.* Hanson, 6 N. Y. Civ. Proc. 43, 67 How. Pr. 305; Lansing *v.* Easton, 7 Paige 364.

Tennessee.— Robins *v.* Frazier, 5 Heisk. 100.

United States.— *In re* North Bloomfield Gravel-Min. Co., 27 Fed. 795; Wells *v.* Oregon R., etc., Co., 19 Fed. 20, 9 Sawy. 601; Matthews *v.* Spangenberg, 15 Fed. 813.

See 10 Cent. Dig. tit. "Contempt," § 257.

One in contempt for violating an injunction wrongfully granted cannot be required to indemnify plaintiff, for the latter is liable to the one in contempt in damages for obtaining such order. Kaehler *v.* Halpin, 59 Wis. 40, 17 N. W. 868; Kaehler *v.* Dobberphul, 56 Wis. 497, 14 N. W. 631.

99. *Arkansas.*—Eads *v.* Brazelton, 22 Ark. 499, 55 Am. Dec. 88.

Indiana.— Swift *v.* State, 63 Ind. 81.

North Carolina.— Morris *v.* Whitehead, 65 N. C. 637; *In re* Rhodes, 65 N. C. 518.

Ohio.— State *v.* Hasleps, Wright 500.

Wisconsin.— State *v.* Lonsdale, 48 Wis. 348, 4 N. W. 390; *In re* Pierce, 44 Wis. 411.

United States.— U. S. *v.* Atchison, etc., R. Co., 16 Fed. 853, 5 McCrary 287.

See 10 Cent. Dig. tit. "Contempt," § 257.

A garnishee who fails to answer questions touching his indebtedness to defendant is liable to a penalty for contempt, but he is not required to satisfy plaintiff's claim. Hamill *v.* Champlin, 12 R. I. 124; Falk *v.* Flint, 12 R. I. 14.

1. Levan *v.* Third Dist. Ct., (Ida. 1896) 43 Pac. 574.

2. Wandling *v.* Thompson, 41 N. J. L. 142; Pages *v.* McLaren, 7 N. J. L. J. 309; People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 49 N. Y. St. 378, 20 L. R. A. 446 [*affirming*

however, be fixed arbitrarily. The extent of the injury or loss must be shown by competent evidence.[3] Where there is no proof of actual damages there can be no indemnity, and hence the fine cannot exceed the amount prescribed by statute.[4]

(II) *Costs and Expenses.* In addition to compensation for loss to the injured party authorized by statute, usually the costs and expenses of the proceeding to punish the guilty may be included.[5]

4. Denial of Privileges As Litigant. One in contempt may be denied certain favors of court and privileges as a litigant until he has purged himself of the contempt.[6] He may be denied the privilege of presenting a defense, filing plead-

18 N. Y. Suppl. 734, 44 N. Y. St. 820]; Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 68 N. Y. App. Div. 414, 74 N. Y. Suppl. 486; People *v.* Kingsland, 3 Abb. Dec. (N. Y.) 526, 3 Keyes (N. Y.) 325; Fenner *v.* Sanborne, 37 Barb. (N. Y.) 610; Harteau *v.* Deer Park Blue-Stone Co., 3 Thomps. & C. (N. Y.) 763; Ross *v.* Clussman, 3 Sandf. (N. Y.) 676; Meyer *v.* Dreyspring, 3 Misc. (N. Y.) 560, 23 N. Y. Suppl. 315, 52 N. Y. St. 520; Foley *v.* Stone, 3 N. Y. Suppl. 288, 15 N. Y. Civ. Proc. 224; Stephenson *v.* Hanson, 6 N. Y. Civ. Proc. 43, 67 How. Pr. (N. Y.) 305; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 272, 38 Am. Dec. 551; *Ex p.* Thurmond, 1 Bailey (S. C.) 605; *In re* Day, 34 Wis. 638; Peertner *v.* Rusel, 33 Wis. 193; Sabin *v.* Fogarty, 70 Fed. 482.

For failure to levy execution, the measure of liability is the actual injury sustained. Wakefield *v.* Moore, 65 Ga. 268; Cowart *v.* Dunbar, 56 Ga. 417.

For selling property in violation of court order a party may be punished to the extent of the injury produced. Johns *v.* Davis, 2 Rob. (Va.) 729.

3. Moffat *v.* Herman, 116 N. Y. 131, 22 N. E. 287, 26 N. Y. St. 328; Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

4. Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742. See also People *v.* Compton, 1 Duer (N. Y.) 512.

For disobeying injunction forbidding transfer of property the punishment will be made nominal where it appears that the injured party has not lost all remedy against the property. Nieuwankamp *v.* Ullman, 47 Wis. 168, 2 N. W. 131.

5. Fitzsimmons *v.* Ryan, 64 N. Y. App. Div. 404, 72 N. Y. Suppl. 65; Matter of Hay Foundry, etc., Works, 22 N. Y. App. Div. 87, 47 N. Y. Suppl. 802, 27 N. Y. Civ. Proc. 80; Brett *v.* Brett, 33 Hun (N. Y.) 547; Dejonge *v.* Brenneman, 23 Hun (N. Y.) 332; Power *v.* Athens, 19 Hun (N. Y.) 165; People *v.* Compton, 1 Duer (N. Y.) 512; De Witt *v.* Gunn, 34 N. Y. Suppl. 879, 24 N. Y. Civ. Proc. 406; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180; People *v.* Davis, 15 Wend. (N. Y.) 602; Post *v.* Van Dine, 1 Johns. Cas. (N. Y.) 412; People *v.* Spalding, 2 Paige (N. Y.) 326; Snow *v.* Snow, 13 Utah 15, 43 Pac. 620; Cleveland *v.* Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190.

The costs and expenses must be ascertained by the rate of compensation fixed by statute for the services performed. Sudlow *v.* Knox, 4 Abb. Dec. (N. Y.) 326, 7 Abb. Pr. N. S. (N. Y.) 411. If the complainant subjects defendant to useless expense by proceeding by attachment instead of by order to show cause, the court may refuse to allow him the extra cost of such proceedings. Hammersley *v.* Parker, 3 N. Y. Leg. Obs. 344. And where the complainants have sustained no injury through the violation of an injunction they are not entitled to a judgment against defendants for costs. Holland *v.* Weed, 87 Mich. 584, 49 N. W. 877.

Attorney's fees may be allowed as part of the expenses. State *v.* Durein, 46 Kan. 695, 27 Pac. 148; McDermott *v.* State, 10 N. J. L. 15; People *v.* Rochester, etc., R. Co., 76 N. Y. 294; Whitman *v.* Haines, 51 Hun (N. Y.) 640, 4 N. Y. Suppl. 48, 21 N. Y. St. 41; Brett *v.* Brett, 33 Hun (N. Y.) 547; Davis *v.* Sturtevant, 4 Duer (N. Y.) 148; Van Valkenburgh *v.* Doolittle, 4 Abb. N. Cas. (N. Y.) 72; Chapman *v.* Munson, 3 Paige (N. Y.) 347; Stahl *v.* Eytel, 62 Fed. 920; *In re* Tift, 11 Fed. 463; Doubleday *v.* Sherman, 7 Fed. Cas. No. 4,020, 8 Blatchf. 45, 4 Fish. Pat. Cas. 253. But see State *v.* Irwin, 8 Blackf. (Ind.) 567; O'Rourke *v.* Cleveland, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719; *In re* Morris, 45 Hun (N. Y.) 167; Power *v.* Athens, 19 Hun (N. Y.) 165; People *v.* Elmer, 3 Paige (N. Y.) 85.

6. *Arkansas.*— As to matters of favor the court may decline to hear one in contempt, but in matters of strict right he will be heard notwithstanding the contempt. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Dec. 545.

District of Columbia.— Hovey *v.* McDonald, 3 MacArthur 184.

Florida.— A notice of contempt proceedings should be served on defendant before his privilege as litigant can be denied. Palmer *v.* Palmer, 36 Fla. 385, 18 So. 720.

Illinois.— Knott *v.* People, 83 Ill. 532.

Indiana.— See Smith *v.* Smith, 2 Blackf. 232.

Kentucky.—Landsown *v.* Landsown, 12 Ky. L. Rep. 509.

Michigan.— Atchison, etc., R. Co. *v.* Jennison, 60 Mich. 232, 27 N. W. 6; McClung *v.* McClung, 40 Mich. 493.

Missouri.— State *v.* Field, 37 Mo. App. 83.

New Jersey.— State *v.* Ackerson, 25 N. J. L. 209; Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299; Freese *v.* Swayze, 26 N. J. Eq. 437.

New York.— Walker *v.* Walker, 82 N. Y. 260 [*affirming* 20 Hun 400]; Brinkley *v.* Brinkley, 47 N. Y. 40; People *v.* Sickles, 59

ings or motions, or taking any other steps in the cause.[7] His pleadings may be stricken from the files.[8] And ordinarily, one guilty of contempt for violating an injunction will not be permitted to be heard on a motion to dissolve until the contempt is purged.[9] But one in contempt for having violated an injunction issued upon an *ex parte* application has the legal right to demand a hearing respecting the regularity and propriety of the order granting the injunction.[10] So where the nature and extent of the punishment to be inflicted upon the one in contempt depends on the determination of the question as to the continuance of the injunc-

Hun 342, 13 N. Y. Suppl. 101, 36 N. Y. St. 548; Rogers *v.* Paterson, 4 Paige 450; Johnson *v.* Pinney, 1 Paige 646, 19 Am. Dec. 459; Evans *v.* Van Hall, Clarke 22.

Oregon.— Where the failure arises from inability or poverty and not from wilful intent to disregard the court order it is error to dismiss the suit. Newhouse *v.* Newhouse, 14 Oreg. 290, 12 Pac. 422.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195.

Vermont.— *Compare* Ward *v.* Ward, 70 Vt. 430, 41 Atl. 435.

West Virginia.— Ruhl *v.* Ruhl, 24 W. Va. 279.

United States.— Wartman *v.* Wartman, 29 Fed. Cas. No. 17,210, Taney 362.

England.— Wenman *v.* Osbaldiston, 2 Bro. P. C. 276, 1 Eng. Reprint 941; Chuck *v.* Cremer, 1 Coop. Ch. 247; Garstin *v.* Garstin, 34 L. J. P. & M. 45, 4 Swab. & Tr. 73, 13 Wkly. Rep. 508; Vowles *v.* Young, 9 Ves. Jr. 172; Cavendish *v.* Cavendish, 15 Wkly. Rep. 182.

Canada.— Matter of Allen, 31 U. C. Q. B. 458.

See 10 Cent. Dig. tit. "Contempt," § 261.

Defendant in a proceeding cannot object to a cause being heard, for the reason that plaintiff is in contempt. Picketts *v.* Mornington, 4 L. J. Ch. 21, 7 Sim. 200, 8 Eng. Ch. 200.

The rule denying the privilege is limited to the proceedings in the cause in which the contempt occurred. Mason *v.* Jones, 7 D. C. 247; Cason *v.* Cason, 15 Ga. 405; Marshall *v.* Marshall, 4 Thomps. & C. (N. Y.) 449; Strong *v.* Strong, 5 Rob. (N. Y.) 612, 1 Abb. Pr. N. S. (N. Y.) 358; Clark *v.* Dew, 1 Russ. & M. 103, 5 Eng. Ch. 103.

7. *Alabama.*— Mussina *v.* Bartlett, 8 Port. 277.

Georgia.— Remley *v.* De Wall, 41 Ga. 466.

Iowa.— Baily *v.* Baily, 69 Iowa 77, 28 N. W. 443; Saylor *v.* Mockbie, 9 Iowa 209.

Kansas.— *Compare* Cunningham *v.* Colonial, etc., Mortg. Co., 57 Kan. 678, 47 Pac. 830.

New York.— White *v.* Springfield Bank, 1 Barb. 225; Ellingwood *v.* Stevenson, 4 Sandf. Ch. 366.

Tennessee.— Gant *v.* Gant, 10 Humphr. 464, 53 Am. Dec. 736.

Virginia.— Lane *v.* Ellzey, 4 Hen. & M. 504; Fisher *v.* Fisher, 4 Hen. & M. 484.

Canada.— Clark *v.* Campbell, 15 Ont. Pr. 338.

See 10 Cent. Dig. tit. "Contempt," § 263.

An appellate court will decline to review the commitment of a witness found guilty of contempt while the witness continues a fugitive in another state. *In re* O'Byrne, 55 Hun (N. Y.) 438, 8 N. Y. Suppl. 676, 29 N. Y. St. 116.

An attorney in contempt may be refused the privileges of pleading as an attorney in a cause. Goldstein *v.* State, (Tex. Crim. App. 1893) 23 S. W. 686.

The court may assess damages in a cause where the party is in contempt, without notice or hearing. Robinson *v.* Owen, 46 N. H. 38. So one in contempt for disobedience to a decree for specific performance will authorize the court without notice to make another decree establishing the contract in the same manner as though it had been executed. Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299.

Where a party who has been guilty of a technical contempt makes a motion, it is not error for the court to hear the motion. Whitman *v.* Johnson, 10 Misc. (N. Y.) 725, 31 N. Y. Suppl. 805, 64 N. Y. St. 613.

8. *California.*— *Compare* Frazer *v.* Lynch, 88 Cal. 621, 26 Pac. 344.

Louisiana.— The court has no power to order the petition of plaintiff taken from the record and returned to him, on his refusal to say whether he intended any disrespect to, or reflection upon, the judge by describing him in the petition as the "acting" judge. Hunter *v.* Backman, 32 La. Ann. 403.

Missouri.— Haskell *v.* Sullivan, 31 Mo. 435.

Montana.— Zimmerman *v.* Zimmerman, 7 Mont. 114, 14 Pac. 665.

New York.— Gross *v.* Clark, 87 N. Y. 272 [*affirming* 1 N. Y. Civ. Proc. 17]; Walker *v.* Walker, 82 N. Y. 260 [*affirming* 20 Hun 400]; Brisbane *v.* Brisbane, 34 Hun 339; Shelp *v.* Morrison, 13 Hun 110; Gaughe *v.* Laroche, 6 Duer 685, 14 How. Pr. 451; Clark *v.* Clark, 13 Daly 497, 11 N. Y. Civ. Proc. 7.

Texas.— Where the petition of plaintiff contains matter so impertinent or scandalous as to amount to a contempt, the court may expunge the objectionable matter, but cannot strike the petition from the files. Herndon *v.* Campbell, 86 Tex. 168, 23 S. W. 980 [*reversing* (Civ. App. 1893) 23 S. W. 558].

United States.— It is a denial of due process of law to strike out an answer, and render a decree *pro confesso* as a punishment for contempt. Hovey *v.* Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. ed. 215.

See 10 Cent. Dig. tit. "Contempt," § 264.

9. Jacoby *v.* Goetter, 74 Ala. 427; Krom *v.* Hogan, 4 How. Pr. (N. Y.) 225; Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58.

10. Kaehler *v.* Dobberpuhl, 56 Wis. 497, 14 N. W. 631.

tion the court may permit a hearing on a motion for its dissolution.[11] Furthermore the legal rights of a party in contempt will be protected.[12] So a party in contempt cannot be denied the right of appeal. The right of appeal is a matter of right and not of favor or grace of the court.[13]

C. Extent — 1. In General. Unless limited by statute, the extent of punishment is discretionary with the court,[14] but it must not be excessive.[15] In determining the amount of punishment to be imposed the court will take into consideration all surrounding facts and circumstances.[16] Where a party is in contempt through a misapprehension of his duties, or where it results from a mistake and a reasonable excuse is presented to the court, ordinarily the party will be discharged upon the payment of the costs and expenses of the proceeding.[17]

11. Crabtree *v.* Baker, 75 Ala. 91, 51 Am. Rep. 424; Endicott *v.* Mathis, 9 N. J. Eq. 110.

12. People *v.* Horton, 46 Ill. App. 434; Kaehler *v.* Dobberpuhl, 56 Wis. 497, 14 N. W. 631. See also Wiggins *v.* Com., 102 Ky. 40, 42 S. W. 1106, 19 Ky. L. Rep. 1017, holding that rendering judgment against one in contempt on a claim, the merits of which had not been tried, is error.

That a party is in contempt is no bar to his proceeding with an action in the ordinary way, the contempt being only a bar to his asking the court for an indulgence. Ferguson *v.* Elgin County, 15 Ont. Pr. 399; Codd *v.* Delap, 15 Ont. Pr. 374. So a party in contempt is entitled to appear and resist any proceeding taken against him and is entitled to such notice of the proceeding as though he were not in contempt. Mead *v.* Norris, 21 Wis. 310.

13. *Connecticut.*— Allen *v.* New Haven, etc., Co., 49 Conn. 243.

Florida.— See Palmer *v.* Palmer, 28 Fla. 295, 9 So. 657.

Illinois.— People *v.* Horton, 46 Ill. App. 434.

Missouri.— State *v.* Field, 37 Mo. App. 83.

New Jersey.— Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299.

New York.— See Brinkley *v.* Brinkley, 47 N. Y. 40.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195.

West Virginia.— Ruhl *v.* Ruhl, 24 W. Va. 279.

See 10 Cent. Dig. tit. "Contempt," § 266; and Appeal and Error, IV, A, 1, d, (II) [2 Cyc. 634].

14. Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638; Com. *v.* Sheehan, 81* Pa. St. 132; Bate Refrigerating Co. *v.* Gillett, 30 Fed. 683; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 615.

The punishment imposed must be entire and final. O'Rourke *v.* Cleveland, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719. See also State *v.* Voss, 80 Iowa 467, 45 N. W. 898, 8 L. R. A. 767. So an attorney having been fined for using disrespectful language to the court cannot be further required to purge himself of the contempt by apologizing. State *v.* Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

Technical violation of injunction.— No punishment should be inflicted for a technical violation of an injunction, where the violation does not result in damage to the opposite party. Scott *v.* Layng, 59 Mich. 43, 26 N. W. 220, 791.

15. De Beukelaer *v.* People, 25 Ill. App. 460.

Excessive fine.— A fine of two hundred dollars for failure to return papers taken from the court files is excessive in the absence of a showing of criminal intent. Miller *v.* People, 10 Ill. App. 400.

16. *In re* Nichols, 54 N. Y. 62; People *v.* St. Louis, etc., R. Co., 19 Abb. N. Cas. (N. Y.) 1; Smith *v.* Fitch, Clarke (N. Y.) 265; Sullivan *v.* Judah, 4 Paige (N. Y.) 444; Com. *v.* Sheehan, 81* Pa. St. 132; *In re* North Bloomfield Gravel Min. Co., 27 Fed. 795.

A nominal fine is proper where the party is not in wilful contempt. Morss *v.* Domestic Sewing-Mach. Co., 38 Fed. 482. See also Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R. Co., 74 Iowa 585, 38 N. W. 496; People *v.* Bonchard, 6 Misc. (N. Y.) 459, 27 N. Y. Suppl. 201, 56 N. Y. St. 779.

Effect of legal advice.— In fixing the punishment the fact that the party charged acted from a mistaken knowledge of duty and under legal advice will be considered. Coffin *v.* Burstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274; People *v.* St. Louis, etc., R. Co., 19 Abb. N. Cas. (N. Y.) 1; Royal Trust Co. *v.* Washburn, etc., R. Co., 113 Fed. 531.

That a party who has violated an injunction order, subsequently becoming alarmed, saves the party obtaining such order from loss attendant upon the violation does not relieve him from liability for its violation, but may mitigate the punishment. Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 10 N. Y. Suppl. 684, 32 N. Y. St. 513.

17. *Connecticut.*— Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650.

Georgia.—Justices Baldwin County Inferior Ct. *v.* Bivins, 6 Ga. 575.

Iowa.—Des Moines St. R. Co. *v.* Des Moines Broad Gauge St. R. Co., 74 Iowa 585, 38 N. W. 496.

Michigan.— Brown *v.* Brown, 22 Mich. 299.

New Jersey.— McQuade *v.* Emmons, 38 N. J. L. 397; Magennis *v.* Parkhurst, 4 N. J. Eq. 433.

New York.— People *v.* Jacobs, 66 N. Y. 8; Matter of McLean, 62 Hun 1, 16 N. Y. Suppl. 417, 41 N. Y. St. 879; People *v.* Rochester,

2. Limitation by Statute. If the statute limits the duration of the imprisonment or the amount of the fine, the punishment may conform to such limitation but cannot exceed it.[18]

3. Cumulative Punishment. Each separate and distinct act of contempt may be punished, but if a series of acts constitutes but one contempt, or the same contempt is permitted to continue for several days, there cannot be a separate punishment for each successive act or day.[19]

4. Jail Liberties. Ordinarily one committed for contempt is entitled to jail liberties.[20]

D. Purging Contempt[21] **— 1. Before Adjudication.** In contempts resulting from disobedience to court orders, decrees, etc., prompt compliance therewith

etc., R. Co., 14 Hun 371; People *v.* Randall, 8 Daly 81; Rhodes *v.* Linderman, 17 N. Y. Suppl. 628, 43 N. Y. St. 520; Jones *v.* Sherman, 8 N. Y. St. 344, 11 N. Y. Civ. Proc. 416, 18 Abb. N. Cas. 461; People *v.* Tefft, 3 Cow. 340; Noe *v.* Gibson, 7 Paige 513; Sullivan *v.* Judah, 4 Paige 444; Deklyn *v.* Davis, Hopk. 135; Hammersley *v.* Parker, 3 N. Y. Leg. Obs. 344.

North Carolina.— Bond *v.* Bond, 69 N. C. 97; *In re* Moore, 63 N. C. 397.

Pennsylvania.— Feree *v.* Strome, 1 Yeates 303; Bullock *v.* McDonough, 2 Pearson 195.

Texas.— State *v.* Sparks, 27 Tex. 705.

West Virginia.— Hutton *v.* Lockridge, 21 W. Va. 254.

United States.— Albertson *v.* The P. I. Nevius, 48 Fed. 927; Iowa Barb Steel-Wire Co. *v.* Southern Barbed-Wire Co., 30 Fed. 615; Spink *v.* Francis, 19 Fed. 678; U. S. *v.* Scholfield, 27 Fed. Cas. No. 16,230, 1 Cranch C. C. 130.

See 10 Cent. Dig. tit. "Contempt," § 256.

18. *Connecticut.*— Cole *v.* Egan, 52 Conn. 219.

Florida.— *Ex p.* Edwards, 11 Fla. 174.

Georgia.— Swafford *v.* Berrong, 84 Ga. 65, 10 S. E. 593; Cobb *v.* Black, 34 Ga. 162.

Indiana.— Stewart *v.* State, 140 Ind. 7, 39 N. E. 508.

Kansas.— *In re* Millington, 24 Kan. 214.

Kentucky.— Rebhan *v.* Fuhrman, 50 S. W. 976, 21 Ky. L. Rep. 17.

Louisiana.— State *v.* St. Paul, 104 La. 203, 28 So. 973.

Michigan.— Sloman *v.* Wayne County Cir. Judge, 95 Mich. 264, 54 N. W. 869; Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1.

Montana.— State *v.* Beaverhead County Fifth Judicial Dist. Ct., 24 Mont. 33, 60 Pac. 493.

New York.— People *v.* Grant, 11 N. Y. 584, 19 N. E. 281, 20 N. Y. St. 77 [*affirming* 47 Hun 604]; Reese *v.* Reese, 46 N. Y. App. Div. 156, 61 N. Y. Suppl. 760, 7 N. Y. Annot. Cas. 209; Matter of Hatfield, 17 N. Y. App. Div. 430, 45 N. Y. Suppl. 270.

North Carolina.— *In re* Patterson, 99 N. C. 407, 6 S. E. 643.

Ohio.— De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

Tennessee.— McCarthy *v.* State, 89 Tenn. 543, 15 S. W. 736; State *v.* Rust, 2 Tenn. Ch. 181.

Texas.— *Ex p.* Tinsley, 37 Tex. Crim. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

Utah.— Elliot *v.* Whitmore, 10 Utah 246, 37 Pac. 461; *Ex p.* Harris, 4 Utah 5, 5 Pac. 129.

Washington.— State *v.* Milligan, 3 Wash. 144, 28 Pac. 369; State *v.* Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

Wisconsin.— *In re* Pierce, 44 Wis. 411.

England.— *In re* Davies, 21 Q. B. D. 236, 37 Wkly. Rep. 57.

19. State *v.* King, 47 La. Ann. 701, 17 So. 288; People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; People *v.* Grant, 13 N. Y. Civ. Proc. 305.

Refusal of witness to answer.— Where a witness refused to answer a number of questions directed to the same point, the court cannot find him guilty of a separate contempt for every question which he refused to answer. The act constitutes but one contempt and but one sentence can be imposed. Maxwell *v.* Rives, 11 Nev. 213.

Refusal to be sworn.— The punishment of a witness for contempt in refusing to be sworn by imprisonment for one day is no bar to second punishment for the refusal to be again sworn at the expiration of the first imprisonment. Each refusal to be sworn is a separate contempt. *Ex p.* Stice, 70 Cal. 51, 11 Pac. 459.

20. *In re* Milburn, 59 Wis. 24, 17 N. W. 965; *In re* Gill, 20 Wis. 686. But see Rose *v.* Tyrrell, 25 Wis. 563.

In New York it has been held that where a party is committed to jail for non-payment of costs he is entitled to the jail limits. Patrick *v.* Warner, 4 Paige (N. Y.) 397; People *v.* Bennett, 4 Paige (N. Y.) 282. But a person committed for non-payment of a fine as a punishment for a contempt of court is not entitled to the jail limits. People *v.* Cowles, 3 Abb. Dec. (N. Y.) 507, 4 Keyes (N. Y.) 38; People *v.* Bennett, 4 Paige (N. Y.) 282. It has also been held that one imprisoned under a commitment for failure to pay counsel fees and alimony is not entitled to the jail liberties. *In re* Clark, 20 Hun (N. Y.) 551; Allen *v.* Alleu, 8 Abb. N. Cas. (N. Y.) 175. But see Ward *v.* Ward, 6 Abb. Pr. N. S. (N. Y.) 79.

21. As to disavowal of intention to commit contempt see *supra*, V, E.

after the institution of the proceedings will usually be regarded as a sufficient purging of the contempt, especially where no material injury or loss has been suffered by the party for whose benefit the action was taken.[22] Where costs are incurred by reason of the neglect or refusal, ordinarily the guilty party will be required to pay them.[23]

2. AFTER ADJUDICATION. One adjudged guilty of contempt will generally be allowed to purge the contempt by performing the act required or undoing or reversing the acts constituting the contempt, or where the act has caused injury to a party to the suit by making reparation to the injured party.[24]

E. Discharge — 1. POWER TO DISCHARGE. A court which commits one for contempt may release him during the same term and while the action is pending for good cause.[25] But one court has no power to discharge a person committed by another court for contempt.[26]

2. GROUNDS FOR DISCHARGE — a. In General. One committed for contempt until he appears before the grand jury may be discharged after the discharge of the grand jury.[27] So a witness committed until he shall answer in the particular proceeding may be discharged when the proceeding is discontinued.[28] And a party committed for not performing a decree will be discharged on proof of his insanity.[29] But mere irregularity in the proceedings leading to the commitment is no ground for discharge where it appears that the court had jurisdiction.[30] So the fact that imprisonment seriously interferes with the collection of county

22. *Connecticut.*—Hull *v.* Harris, 45 Conn. 544.

Georgia.— Chittenden *v.* Brady, Ga. Dec. Pt. II, 219.

Maine.— Snowman *v.* Harford, 57 Me. 397.

New Jersey.— East New Brunswick, etc., Turnpike Co. *v.* Raritan River R. Co., (1889) 18 Atl. 670; Freese *v.* Swayze, 26 N. J. Eq. 437.

New York.— Wallis *v.* Talmadge, 10 Paige 443.

South Carolina.— James *v.* Mayrant, 1 Harp. Eq. 180.

United States.— Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647. *Compare* Carman *v.* Emerson, 71 Fed. 264, 18 C. C. A. 38. See also U. S. *v.* Sweeney, 95 Fed. 434.

A publisher to purge himself of contempt for the publication of a contemptuous article must express his regret and contrition to the court, but is not obliged to apologize to the person mentioned in the published article. Felkin *v.* Herbert, 10 Jur. N. S. 62, 9 L. T. Rep. N. S. 635, 12 Wkly. Rep. 332.

See 10 Cent. Dig. tit. "Contempt," § 271.

23. Vincent *v.* Daniel, 59 Ala. 602.

24. *New York.*— People *v.* Miller, 9 Misc. 1, 29 N. Y. Suppl. 305, 59 N. Y. St. 702; People *v.* Seaman, 8 Misc. 152, 29 N. Y. Suppl. 329, 59 N. Y. St. 462.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195.

South Carolina.— Pitman *v.* Clarke, 1 McMull. 316.

Utah.— U. S. *v.* Church of Jesus Christ, 6 Utah 9, 21 Pac. 503, 524.

West Virginia.— Hebb *v.* Tucker County Ct., 48 W. Va. 279, 37 S. E. 676.

United States.— *In re* Hayden, 11 Fed. Cas. No. 6,257; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

England.— Reg. *v.* Weston, 8 Jur. 1122.

Canada.— Reg. *v.* Wilkinson, 41 U. C. Q. B. 42.

See 10 Cent. Dig. tit. "Contempt," § 272.

Payment of costs.— Where a party in custody has purged his contempt an order for his release will be made upon the payment of costs. Britnell *v.* Walton, 18 Wkly. Rep. 446.

25. Ammon *v.* Johnson, 3 Ohio Cir. Ct. 263; Hendryx *v.* Fitzpatrick, 19 Fed. 810. See also *supra*, VII, Q, 4.

After conviction and a commitment the court has no more power to discharge or remit the sentence than in case of conviction for any other crime. *In re* Mullee, 17 Fed. Cas. No. 9,911, 7 Blatchf. 23. See also Jones *v.* Macdonald, 15 Ont. Pr. 345, holding that where a judgment debtor was committed for three months for a refusal to answer questions upon his examination as such debtor, an application for his discharge before the expiration of the term will not be granted, even upon the consent of the judgment creditor upon whose motion the committal had been made.

26. Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; State *v.* White, T. U. P. Charlt. (Ga.) 123; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *In re* Yates, 4 Johns. (N. Y.) 317; Gist *v.* Bowman, 2 Bay (S. C.) 182.

Federal court or judge has no power to discharge a person committed for contempt of state court, notwithstanding the state court may have, under the acts of congress, no jurisdiction of the subject-matter. *Ex p.* Forbes, 9 Fed. Cas. No. 4,921, 1 Dill. (U. S.) 363.

27. *Ex p.* Maulsby, 13 Md. 625, Appendix.

28. *Ex p.* Rowe, 7 Cal. 175; *In re* Hall, 10 Mich. 210.

29. State *v.* Marshall, 4 Del. Ch. 598.

30. People *v.* Grant, 50 Hun (N. Y.) 243, 3 N. Y. Suppl. 142, 20 N. Y. St. 48, 3 N. Y. Suppl. 144, 19 N. Y. St. 933; Myers *v.* Janes, 3 Abb. Pr. (N. Y.) 301. But see

revenue is not sufficient reason to discharge county officers imprisoned for contempt.[31] And one imprisoned for advising parties to disobey a judgment is not entitled to a discharge because of the fact that the parties so advised had purged themselves of their contempt.[32]

b. Inability to Comply With Requirement. Where one is imprisoned for contempt the court may at any time in its discretion, either on its motion or upon proper application, inquire into the question of the ability of the offender to obey the order,[33] and if satisfied of the inability of the offender to comply he may be discharged.[34] Thus the insolvency of one committed for contempt is ground for his discharge,[35] at least where he complies with the conditions of the insolvency or Poor Debtors' Act.[36]

3. Necessity of Performing Required Act. Usually courts will not discharge persons committed for contempt until after a full and complete performance of the act required.[37] But if the court is of opinion that its authority has been vin-

State *v.* Anders, 64 Kan. 742, 68 Pac. 668, holding that where trial for indirect contempt is conducted as though for a direct contempt, defendant should be discharged.

Irregular order.— An order of committal which has been irregularly obtained is valid until discharged. Blake *v.* Blake, 7 Beav. 514, 29 Eng. Ch. 514. So a person is not entitled to be discharged from custody under an attachment for disobedience to an order to furnish accounts, upon the ground that when arrested he was attending the trial of an action to which he was a party. McKinshy *v.* Henry, Ir. R. 7 Eq. 465.

31. *In re* Copenhaver, 54 Fed. 660.

32. King *v.* Barnes, 113 N. Y. 476, 21 N. E. 182, 23 N. Y. St. 263.

33. Tindall *v.* Nisbet, 114 Ga. 224, 39 S. E. 849.

34. *Georgia.*— Nisbet *v.* Tindall, 115 Ga. 374, 41 S. E. 569; Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; Thweatt *v.* Kiddoo, 58 Ga. 300.

Kansas.— Pierce *v.* State, 54 Kan. 519, 38 Pac. 812.

New York.— Valentine *v.* Mandel, 11 N. Y. Suppl. 718, 19 N. Y. Civ. Proc. 155; Ryer *v.* Ryer, 67 How. Pr. 369.

North Carolina.— Childs *v.* Wiseman, 119 N. C. 497, 26 S. E. 126.

Pennsylvania.— Com. *v.* James, 9 Pa. Co. Ct. 145; Stevenson's Case, 7 Wkly. Notes Cas. 65.

United States.— Hendryx *v.* Fitzpatrick, 19 Fed. 810.

See 10 Cent. Dig. tit. "Contempt," § 281.

Inability to pay must clearly appear in order to entitle the prisoner to a deduction or remission of the fine. Doubleday *v.* Sherman, 7 Fed. Cas. No. 4,020, 8 Blatchf. 45, 4 Fish. Pat. Cas. 253.

35. *California.*— *Ex p.* Wilson, 73 Cal. 97, 14 Pac. 393, 75 Cal. 580, 17 Pac. 698.

Delaware.— State *v.* Livingston, 4 Del. Ch. 264.

Georgia.— Nisbet *v.* Tindall, 115 Ga. 374, 41 S. E. 569; Tindall *v.* Westcott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

Kansas.— Pierce *v.* State, 54 Kan. 519, 38 Pac. 812.

Pennsylvania.— *In re* Batdorf's Estate, 2 Dauph. Co. Rep. 287.

See 10 Cent. Dig. tit. "Contempt," § 282.

Non-payment of fine.— A person in custody for non-payment of a fine cannot be discharged therefrom, although he may have been discharged from his debts under the bankruptcy act. People *v.* Spalding, 2 N. Y. Leg. Obs. 232.

36. *Georgia.*— Standley *v.* Harrison, 26 Ga. 139.

Iowa.—One imprisoned for non-payment of a fine for the violation of an injunction against the maintenance of a liquor nuisance is not entitled to be discharged upon tendering the sheriff his note for the amount of the fine, together with a written schedule of his property, as provided by the code in the case of persons committed for non-payment of fine in a criminal case. Hanks *v.* Workman, 69 Iowa 600, 29 N. W. 628.

New York.— Van Wezel *v.* Van Wezel, 1 Edw. 113. But see Jackson *v.* Smith, 5 Johns. 115.

Pennsylvania.—Newhouse *v.* Com., 5 Whart. 82; Spear's Estate, 1 Wkly. Notes Cas. 637; Jacoby's Appeal, 1 Walk. 346.

South Carolina.—*Ex p.* Thurmond, 1 Bailey 605; *Ex p.* Perkins, 3 Desauss. 549. But see Blake *v.* Lowe, 3 Desauss. 269.

England.—Dew *v.* Clark, 16 Jur. 1, 3 Macn. & G. 357, 49 Eng. Ch. 271; *Re* Thompson, 43 L. J. Ch. 721, 30 L. T. Rep. N. S. 783, 22 Wkly. Rep. 857.

See 10 Cent. Dig. tit. "Contempt," § 277.

A person in custody for contempt in failing to pay over money in his possession as ordered by the court cannot obtain his discharge by causing himself to be made a bankrupt. Lewes *v.* Barnett, 47 L. J. Ch. 144, 26 Wkly. Rep. 101.

37. *Louisiana.*— State *v.* Blackman, 42 La. Ann. 1075, 8 So. 302.

Minnesota.— *In re* Fanning, 40 Minn. 4, 41 N. W. 1076.

New Hampshire.— Buffum's Case, 13 N. H. 14.

New York.— *In re* Steinert, 29 Hun 301; People *v.* Jacobs, 5 Hun 428; People *v.* Grant, 13 N. Y. Civ. Proc. 183; Lansing *v.* Easton, 7 Paige 364.

United States.— *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207.

See 10 Cent. Dig. tit. "Contempt," § 284.

dicated in the punishment undergone the prisoner may be discharged, although he has not performed the act required of him.[38]

4. Application — a. Requisites and Sufficiency. The application for discharge should state sufficient grounds to justify the granting of such relief.[39]

b. Notice. Where defendant was committed for contempt in not obeying an order to appear before an examiner and be examined, and afterward did appear and was examined, notice of the motion to discharge must be served upon plaintiff before discharge can be had.[40]

c. Time of Application. The application for discharge should be seasonably made.[41]

5. Imposition of Conditions. The court may impose reasonable conditions upon the grant of a discharge,[42] such as the payment of the costs and expenses of the proceeding leading to the commitment, the giving of security to pay the fine, etc.[43] But where one is unlawfully imprisoned for an alleged contempt he cannot be forced to stipulate that he will not sue for false imprisonment, as a condition of the discharge.[44]

F. Pardon. Since a contempt of court is an offense against the state, and not against the judge personally, an order of the judge inflicting punishment for contempt is within the range of the pardoning prerogatives vested in the executive.[45]

IX. REVIEW.

A. Right of Review — 1. In General. At common law the exercise by a court of competent jurisdiction of the power to punish for contempt cannot be

38. McClung *v.* McClung, 33 N. J. Eq. 462. Where the purposes of justice will not be answered by detaining defendant in custody the court is bound to exercise its power to discharge the party. Joyce *v.* Joyce, San. & Sc. 703.

39. Palmer *v.* Kelly, 4 Sandf. Ch. (N. Y.) 575, holding that an affidavit for discharge on behalf of one sentenced for contempt for violating an injunction, restraining the sale of property, which recites that he did not know or believe that he ever did violate the injunction in any way, is a mere denial of the contempt, and further statements in the affidavit that he was unable to pay the fine imposed cannot be considered and the application will be denied. See also *In re* Terry, 36 Fed. 419, holding that an application for discharge for assaulting a court officer and addressing disrespectful language to the court, which merely alleges no intentional disrespect to court, without expressing regret for the acts, and which also misstates facts relating to the contempt is insufficient.

40. *Re* Evans, 68 L. T. Rep. N. S. 324, 3 Reports 399.

41. Falkenberg *v.* Frank, 20 Misc. (N. Y.) 692, 46 N. Y. Suppl. 675, holding that where one committed to jail for contempt institutes habeas corpus proceedings for his release, which he abandons, and then pays the fine and moves two years thereafter to set aside the commitment, he will be held guilty of such laches that the application will be denied.

42. *In re* Hahlin, 53 How. Pr. (N. Y.) 501, holding that where the surrogate has imprisoned an executor for non-compliance with a decree of the court made on an accounting, and such executor is unable to perform the requirements imposed by such decree, the court may release him on such terms as may seem just.

43. *Connecticut.*— William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

New York.— *In re* Steinert, 29 Hun 301; *In re* Hahlin, 53 How. Pr. 501.

North Carolina.— *In re* Daves, 81 N. C. 72; Bond *v.* Bond, 69 N. C. 97.

United States.— U. S. *v.* Kane, 23 Fed. 748; Thornton *v.* Davis, 23 Fed. Cas. No. 13,998, 4 Cranch C. C. 500.

England.— A person who has been committed to prison for a contempt may be discharged upon condition that he refrain from doing certain things or that he do certain things. *In re* Davies, 21 Q. B. D. 236, 37 Wkly. Rep. 57; Scully *v.* Skehane, Sau. & Sc. 710.

Canada.— An order may be made for the release of a person in custody for a contempt, upon condition that he agree to abide by the conditions of his release. Roberts *v.* Donovan, 16 Ont. Pr. 456.

See 10 Cent. Dig. tit. "Contempt," § 283.

44. Matter of Hess, 48 Hun (N. Y.) 586, 1 N. Y. Suppl. 811, 16 N. Y. St. 255. But see Newton *v.* Askew, 6 Hare 319, 13 Jur. 186, 18 L. J. Ch. 42, 31 Eng. Ch. 319, holding that the court may in some cases impose a condition upon the discharge that the party will not bring an action in respect of the arrest.

45. State *v.* Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115; *Ex p.* Hickey, 4 Sm. & M. (Miss.) 751; *In re* Mason, 43 Fed. 510; *In re* Mullee, 17 Fed. Cas. No. 9,911, 7 Blatchf. 23. But see Taylor *v.* Goodrich, (Tex. Civ. App.

reviewed.[46] Every court is the exclusive judge of a contempt committed in its presence or against its process. The common-law rule has been changed, however, in some jurisdictions by constitutional or statutory provisions authorizing a review.[47]

1897) 40 S. W. 515, holding that a proceeding for contempt is not a "criminal case" in which the governor has, under the constitution, the pardoning power.

Pardoning power of the president extends to cases of contempt. *In re* Mullee, 17 Fed. Cas. No. 9,911, 7 Blatchf. 23; 3 Op. Atty.-Gen. 622.

46. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303; Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49.

Arkansas.— Beene *v.* State, 22 Ark. 149; Bunch *v.* State, 14 Ark. 544; Cossart *v.* State, 14 Ark. 538.

California.— Mott *v.* Clark, (1899) 56 Pac. 545; *In re* Wittmeir, 118 Cal. 255, 50 Pac. 393; People *v.* Kuhlman, 118 Cal. 140, 50 Pac. 382; Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; *In re* Vance, 88 Cal. 262, 26 Pac. 101; Sanches *v.* Newman, 70 Cal. 210, 11 Pac. 645; Kelly *v.* Wilson, (1886) 11 Pac. 244; *In re* Gannon, 69 Cal. 541, 11 Pac. 240; Tyler *v.* Connolly, 65 Cal. 28, 2 Pac. 414; Huerstal *v.* Muir, 62 Cal. 479; Larrabee *v.* Selby, 52 Cal. 506; Aram *v.* Shallenberger, 42 Cal. 275; Ware *v.* Robinson, 9 Cal. 107; *In re* Cohen, 5 Cal. 494.

Colorado.— Teller *v.* People, 7 Colo. 451, 4 Pac. 48.

Connecticut.—Tyler *v.* Hamersley, 44 Conn. 393, 26 Am. Rep. 471.

Florida.— Caro *v.* Maxwell, 20 Fla. 17; *Ex p.* Edwards, 11 Fla. 174.

Georgia.— Hayden *v.* Phinizy, 67 Ga. 758.

Iowa.— *Ex p.* Holman, 28 Iowa 88, 5 Am. Rep. 159; Dunham *v.* State, 6 Iowa 345; Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

Kentucky.— Patton *v.* Harris, 15 B. Mon. 607; Watson *v.* Thomas, Litt. Sel. Cas. 248; Johnston *v.* Com., 1 Bibb 598.

Louisiana.— State *v.* Orleans Parish Civil Sheriff, 32 La. Ann. 1225; State *v.* Ouachita Parish Judge, 31 La. Ann. 116.

Minnesota.— Menage *v.* Lustfield, 30 Minn. 487, 16 N. W. 398; Semrow *v.* Semrow, 26 Minn. 9, 48 N. W. 446. *Compare* Register *v.* State, 8 Minn. 214.

Mississippi.— *Ex p.* Wimberly, 57 Miss. 437; Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624; Watson *v.* Williams, 36 Miss. 331; Louis *v.* Miller, 13 Sm. & M. 110.

Nevada.— Phillips *v.* Welch, 11 Nev. 187.

New Hampshire.— State *v.* Towle, 42 N. H. 540.

New Jersey.— *In re* Kerrigan, 33 N. J. L. 344; Grand Lodge K. of P. *v.* Jansen, 62 N. J. Eq. 737, 48 Atl. 526; Knauss *v.* Jones, 32 N. J. Eq. 323; Coryell *v.* Holcomb, 9 N. J. Eq. 650.

New York.— People *v.* Gilmore, 88 N. Y. 626; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 71 N. Y. 430; People *v.* Kelly, 24 N. Y. 74, 24 How. Pr. 369; Conover *v.* Wood, 5 Abb. Pr. 84; People *v.* Donohue, 59 How. Pr. 417; Darby's Case, 3 Wheel. Crim. 1.

North Carolina.— *In re* Deaton, 105 N. C. 59, 11 S. E. 244; State *v.* Mott, 49 N. C. 449; State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161; *Ex p.* Summers, 27 N. C. 149.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

Tennessee.— Brizendine *v.* State, 103 Tenn. 677, 54 S. W. 982; Brooks *v.* Fleming, 6 Baxt. 331; State *v.* Galloway, 5 Coldw. 326, 98 Am. Dec. 404.

Texas.— State *v.* Thurmond, 37 Tex. 340; Casey *v.* State, 25 Tex. 380; Crow *v.* State, 24 Tex. 12; Jordan *v.* State, 14 Tex. 436; Floyd *v.* State, 7 Tex. 215; Borrer *v.* State, (Crim. App. 1901) 63 S. W. 630; Carter *v.* State, 4 Tex. App. 165.

Utah.— Elliott *v.* Whitmore, 10 Utah 246, 37 Pac. 461; *In re* Whitmore, 9 Utah 441, 35 Pac. 524; People *v.* Owens, 8 Utah 20, 28 Pac. 871.

Vermont.— *In re* Cooper, 32 Vt. 253; Vilas *v.* Burton, 27 Vt. 56.

West Virginia.— Craig *v.* McCulloch, 20 W. Va. 148.

United States.— Hayes *v.* Fischer, 102 U. S. 121, 26 L. ed. 95; New Orleans *v.* New York Mail Steamship Co., 20 Wall. 387, 22 L. ed. 354; McMicken *v.* Perin, 20 How. 133, 15 L. ed. 857; Sessions *v.* Gould, 63 Fed. 1001, 11 C. C. A. 550; King *v.* Wooten, 54 Fed. 612, 4 C. C. A. 519; *In re* Mason, 43 Fed. 510.

England.— Lewis *v.* Owen, [1894] 1 Q. B. 102, 58 J. P. 263, 63 L. J. Q. B. 233, 69 L. T. Rep. N. S. 861, 10 Reports 59, 42 Wkly. Rep. 254; *Ex p.* Fernandez, 10 C. B. N. S. 3, 7 Jur. N. S. 571, 4 L. T. Rep. N. S. 324, 9 Wkly. Rep. 832, 100 E. C. L. 3.

See 10 Cent. Dig. tit. "Contempt," §§ 213, 223; and APPEAL AND ERROR, III, D, 3, z, (II) [2 Cyc. 614].

47. *Colorado.*— Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430.

Illinois.— People *v.* Weigley, 155 Ill. 491, 40 N. E. 300 [*affirming* 51 Ill. App. 51]; Lester *v.* People, 150 Ill. 408, 37 N. E. 1004, 41 Am. St. Rep. 375; People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038 [*affirming* 37 Ill. App. 604]; Leopold *v.* People, 140 Ill. 552, 30 N. E. 348 [*affirming* 41 Ill. App. 293]; Lester *v.* Berkowitz, 125 Ill. 307, 17 N. E. 706; Haines *v.* People, 97 Ill. 161; Kyle *v.* People, 72 Ill. App. 171; Stone *v.* Burry, 63 Ill. App. 285; Rawson *v.* Rawson, 35 Ill. App. 505.

Indiana.— McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; Worland *v.* State, 82 Ind. 49; Wagner *v.* State, 68 Ind. 42; *Ex p.* Wright, 65 Ind. 504; Whittem *v.* State, 36 Ind. 196.

Kansas.— State *v.* Dent, 29 Kan. 416.

Kentucky.— Newport *v.* Newport Light Co., 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532;

2. Civil or Constructive Contempt. Authority is not wanting in support of the right of review in cases of civil or constructive contempt.[48]

3. Court Without Jurisdiction. Where the lower court exceeds its jurisdiction the case may be brought to a superior court for review.[49]

4. Interlocutory Orders. An order made in a contempt proceeding which is not a final order affecting a substantial right is not appealable.[50]

Rebham *v.* Fuhrman, 50 S. W. 976, 21 Ky. L. Rep. 17.

Michigan.—Haines *v.* Haines, 35 Mich. 138; People *v.* Jones, 33 Mich. 303; Romeyn *v.* Caplis, 17 Mich. 449; People *v.* Simonson, 9 Mich. 492. But see Rasch *v.* Sheppard, 105 Mich. 667, 63 N. W. 968; Schwab *v.* Coots, 44 Mich. 463, 7 N. W. 61.

Missouri.— Glover *v.* American Casualty Ins., etc., Co., 130 Mo. 173, 32 S. W. 302; State *v.* Schneider, 47 Mo. App. 669; State *v.* Horner, 16 Mo. App. 191.

New Jersey.—Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319.

New York.— People *v.* Dwyer, 90 N. Y. 402, 2 N. Y. Civ. Proc. 379; Brinkley *v.* Brinkley, 47 N. Y. 40; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Sudlow *v.* Knox, 4 Abb. Dec. 326, 7 Abb. Pr. N. S. 411; Hart *v.* Johnson, 43 Hun 505; Newell *v.* Cutler, 19 Hun 74; Forbes *v.* Willard, 54 Barb. 520; Ross *v.* Clussman, 3 Sandf. 676; Wolf *v.* Buttner, 6 Misc. 119, 26 N. Y. Suppl. 52, 57 N. Y. St. 861.

North Dakota.— State *v.* Massey, 10 N. D. 154, 86 N. W. 225; Merchant *v.* Pielke, 9 N. D. 245, 83 N. W. 18.

Ohio.— Brimson *v.* State, 63 Ohio St. 347, 58 N. E. 803; Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

South Carolina.— State *v.* Nathans, 49 S. C. 199, 27 S. E. 52; *In re* Stokes, 5 S. C. 71; State *v.* Hunt, 4 Strobh. 322.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Virginia.— Wells *v.* Com., 21 Gratt. 500; Stokeley *v.* Com., 1 Va. Cas. 330.

Washington.— State *v.* King County Super. Ct., 28 Wash. 590, 68 Pac. 1051; State *v.* Allen, 14 Wash. 684, 45 Pac. 644.

Wisconsin.— *In re* Day, 34 Wis. 638; Witter *v.* Lyon, 34 Wis. 564; Lamonte *v.* Pierce, 34 Wis. 483; Shannon *v.* State, 18 Wis. 604; Ballston Spa Bank *v.* Milwaukee Mar. Bank, 18 Wis. 490.

Wyoming.— Laramie Nat. Bank *v.* Steinhoff, 7 Wyo. 464, 53 Pac. 299.

Canada.— *In re* O'Brien, 16 Can. Supreme Ct. 197.

See 10 Cent. Dig. tit. "Contempt," §§ 213, 223; and Appeal and Error, III, D, 3, z, (II) [2 Cyc. 614].

Appeal by state.— In Indiana an appeal may be taken by the state in proceedings for indirect contempt. State *v.* Rockwood, 159 Ind. 94, 64 N. E. 592.

Where the fine imposed was paid under protest no appeal will lie from the judgment. State *v.* Conkling, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270.

48. *Connecticut.*— Baldwin *v.* Miles, 58 Conn. 496, 20 Atl. 618.

Indiana.— State *v.* Rockwood, 159 Ind. 94, 64 N. E. 592; Beck *v.* State, 72 Ind. 250.

Kentucky.— Nienaber *v.* Tarvin, 104 Ky. 149, 46 S. W. 513, 20 Ky. L. Rep. 451.

Minnesota.— State *v.* Willis, 61 Minn. 120, 63 N. W. 169; State *v.* Leftwich, 41 Minn. 42, 42 N. W. 598.

Missouri.— State *v.* Horner, 16 Mo. App. 191.

Nevada.— Hagerman *v.* Tong Lee, 12 Nev. 331.

New Jersey.— Grand Lodge K. of P. *v.* Jansen, 62 N. J. Eq. 737, 48 Atl. 526.

North Carolina.— *In re* Deaton, 105 N. C. 59, 11 S. E. 244; *In re* Walker, 82 N. C. 95; *In re* Daves, 81 N. C. 72; *Ex p.* Robbins, 63 N. C. 309.

Tennessee.—Brooks *v.* Fleming, 6 Baxt. 331.

Utah.— Snow *v.* Snow, 13 Utah 15, 43 Pac. 620.

Wisconsin.— State *v.* Giles, 10 Wis. 101.

See 10 Cent. Dig. tit. "Contempt," § 227.

49. *California.*— People *v.* O'Neil, 47 Cal. 109.

Colorado.— Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961.

Idaho.— Levan *v.* Third Dist. Ct., (1896) 43 Pac. 574.

Tennessee.— *Ex p.* Martin, 5 Yerg. 456, 26 Am. Dec. 276.

West Virginia.—See Hebb *v.* Tucker County Ct., 48 W. Va. 279, 37 S. E. 676.

See 10 Cent. Dig. tit. "Contempt," § 213.

50. *Colorado.*— Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430.

Illinois.— Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 [*affirming* 25 Ill. App. 194]; Springfield *v.* Edwards, 84 Ill. 626; McEwen *v.* McEwen, 55 Ill. App. 340.

Indiana.— Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 145 Ind. 174, 44 N. E. 191.

Maryland.— Williamson *v.* Carnan, 1 Gill & J. 184.

Minnesota.— Menage *v.* Lustfield, 30 Minn. 487, 16 N. W. 398; Semrow *v.* Semrow, 26 Minn. 9, 46 N. W. 446.

New Jersey.— Coryell *v.* Holcombe, 9 N. J. Eq. 650.

New York.— Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 87 N. Y. 355; New York, etc., R. Co. *v.* Ketchum, 3 Abb. Dec. 347, 3 Keyes 24; Buel *v.* Street, 9 Johns. 443; McCredie *v.* Senior, 4 Paige 378.

North Dakota.— State *v.* Davis, 2 N. D. 461, 51 N. W. 942.

Ohio.— Campbell *v.* Shotwell, 7 Ohio Dec. (Reprint) 473, 3 Cinc. L. Bul. 433.

United States.— McMicken *v.* Perin, 20 How. 133, 15 L. ed. 857. *Compare* Worden *v.* Searles, 121 U. S. 14, 7 S. Ct. 814, 30

B. Mode of Review — 1. In General. The method to be adopted to secure a review of the proceedings or relief from alleged erroneous action of the trial court depends upon the nature of the error claimed, the condition of the record of the case, the progress made in the hearing at the time the relief is sought, and the statutes of the particular state.[51]

2. Certiorari. In a proper case certiorari may be invoked to correct errors of the trial court in matters of contempt.[52] The writ will not issue if the error complained of is one that can be corrected by appeal.[53]

3. Habeas Corpus. In matters of contempt the jurisdiction may be inquired into on habeas corpus.[54] So habeas corpus is a proper remedy in cases for con-

L. ed. 853, holding that an order fining a person for the violation of an injunction, which directs that the fine be paid to the adverse party, being an interlocutory order in a civil suit, is reviewable.

See 10 Cent. Dig. tit. "Contempt," § 224.

As to appeal from interlocutory orders generally see Appeal and Error, III, D [2 Cyc. 586].

51. In Colorado the statute declaring that judgments and orders of a court made in cases of contempt shall be final and conclusive has reference only to the extent of review and not to the mode, as by writ of error or otherwise. Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430.

52. *Alabama.*— Easton *v.* State, 39 Ala. 551, 87 Am. Dec. 49.

California.— McClatchy *v.* Sacramento County Super. Ct., 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; *In re* Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755; Tyler *v.* Connolly, 65 Cal. 28, 2 Pac. 414; *Ex p.* Field, 1 Cal. 187; People *v.* Turner, 1 Cal. 152. It will not lie to review a final order in contempt proceedings, if the plea does not go to the jurisdiction. White *v.* San Francisco Super. Ct., 110 Cal. 60, 42 Pac. 480; Sayers *v.* San Francisco Super. Ct., 84 Cal. 642, 24 Pac. 296; Muir *v.* Contra Costa County Super. Ct., 58 Cal. 361; People *v.* Dwinelle, 29 Cal. 632.

Colorado.— *Compare* Ellis *v.* People, 15 Colo. App. 341, 62 Pac. 232.

Iowa.— State *v.* Buchanan County Dist. Ct., 84 Iowa 167, 50 N. W. 677; Currier *v.* Mueller, 79 Iowa 316, 44 N. W. 555; Ver Straeten *v.* Lewis, 77 Iowa 130, 41 N. W. 594; Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817; Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245; State *v.* Myers, 44 Iowa 580; State *v.* Folsom, 34 Iowa 583; State *v.* Dougherty, 32 Iowa 261; State *v.* Utley, 13 Iowa 593; Dunham *v.* State, 6 Iowa 245; Skiff *v.* State, 2 Iowa 550; Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

Louisiana.— State *v.* Judge Civil Dist. Ct., 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282; State *v.* Monroe, 41 La. Ann. 314, 6 So. 539; State *v.* Lazarus, 37 La. Ann. 401; State *v.* Judge Crim. Dist. Ct., 32 La. Ann. 1222.

Michigan.—Montgomery *v.* Muskegon Booming Co., 104 Mich. 411, 62 N. W. 561.

Minnesota.— State *v.* Leftwich, 41 Minn. 42, 42 N. W. 598; *In re* Fanning, 40 Minn. 4, 41 N. W. 1076.

Montana.— State *v.* Fourth Judicial Dist. Ct., 13 Mont. 347, 34 Pac. 39; *In re* McKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New York.— People *v.* Forbes, 143 N. Y. 219, 38 N. E. 303; People *v.* Kelly, 24 N. Y. 74, 24 How. Pr. 369; *In re* Hess, 48 Hun 586, 1 N. Y. Suppl. 811, 16 N. Y. St. 255; People *v.* Donohue, 22 Hun 470; People *v.* Sheriff, 29 Barb. 622; Birdsall *v.* Phillips, 17 Wend. 464.

North Carolina.— *Ex p.* Biggs, 64 N. C. 202; State *v.* Mott, 49 N. C. 449; State *v.* Woodfin, 27 N. C. 199, 42 Am. Dec. 161.

Pennsylvania.— Com. *v.* Newton, 1 Grant 453; *In re* Hummell, 9 Watts 416.

Tennessee.— Warner *v.* State, 13 Lea 52.

Virginia.— Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

Wisconsin.— Tallmadge *v.* Potter, 12 Wis. 317; Stokes *v.* Knarr, 11 Wis. 389.

United States.— *Ex p.* Chetwood, 165 U. S. 443, 17 S. Ct. 385, 41 L. ed. 782.

See 10 Cent. Dig. tit. "Contempt," § 221.

The writ reaches matters on the face of the record which are jurisdictional in their nature (State *v.* Smith, 101 Mo. 174, 14 S. W. 108) and errors which might not be fatal in a collateral proceeding (Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; State *v.* Moniteau County Ct., 45 Mo. App. 387).

53. White *v.* San Francisco Super. Ct., 110 Cal. 60, 42 Pac. 480; State *v.* Second Judicial Dist. Ct., 14 Mont. 396, 40 Pac. 66; *In re* Finkelstein, 13 Mont. 425, 34 Pac. 847.

54. *California.*— *Ex p.* Rowe, 7 Cal. 181.

District of Columbia.— Lamon *v.* McKee, 7 Mackey 446.

Indiana.— *Ex p.* Lawler, 28 Ind. 241.

Kansas.— *In re* Mitchell, 1 Kan. 643.

Kentucky.— *Ex p.* Alexander, 2 Am. L. Reg. 44.

Louisiana.— State *v.* Fagin, 28 La. Ann. 881.

Nebraska.— *In re* Havlik, 45 Nebr. 747, 64 N. W. 234.

Nevada.— *Ex p.* Gardner, 22 Nev. 280, 39 Pac. 570.

New York.— People *v.* Grant, 13 N. Y. Civ. Proc. 305.

Pennsylvania.— Williamson *v.* Lewis, 39 Pa. St. 9.

Texas.— *Ex p.* Kearby, 35 Tex. Crim. 531, 34 S. W. 635; *Ex p.* Degener, 30 Tex. App. 566, 17 S. W. 1111.

Vermont.— *In re* Cooper, 32 Vt. 253.

tempt where the judgment is void on its face.[55] But the supreme court will not grant a habeas corpus where a party has been committed for a contempt by a court having competent jurisdiction.[56]

4. Mandamus. The extraordinary writ of mandamus will issue when the applicant has a clear right and no other specific and adequate remedy.[57]

5. Writ of Error. In some jurisdictions contempt proceedings are reviewable by a higher court by writ of error, which lies only from a final judgment.[58]

C. Presentation and Reservation of Grounds For Review. Questions not presented in the trial court in some appropriate manner[59] will not as a rule[60] be considered by the reviewing court.[61]

United States.— *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 3 L. ed. 1207.

See 10 Cent. Dig. tit. "Contempt," § 217; and Habeas Corpus.

Tyrannical exercise of power.— If the power of the court to commit or fine for contempt has been tyrannically exercised it may be remedied by habeas corpus. Tyler *v.* Connolly, 65 Cal. 28, 2 Pac. 414.

55. *Ex p.* Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 49 Am. St. Rep. 557, 33 L. R. A. 386; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404.

Where the petition showed that the party had been imprisoned for a longer term than allowed by law as a punishment for contempt the writ was granted in order to investigate the case and ascertain whether or not the imprisonment was legal. *Ex p.* Edwards, 11 Fla. 174.

56. *California.*— *Ex p.* Cohen, 5 Cal. 494.

Illinois.— Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Iowa.— *Ex p.* Holman, 28 Iowa 88, 5 Am. Rep. 159.

Louisiana.— *Ex p.* Wood, 30 La. Ann. 672.

Maryland.— *Ex p.* Maulsby, 13 Md. 625, Appendix.

Michigan.— *In re* Bissell, 40 Mich. 63.

Mississippi.— Shattuck *v.* State, 51 Miss. 50, 24 Am. Rep. 624; *Ex p.* Adams, 25 Miss. 883, 59 Am. Dec. 234.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New York.— *In re* Taylor, 8 Misc. 159, 28 N. Y. Suppl. 500, 60 N. Y. St. 136; *In re* Kahn, 11 Abb. Pr. 147, 19 How. Pr. 475.

Pennsylvania.— *In re* Williamson, 12 Leg. Int. 246.

Texas.— Jordan *v.* State, 14 Tex. 436.

United States.— *Ex p.* Kearney, 7 Wheat. 38, 5 L. ed. 391.

See 10 Cent. Dig. tit. "Contempt," § 217.

57. *Alabama.*— Hogan *v.* Alston, 9 Ala. 627.

California.— Merced Min. Co. *v.* Fremont, 7 Cal. 130.

District of Columbia.— Lamon *v.* McKee, 7 Mackey 446.

Michigan.— Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148; Schwartz *v.* Barry, 90 Mich. 267, 51 N. W. 279.

New York.—*Ex p.* Chamberlain, 4 Cow. 49.

See 10 Cent. Dig. tit. "Contempt," § 216; and Mandamus.

Mandamus will not issue to compel a district judge to allow an appeal in a contempt proceeding. *Ex p.* Powers, 4 La. Ann. 105. And where the proceedings to punish for contempt have been dismissed by the trial court, the appellate court will not by mandamus compel the trial court to punish. Heilbron *v.* Tulare County Super. Ct., 72 Cal. 96, 13 Pac. 160. So a final order of court refusing to punish for wilful disobedience of its order cannot be reviewed under a writ of mandamus. State *v.* Horner, 16 Mo. App. 191.

In an application for mandamus to compel the probate judge to arrest a debtor for disobedience of an order of court the facts upon which the writ is sought must be shown to be true. Kimball *v.* Morris, 2 Metc. (Mass.) 573.

58. *Colorado.*— Cooper *v.* People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430.

Georgia.— An order adjudging one in contempt for violating an injunction may be brought to the supreme court on a "fast" writ of error. Hayden *v.* Phinizy, 67 Ga. 758.

Illinois.— *Ex p.* Smith, 117 Ill. 63, 7 N. E. 683; Stuart *v.* People, 4 Ill. 395.

Ohio.— State *v.* Davis, 18 Ohio Cir. Ct. 479, 10 Ohio Cir. Dec. 203; Butterfield *v.* O'Connor, 3 Ohio Dec. (Reprint) 34, 2 Wkly. L. Gaz. 192.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Virginia.—Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

West Virginia.— State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413.

See 10 Cent. Dig. tit. "Contempt," § 214.

59. In Nebraska before a review can be obtained the alleged errors committed must be submitted to the court by a motion for a new trial. Zimmerman *v.* State, 46 Nebr. 13, 64 N. W. 375.

60. The question of the jurisdiction of the court may be raised on appeal, although not raised in trial court. People *v.* Weigley, 155 Ill. 491, 40 N. E. 300. And where defendant in the trial court was denied the right of objecting to the jurisdiction of the court, he is entitled in the appellate court to the benefit of all preliminary motions which he could properly have made in the court below. State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

61. *Georgia.*— Brannon *v.* Central Bank, 18 Ga. 361.

New Jersey.— *In re* Cheeseman, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596.

New York.— King *v.* Barnes, 113 N. Y. 476, 21 N. E. 182, 23 N. Y. St. 263 [*affirming*

D. Supersedeas. An appeal will not of itself stay or supersede the judgment of the trial court.[62] A bond must be given.[63]

E. Record. In some jurisdictions the facts constituting the contempt must be set out in the record.[64] The statement entered of record by the lower court of the facts constituting the contempt will be taken as true by the appellate court.[65]

F. Scope and Extent of Review — 1. In General. The question of jurisdiction of the trial court and its power to pronounce the sentence are always open to review.[66] But on appeal from an order that an attachment for contempt issue

51 Hun 550, 4 N. Y. Suppl. 247, 22 N. Y. St. 47, 51, 54]; Park *v.* Park, 80 N. Y. 156; People *v.* Tamsen, 15 Misc. 364, 37 N. Y. Suppl. 407, 72 N. Y. St. 472, 25 N. Y. Civ. Proc. 141; Wilson *v.* Greig, 12 N. Y. Wkly. Dig. 73.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

South Carolina.—State *v.* Nathans, 49 S. C. 199, 27 S. E. 52.

Texas.— Harris *v.* McDade, 1 Tex. App. Civ. Cas. § 796.

See 10 Cent. Dig. tit. "Contempt," § 229.

62. Whittem *v.* State, 36 Ind. 196.

As to effect of appeal as supersedeas generally see Appeal and Error, VIII, F [2 Cyc. 889].

Good cause must be shown to have execution suspended. The mere pendency of the petition in error to reverse the judgment of the trial court is not sufficient ground. Steube *v.* State, 3 Ohio Cir. Ct. 383.

Second application for attachment.— Where an application for attachment to compel a party to pay alimony has been dismissed, the pending of an appeal is no bar to a second and similar application for attachment to compel payment of alimony accruing after the dismissal of the first application. State *v.* McClinton, 17 Wash. 45, 48 Pac. 740.

Trial court cannot grant a stay of proceedings where an appeal has been taken; the application should be made to the court in which the appeal is pending. Van Orden *v.* Van Orden, 27 N. Y. App. Div. 136, 50 N. Y. Suppl. 184.

63. *Ex p.* Clancy, 90 Cal. 553, 27 Pac. 411; Fischer *v.* Hayes, 7 Fed. 96, 19 Blatchf. 184.

Breach of bond. — Where an appeal-bond was conditioned upon the surrender to the sheriff within ten days after affirmance, the surrender to the sheriff within ten days after a rehearing was refused was not within the conditions of the bond. Klein *v.* Boyd, 169 Ill. 325, 48 N. E. 475 [*affirming* 67 Ill. App. 165].

64. Rawson *v.* Rawson, 35 Ill. App. 505; Wilcox *v.* State, 46 Nebr. 402, 64 N. W. 1072.

In Iowa the evidence upon which the court acted in the proceeding for contempt is required to be preserved in the record, or if the court acted upon its own knowledge a statement of the facts must be filed. Dorgan *v.* Granges, 76 Iowa 156, 40 N. W. 697; State *v.* Dougherty, 32 Iowa 261; State *v.* Utley, 13 Iowa 593; Skiff *v.* State, 2 Iowa 550. But under the statute requiring the evidence in the proceeding to be in writing and filed the writ of injunction disobeyed is not included. Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548. And a failure to preserve a statement of the facts on which the order was granted will not be fatal, where the facts of the contempt were at the time taken down by a shorthand reporter and afterward filed. Small *v.* Wakefield, 84 Iowa 533, 51 N. W. 35; Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245.

Under the Indiana statute requiring a verified charge setting forth the facts constituting the contempt, the verified charge is a part of the record without being made so by bill of exceptions. Stewart *v.* State, 140 Ind. 7, 39 N. E. 508.

Under a code provision providing that a party may be punished as for a civil contempt where the act committed impaired, impeded, or prejudiced the rights or remedies of the complaining party the record on appeal must show that there had been an adjudication, that he had committed the acts complained of, or that plaintiff's rights had been impaired by his acts. Dailey *v.* Fenton, 47 N. Y. App. Div. 418, 62 N. Y. Suppl. 337, 7 N. Y. Annot. Cas. 222.

65. Holman *v.* State, 105 Ind. 513, 5 N. E. 556.

66. *California.*—*Ex p.* Clark, 110 Cal. 405, 42 Pac. 905; *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *Ex p.* Fong Yen Yon, (1888) 19 Pac. 500; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Ex p.* Steines, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; Kelly *v.* Wilson, (1886) 11 Pac. 244; *In re* Gannon, 69 Cal. 541, 11 Pac. 240; *Ex p.* Perkins, 18 Cal. 60; *In re* Cohen, 5 Cal. 494.

Colorado.— Shore *v.* People, 26 Colo. 516, 59 Pac. 49; Bloom *v.* People, 23 Colo. 416, 48 Pac. 519; Wyatt *v.* People, 17 Colo. 252, 28 Pac. 961; Cooper *v.* People, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430.

Illinois.— Berkson *v.* People, 154 Ill. 81, 39 N. E. 1079 [*affirming* 51 Ill. App. 102]; Tolman *v.* Jones, 114 Ill. 147, 28 N. E. 464; Clark *v.* Burke, 62 Ill. App. 252.

Kansas.— *In re* Smith, 52 Kan. 13, 33 Pac. 957; *In re* Morris, 39 Kan. 28, 18 Pac. 171, 7 Am. St. Rep. 512; *In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747.

Louisiana.— State *v.* Houston, 40 La. Ann. 434, 4 So. 131.

Maine.—Androscoggin R. Co. *v.* Androscoggin R. Co., 49 Me. 392.

Michigan.— *In re* Morton, 10 Mich. 208.

against a person for disobeying an order, the propriety of such order cannot be questioned.[67]

2. Discretion of Trial Court. In the absence of statutory regulation, the matter of dealing with contempts, and when and how they shall be punished, are within the sound discretion of the trial court, and unless such discretion is grossly abused the decision must stand.[68]

3. Harmless Error. Mere irregularities in the proceedings, or errors of judgment on the part of the trial court, which do not affect the substantial rights of defendant ordinarily will not be considered on review.[69]

Mississippi.— *Ex p.* Wimberly, 57 Miss. 437.

Missouri.— *Ex p.* O'Brien, 127 Mo. 477, 30 S. W. 158.

Nebraska.—Nebraska Children's Home Soc. *v.* State, 57 Nebr. 765, 78 N. W. 267.

Nevada.— Phillips *v.* Welch, 12 Nev. 158.

New Hampshire.—State *v.* Towle, 42 N. H. 540.

New York.— People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; People *v.* Hannah, 92 Hun 476, 37 N. Y. Suppl. 702, 73 N. Y. St. 246; People *v.* Sheriff, 29 Barb. 622; People *v.* Sheriff, 7 Abb. Pr. 96; People *v.* Kelly, 21 How. Pr. 54.

North Carolina.— Young *v.* Rollins, 90 N. C. 125; *Ex p.* Summers, 27 N. C. 149.

Oregon.— State *v.* McKinnon, 8 Oreg. 487.

Pennsylvania.— Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260, 36 Wkly. Notes Cas. 128; *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374.

South Carolina.— Gilliam *v.* McJunkin, 2 S. C. 442; James *v.* Smith, 2 S. C. 183.

South Dakota.— State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

Utah.— People *v.* Owens, 8 Utah 20, 28 Pac. 871.

Virginia.— Nelson *v.* Suddarth, 1 Hen. & M. 350.

Wisconsin.— *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re* Graham, 76 Wis. 366, 44 N. W. 1105; State *v.* Sloan, 65 Wis. 647, 27 N. W. 616; *In re* Milburn, 59 Wis. 24, 17 N. W. 965.

United States.— *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; *Ex p.* Frederick, 149 U. S. 70, 13 S. Ct. 793, 37 L. ed. 653; Delgado *v.* Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. ed. 578; *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117.

See 10 Cent. Dig. tit. "Contempt," § 232.

Trial de novo.— Under a statute giving an appeal from final orders in contempt cases, and providing that the court may review all the proceedings on affidavits and other proof, the court has no authority to try the case anew, but sits as a court of review for correction of errors. State *v.* Massey, 10 N. D. 154, 86 N. W. 225.

67. People *v.* Rochester, etc., R. Co., 76 N. Y. 294; Clark *v.* Bininger, 75 N. Y. 344; *In re* Bornemann, 6 N. Y. App. Div. 524, 39 N. Y. Suppl. 686; Myers *v.* Trimble, 3 E. D. Smith (N. Y.) 607; Grimm *v.* Grimm, 1 E. D. Smith (N. Y.) 190.

The correctness of an order which the court had jurisdiction to pronounce if not appealed from cannot be inquired into as a ground for reversing a subsequent order to commit defendant for contempt for disobeying the prior order. People *v.* Brower, 4 Paige (N. Y.) 405.

68. *Alabama.*— Wyatt *v.* Magee, 3 Ala. 94.

Connecticut.— William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

Georgia.— Wakefield *v.* Moore, 65 Ga. 268; Tucker *v.* Keen, 60 Ga. 410; Thweatt *v.* Gammell, 56 Ga. 98; Williams *v.* Lumpkin, 53 Ga. 200; Remley *v.* De Wall, 41 Ga. 466; Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767; Cabot *v.* Yarborough, 27 Ga. 476.

Illinois.— Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177.

Indiana.— Brown *v.* Brown, 4 Ind. 627, 58 Am. Dec. 641.

Iowa.— State *v.* Archer, 48 Iowa 310.

Michigan.— Bagley *v.* Scudder, 66 Mich. 97, 33 N. W. 47; Froman *v.* Froman, 53 Mich. 581, 19 N. W. 193; Haines *v.* Haines, 35 Mich. 138.

New York.— Watrous *v.* Kearney, 79 N. Y. 496 [*affirming* 11 Hun 584]; Cochrane *v.* Ingersoll, 73 N. Y. 613; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; People *v.* Delvecchio, 18 N. Y. 352; Schulte *v.* Anderson, 48 N. Y. Super. Ct. 133; Putnam *v.* Anthony, 7 N. Y. St. 580; Ackroyd *v.* Ackroyd, 2 Abb. Pr. N. S. 380; Troy, etc., R. Co. *v.* Boston, etc., R. Co., 57 How. Pr. 181.

North Carolina.— Murray *v.* Berry, 113 N. C. 46, 18 S. E. 78.

Ohio.— *Compare* Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

Texas.—Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 13 Tex. Civ. App. 103, 35 S. W. 337.

Wisconsin.— West *v.* State, 1 Wis. 209.

England.—Rex *v.* Clement, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458; *In re* Wray, 36 Ch. D. 138, 56 L. J. Ch. 1106, 67 L. T. Rep. N. S. 605, 36 Wkly. Rep. 67.

See 10 Cent. Dig. tit. "Contempt," § 234.

69. *California.*— *Ex p.* Rowe, 7 Cal. 181.

Georgia.— Martin *v.* Burgwyn, 88 Ga. 78, 13 S. E. 958; Clement *v.* Bunn, 60 Ga. 334.

Indiana.— Hawkins *v.* State, 126 Ind. 294, 26 N. E. 43.

New York.— *In re* Copcutt, 69 Hun 110, 23 N. Y. Suppl. 394, 52 N. Y. St. 724.

South Carolina.— *In re* Stokes, 5 S. C. 71.

Wisconsin.— *In re* Perry, 30 Wis. 268.

See 10 Cent. Dig. tit. "Contempt," § 236.

Before defendant will be discharged it

4. PRESUMPTIONS. Every fact found by a court in a proceeding for contempt is to be taken as true, and every intendment is to be made in favor of its record, if it appears within the jurisdiction of the court.[70] Thus where the objection that no competent order was made for the issuing of the attachment was not raised in the trial court, the court reviewing the proceedings will presume that such an order had been made.[71] Unless the fact affirmatively appears from the record, it will be presumed that the court did not adjudge defendant guilty without an examination of the facts and an opportunity to be heard.[72]

5. QUESTIONS OF FACT. The review is generally limited to questions of law. Questions of fact will not be considered.[73] The court, however, may determine whether the alleged contemptuous conduct constitutes a contempt in law.[74]

G. Determination and Disposition of Cause. The reviewing court has power to affirm[75] in whole or in part, reverse[76] in whole or in part, or modify[77]

must appear that the proceedings were in whole or in part void. *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

70. Gunn *v.* Calhoun, 51 Ga. 501; Com. *v.* Newton, 1 Grant (Pa.) 453. So an order will not be reversed because it does not affirmatively appear from the appeal papers that proof of the misconduct was made by affidavit, and due notice given. Sudlow *v.* Knox, 4 Abb. Dec. (N. Y.) 326, 7 Abb. Pr. N. S. (N. Y.) 411.

Existence of jurisdictional facts.— It will be presumed in support of the judgment that the necessary jurisdictional facts existed. *In re* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. ed. 154.

71. Park *v.* Park, 80 N. Y. 156. See also Beck *v.* State, 72 Ind. 250.

Scope of order.— It will be assumed that the order of the trial court fully expresses the intention of the court as to the scope of the order disobeyed. People *v.* Bergen, 6 Hun (N. Y.) 267.

72. Papke *v.* Papke, 30 Minn. 260, 15 N. W. 117. And it is presumed that the trial court considered all matters offered in defense or extenuation, and its judgment is conclusive. Seventy-six Land, etc., Co. *v.* Fresno County Super. Ct., 93 Cal. 139, 28 Pac. 813.

Conformity to rules of practice.— It will be presumed by the appeal court that the chancellor conformed to the rule of practice as it existed in his own court. Lewis *v.* Miller, 13 Sm. & M. (Miss.) 110.

73. *Georgia.*— Smith *v.* Cook, 39 Ga. 191.
Kansas.— *In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747.
Kentucky.— Turner *v.* Com., 2 Metc. 619; Bickley *v.* Com., 2 J. J. Marsh. 572; Fechter *v.* Hays, 4 Ky. L. Rep. 217.
Louisiana.— State *v.* Houston, 40 La. Ann. 434, 4 So. 131.
New York.— Holly Mfg. Co. *v.* Venner, 143 N. Y. 639, 37 N. E. 648.
North Carolina.—Green *v.* Green, 130 N. C. 578, 41 S. E. 784; Young *v.* Rollins, 90 N. C. 125. But see *In re* Deaton, 105 N. C. 59, 11 S. E. 244.
Oklahoma.— Burke *v.* Territory, 2 Okla. 499, 37 Pac. 829.
Oregon.— State *v.* McKinnon, 8 Oreg. 487.
Canada.— Young *r.* Saylor, 23 Ont. 513.
See 10 Cent. Dig. tit. "Contempt," § 235.

74. *Florida.*— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.
Illinois.— *Ex p.* Thatcher, 7 Ill. 167.
Iowa.— State *v.* Seaton, 61 Iowa 563, 16 N. W. 736.
Kansas.— *In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747.
Maine.— Bradley *v.* Veazie, 47 Me. 85.
New York.— *In re* Blumenthal, 22 Misc. 704, 50 N. Y. Suppl. 49 [*affirming* 22 Misc. 764, 48 N. Y. Suppl. 1101].
North Carolina.— *Ex p.* Summers, 27 N. C. 149.
See 10 Cent. Dig. tit. "Contempt," § 235.

75. Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; *In re* Copcutt, 69 Hun (N. Y.) 110, 23 N. Y. Suppl. 394, 52 N. Y. St. 724.
Where the judgment is in accordance with the law and facts, the supreme court will affirm it, and will not consider the general policy of punishing for the contempt. *In re* Chesseman, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596.

76. Middlebrook *v.* State, 43 Conn. 257, 21 Am. Rep. 650; Patton *v.* Harris, 15 B. Mon. (Ky.) 607.
Effect of reversal.— Where the order for the disobedience of which defendant was adjudged in contempt has been reversed by the appellate court the order adjudging the contempt also falls. Smith *v.* McQuade, 13 N. Y. Suppl. 63, 36 N. Y. St. 557.

77. Turner *v.* Com., 2 Metc. (Ky.) 619; Bickley *v.* Com., 2 J. J. Marsh. (Ky.) 572; Fechter *v.* Hays, 4 Ky. L. Rep. 217; State *v.* Houston, 40 La. Ann. 434, 4 So. 131.
Costs.— The appellate court will not modify the order so as to include the costs of the appeal where they were not included in the order to show cause. Tucker *v.* Gilman, 14 N. Y. Suppl. 392, 37 N. Y. St. 958, 20 N. Y. Civ. Proc. 397.
Reduction of fine.— The court has power to make a reduction of the fine imposed by the lower court. Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Light Co., 68 N. Y. App. Div. 414, 74 N. Y. Suppl. 486. Thus where the fine assessed was in excess of the amount limited by the statute, the appellate court will modify the order reducing the fine within the

the judgment of the trial court. In a proper case the cause may be dismissed[78] or remanded to the trial court with directions as to further proceedings, or to enter such judgment as may seem proper.[79] When the reviewing court has given final judgment in a case all questions therein become *res adjudicata*.[80]

X. COSTS.

In civil contempts if the rule is made absolute the costs should be taxed against defendant, but if discharged, against complainant.[81] In a proceeding for a criminal contempt it has been held that costs cannot be imposed.[82]

CONTENEMENT or **CONTENTMENT.** A man's countenance or credit, which he has together with, and by reason of, his freehold; or, that which is necessary for the support and maintenance of men, agreeably to their several qualities of life.[1]

CONTENTION. A violent effort to obtain something, or to resist physical force, whether an assault or bodily opposition; physical contest; struggle; strife.[2]

CONTENTIOUS. Contested; adversary; litigated between adverse or contending parties; a judicial proceeding not merely *ex parte* in its character, but comprising attack and defense as between opposing parties, is so called.[3]

limits of the statute. Luedeke *v.* Coursen, 3 Misc. (N. Y.) 559, 23 N. Y. Suppl. 314, 52 N. Y. St. 516.

Where the order has been modified, such as finding that the amount which defendant was ordered to pay was too large, the appellate court in reviewing the order of commitment may discharge the party from the contempt without prejudice to institute proceedings if the amount as found by the appellate court is not paid. Gilman *v.* Byrnes, 10 N. Y. Civ. Proc. 46.

78. Where the party was adjudged guilty of contempt and ordered to be confined for a term which has long since elapsed, the supreme court dismissed the writ of error on the ground that a reversal would be inoperative to release plaintiff in error from the punishment he has suffered, while an affirmance could not restore vitality to an order limited to particular debts long since past. Loven *v.* People, 46 Ill. App. 306.

79. Russell *v.* Mohr-Weil Lumber Co., 102 Ga. 563, 29 S. E. 271; Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 11 S. E. 599. But see Livingston *v.* Swift, 23 How. Pr. (N. Y.) 1, holding that on reversing the order of commitment the supreme court will not make such order as the court below ought to have made, but will leave the parties to such future proceedings to vindicate their rights as they shall be advised.

Reference.— The supreme court may direct the lower court to have a reference made of the facts and that thereafter the lower court should take such further action in regard to the discharge of the contemner as in its discretion might seem just and lawful. Ryan *v.* Kingsbery, 89 Ga. 228, 15 S. E. 302. See also Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377.

80. Ryan *v.* Kingsbery, 89 Ga. 228, 15 S. E. 302.

Modification after affirmance.— Where the supreme court has affirmed a judgment it has no power afterward to modify or remit the fine. *In re* Griffin, 98 N. C. 225, 3 S. E. 515.

81. Ahlers *v.* Thomas, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820; Weaver *v.* Hamilton, 47 N. C. 343; State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413; Sparkman *v.* Higgins, 22 Fed. Cas. No. 13,209, 2 Blatchf. 29, 1 Fish. Pat. Cas. 135.

As to costs and expenses as indemnity to injured party see *supra*, VIII, B, 3, b, (II).

82. People *v.* Gilmore, 88 N. Y. 626 [*reversing* 26 Hun 1]; Doyle *v.* Doyle, 4 N. Y. Civ. Proc. 265. But see State *v.* Rinehart, 92 Tenn. 270, 21 S. W. 524, holding that defendant is liable for the costs of attachments against witnesses, where witnesses were afterward found innocent of any contempt.

As to imprisonment for non-payment of fine and costs see *supra*, VIII, B, 2, b.

Taxation against county.— Where the proceeding is of a criminal nature and the party discharged, the costs should be taxed against the county. State *v.* Milligan, 4 Wash. 29, 29 Pac. 763.

1. Wharton L. Lex. See also Black L. Dict.

2. Century Dict.

Employed in Westminster Hall as a synonym for point or proposition see Orvis *v.* Jennings, 6 Daly (N. Y.) 434, 447.

3. Black L. Dict.

Coke's definition explained.— In Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605, 622 [*citing* Coke Litt. 113*b*], it is said: "Coke gives no illustration of what was meant by 'contentions,' except 'opposition on good grounds,' . . . The expression 'opposition on good grounds' implies an act which would afford an opportunity to submit its validity to the test of judicial decision, and is more consistent with the idea of an

CONTENTMENT. See CONTENEMENT.

CONTENTS. That which is contained; the thing or things held, included, or comprehended within a limit or limits.[4] (Contents: Of Building, see FIRE INSURANCE; WILLS. Unknown, see CONTENTS UNKNOWN.)

CONTENTS AND NOT-CONTENTS. In parliamentary law, the "contents" are those who, in the house of lords, express assent to a bill; the "not" or "non-contents" dissent.[5]

CONTENTS OF A NOTE. The sum it shows to be due, and the same may, without much violence to language, be said of an account;[6] designate the specific sum named therein and payable by the terms of the instrument itself.[7]

CONTENTS UNKNOWN. Words sometimes annexed to a bill of lading of goods in cases. Their meaning is that the master only means to acknowledge the shipment, in good order, of the cases, as to their external condition.[8] (See, generally, CARRIERS; SHIPPING.)

CONTER. See CONTRE.

CONTERMINOUS. ADJACENT, *q. v.*; ADJOINING, *q. v.*; having a common boundary; coterminous.[9] (Conterminous: Landowners, see ADJOINING LANDOWNERS.)

CONTEST.[10] As a noun, strife; struggle for victory or superiority, or in defense; a struggle in arms,[11] a litigation,[12] a trial of the title to office.[13] As a

interference with the enjoyment of the right, such as would give the owner ability to go into court and establish his right, than with the supposition that prescriptive rights should be forever kept in abeyance by acts which gave persons claiming them, no power by suit at law to establish the right."

"The litigious proceedings in ecclesiastical courts are sometimes said to belong to its 'contentious' jurisdiction, in contradistinction to what is called its 'voluntary' jurisdiction, which is exercised in the granting of licenses, probates of wills, dispensations, faculities, etc." Black L. Dict.

4. Century Dict. See Fenton *v.* Fenton, 35 Misc. (N. Y.) 479, 485, 71 N. Y. Suppl. 1083, where it is stated that the term is broad enough to include bonds, mortgages, bank books and cash.

The general phrase "contents of house," following the specific one of "household furniture," must be confined to matters *ejusdem generis*. Fenton *v.* Fenton, 35 Misc. (N. Y.) 479, 485, 71 N. Y. Suppl. 1083.

"The word 'contents,' in the statute, is significant, and its true import is to be sought in the connection in which it is found." Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107, 115, 2 Fed. Cas. No. 1,031. See also Bohan *v.* Casey, 5 Mo. App. 101, 106.

5. Black L. Dict.

6. North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 44 L. ed. 1061; Sere *v.* Pitot, 6 Cranch (U. S.) 332, 335, 3 L. ed. 240; Simons *v.* Ypsilanti Paper Co., 33 Fed. 193, 194; Wilkinson *v.* Wilkinson, 2 Curt. (U. S.) 582, 584, 29 Fed. Cas. No. 17,677.

7. Barney *v.* Globe Bank, 5 Blatchf. (U. S.) 107, 115, 2 Fed. Cas. No. 1,031.

Construing the terms as used in the judiciary act of 1789 "the contents of any promissory note or other chose in action," it was said in Corbin *v.* Black Hawk County, 105 U. S. 659, 26 L. ed. 1136 [*quoted* in Republic Iron Min. Co. *v.* Jones, 37 Fed. 721, 722, 2 L. R. A. 746]: "The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents." And see Simons *v.* Ypsilanti Paper Co., 33 Fed. 193, 194. See also Wilkinson *v.* Wilkinson, 2 Curt. (U. S.) 582, 583, 29 Fed. Cas. No. 17,677.

8. Black L. Dict.

What the terms import.— In Clark *v.* Barnwell, 12 How. (U. S.) 272, 283, 13 L. ed. 985, the bill of lading contained the usual clause, that the goods were shipped in good order; but there was added, at the conclusion, "contents unknown." The court said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board, extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, the condition of it at the time received on board, or whether properly packed or not in the boxes."

"'Contents and gauge unknown,' used in this bill of lading, [they] cannot be considered as implying more than ignorance of the quantity or quality, not of the fact of there being molasses in the casks." Nelson *v.* Stephenson, 5 Duer (N. Y.) 538, 552.

9. Black L. Dict.

10. The term is considered as a word of art when used in constitutions and statutes and has a distinct and defined meaning. Pratt *v.* Breckinridge, 65 S. W. 136, 23 Ky. L. Rep. 1356.

11. Century Dict.

12. Pratt *v.* Breckinridge, 65 S. W. 136, 142, 23 Ky. L. Rep. 1356, where it is said: "It implies a plaintiff and a defendant, and a thing in controversy."

13. Dalton *v.* State, 43 Ohio St. 652, 683, 3 N. E. 685.

verb, to make a subject of dispute, contention, or litigation;[14] to call in question; to controvert; to oppose; to dispute;[15] to defend, as a suit or other judicial proceeding;[16] to dispute or resist, as a claim, by course of law;[17] to litigate;[18] to strive to win or hold; to challenge.[19] (Contest: Of Claim, see Assignments For Benefit of Creditors; Bankruptcy; Executors and Administrators; Insolvency. Of Election, see Elections. Of Will, see Wills.)

CONTESTATIO LITIS. In old English law, coming to an issue; the issue so produced. In Roman law, contestation of a suit; the framing an issue; joinder in issue.[20]

CONTESTATIO LITIS EGET TERMINOS CONTRADICTARIOS. A maxim meaning "An issue requires terms of contradiction."[21]

CONTESTATION. An issue of controversy.[22]

CONTESTATION OF SUIT. In an ecclesiastical cause, that stage of the suit which is reached when the defendant has answered the libel by giving in an allegation.[23]

CONTESTED ELECTION. See Elections.

CONTEXT. The part or parts of something written or printed which precede or follow a text or quoted sentence, or are so intimately associated with it as to throw light upon its meaning.[24] (Context: Considered in Aid of Construction, see Constitutional Law; Contracts; Statutes; Wills.)

CONTIGUOUS.[25] Adjacent,[26] *q. v.;* in actual close contact,[27] touching,[28] near;[29]

14. Webster Dict. [*quoted* in Robertson *v.* State, 109 Ind. 79, 117, 10 N. E. 582, 643].

15. Parks *v.* State, 100 Ala. 634, 652, 13 So. 756; Webster Dict. [*quoted* in Robertson *v.* State, 109 Ind. 79, 117, 10 N. E. 582, 643].

16. Parks *v.* State, 100 Ala. 634, 652, 13 So. 756; Webster Dict. [*quoted* in Robertson *v.* State, 109 Ind. 79, 117, 10 N. E. 582, 643].

17. Webster Dict. [*quoted* in Robertson *v.* State, 109 Ind. 79, 117, 10 N. E. 582, 643].

18. Parks *v.* State, 100 Ala. 634, 652, 13 So. 756; Webster Dict. [*quoted* in Robertson *v.* State, 109 Ind. 79, 117, 10 N. E. 582, 643].

19. Parks *v.* State, 100 Ala. 634, 652, 13 So. 756.

20. Black L. Dict.

21. Black L. Dict.

22. Wharton L. Lex.

23. Black L. Dict.

24. Webster Int. Dict.

25. Derived from the two Latin words *con* and *tangere*. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

26. Langlois *v.* Cameron, 201 Ill. 301, 306, 66 N. E. 332; Adams County *v.* Quincy, 130 Ill. 566, 579, 22 N. E. 624, 6 L. R. A. 155; Linn County Bank *v.* Hopkins, 47 Kan. 580, 582, 28 Pac. 606, 27 Am. St. Rep. 309; Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 193, 25 Am. Rep. 168; Webster Unabr. Dict. [*quoted* in Clements *v.* Crawford County Bank, 64 Ark. 7, 9, 40 S. W. 132, 62 Am. St. Rep. 149; Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

Distinguished from "adjacent."—"What is 'adjacent' may be separated by the intervention of some object; what is 'contiguous' must touch on one side." Worcester Dict. [*quoted* in Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274].

27. Langlois *v.* Cameron, 201 Ill. 301, 306, 66 N. E. 332; Adams County *v.* Quincy, 130 Ill. 566, 579, 22 N. E. 624, 6 L. R. A. 155; Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 193, 25 Am. Rep. 168; Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 398, 16 S. E. 274 [*quoting* Pigg *v.* Clark, 3 Ch. D. 672, where it is said: "The word, then, having a primary meaning, must always be understood in that sense, unless the context shows it was otherwise intended; the rule being . . . that where a word is used that has a primary meaning (as all words have which have more than one meaning), you want a context to find another"]; Webster Unabr. Dict. [*quoted* in Clements *v.* Crawford County Bank, 64 Ark. 7, 9, 40 S. W. 132, 62 Am. St. Rep. 149; Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

28. Langlois *v.* Cameron, 201 Ill. 301, 306, 66 N. E. 332; Adams County *v.* Quincy, 130 Ill. 566, 579, 22 N. E. 624, 6 L. R. A. 155; Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274; Webster Unabr. Dict. [*quoted* in Clements *v.* Crawford County Bank, 64 Ark. 7, 9, 40 S. W. 132, 62 Am. St. Rep. 149; Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

29. Langlois *v.* Cameron, 201 Ill. 301, 66 N. E. 332, 334; Adams County *v.* Quincy, 130 Ill. 566, 579, 22 N. E. 624, 6 L. R. A. 155; Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 193, 25 Am. Rep. 168; Webster Unabr. Dict. [*quoted* in Clements *v.* Crawford County Bank, 64 Ark. 7, 9, 40 S. W. 132, 62 Am. St. Rep. 149; Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

It is a relative term, and when employed in reference to a building, evidently means in close proximity to the same. Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 193, 25 Am. Rep. 168. See also Guild *v.* Chicago, 82 Ill. 472 ("contiguous property" in constitution); Chapman *v.* Cook, 10 R. I. 304, 309, 14 Am.

ADJOINING,[30] *q. v.*, neighboring;[31] lying adjoining;[32] touching sides;[33] touching along a considerable line.[34] (Contiguous: Landowners, see ADJOINING LANDOWNERS.)

CONTIGUOUS LOTS. Lots that are bounded and described on the recorded plats of cities and towns (where there is any such platting), and such as lie adjacent or adjoining to each other.[35]

CONTIGUOUS PERSON. One whose property is separated from the river only by a street or public highway.[36]

CONTIGUOUS PROPRIETORS. Those whose land actually touches the road, or through whose land the road passes.[37] (See, generally, ADJOINING LANDOWNER; STREETS AND HIGHWAYS.)

CONTINENTAL. Pertaining to or characteristic of a continent.[38]

CONTINENTIA. In old English practice, continuance or connection.[39]

CONTINGENCY. The quality of being contingent or casual; the possibility of coming to pass; an event which may occur; a casualty;[40] a POSSIBILITY,[41] *q. v.*; some specified time, thing or event, in the future, which may or may not occur;[42] a fortuitous event which comes without design, foresight or expectation.[43] (See CONTINGENT.)

CONTINGENT.[44] Not existing or occurring through necessity; dependent upon a foreseen possibility; provisionally liable to exist, happen, or take effect in the future;[45] possible, or liable, but not certain, to occur; incidental; casual; dependent on that which is undetermined or unknown;[46] falling or coming by

Rep. 686 ("contiguous" in respect to highway fence).

30. Webster Unabr. Dict. [*quoted* in Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

31. Linn County Bank *v.* Hopkins, 47 Kan. 580, 582, 28 Pac. 606, 27 Am. St. Rep. 309; Webster Unabr. Dict. [*quoted* in Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 433, 29 N. W. 125, 59 Am. Rep. 333].

32. Webster Unabr. Dict. [*quoted* in Clements *v.* Crawford County Bank, 64 Ark. 7, 9, 40 S. W. 132, 62 Am. St. Rep. 149].

33. Linn County Bank *v.* Hopkins, 47 Kan. 580, 582, 28 Pac. 606, 27 Am. St. Rep. 309.

"What is contiguous must be fitted to touch entirely on one side: 'We arrived at the utmost boundaries of a wood, which lay contiguous to a plain.' Steele. Lands are adjacent to a house or town; fields are adjoining to each other; houses contiguous to each other." Crabbe Eng. Synonyms [*quoted* in Peverelly *v.* People, 3 Park. Crim. (N. Y.) 59, 69].

34. Century Dict. [*quoted* in *In re* Valley Forge, 14 Montg. Co. Rep. (Pa.) 129, 131].

35. Bulger *v.* Robertson, 50 Mo. App. 499, 504 [*citing* Fitzgerald *v.* Thomas, 61 Mo. 499], construing the words as used in a statute.

36. New Orleans Water-Works Co. *v.* Ernst, 32 Fed. 5, 6.

37. Raxedale *v.* Seip, 32 La. Ann. 435, 436, where it is said that vicinal landowners are not necessarily contiguous proprietors.

38. Continental Ins. Co. *v.* Continental F. Assoc., 96 Fed. 846, 848.

39. Black L. Dict.

40. Webster Dict. [*quoted* in Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554]. And see Keeney *v.* Grank Trunk R. Co., 59 Barb. (N. Y.) 104, 140, where it is said: "'Contingencies' a word which, though capable of a much larger signification, would ordinarily be understood as referring only to accidents, or casualties." See also Ruby's Estate, 185 Pa. St. 359, 360, 39 Atl. 968, 64 Am. St. Rep. 654.

41. Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554 [*citing* Anderson L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Webster Dict.].

42. Spencer *v.* See, 5 Redf. Surr. (N. Y.) 442, 447.

43. People *v.* Yonkers, 39 Barb. (N. Y.) 266, 272.

As used in a statute see Dwinel *v.* Stone, 30 Me. 384 (relating to trustee process); Adams *v.* Bigelow, 128 Mass. 365, 366 (concerning the apportionment of rent); Parker *v.* Ince, 4 H. & N. 53, 64, 28 L. J. Exch. 189, 7 Wkly. Rep. 201 (liability to pay money on a contingency under statute).

44. The adjective, as used in appropriation bills to qualify the word "expenses," has a technical and well-understood meaning. Dunwoody *v.* U. S., 22 Ct. Cl. 269, 280.

Distinguished from "inchoate" see ATTACHMENT, 4 Cyc., note 41.

45. Century Dict. [*quoted* in Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554].

When applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event. Jemison *v.* Blowers, 5 Barb. (N. Y.) 686, 692.

46. Webster Dict. [*quoted* in Verdier *v.* Roach, 96 Cal. 457, 474, 31 Pac. 554].

The legal definition of the word concurs with its ordinary acceptation in showing that the term "contingent" implies a possibility. Jemison *v.* Blowers, 5 Barb. (N. Y.) 686, 692.

chance, without design or expectation.[47] In law, dependent for effect on something that may or may not occur.[48] (Contingent: Damages, see DAMAGES. Estate, see CONTRACTS; DEEDS; ESTATES; WILLS. Fees, see ATTORNEY AND CLIENT; CHAMPERTY AND MAINTENANCE. Interest, see CONTRACTS; DESCENT AND DISTRIBUTION. Remainder, see DEEDS; ESTATES; WILLS.)

CONTINGENT CLAIM. A claim which may never accrue.[49]

CONTINGENT DEBT. Not a demand whose existence depended on a contingency, but an existing demand, the cause of action upon which depends on a contingency.[50]

CONTINGENT DEMAND. The term is applicable where a present claim exists, or where it is certain to arise in future; and it is only appropriate when there is no claim *in presenti*, and when it is uncertain whether any in fact will ever arise.[51]

CONTINGENT EVENTS. All anticipated future events which are not certain to occur.[52]

CONTINGENT EXPENSES.[53] A round sum appropriated by congress to meet certain disbursements of the public service.[54] Used in connection with municipal, public improvements, expenses which the commissioners could not ascertain — expenses which were unknown, and were uncertain, and which might or might not be incurred thereafter.[55]

CONTINGENT INTEREST IN PERSONAL PROPERTY. A future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession.[56]

CONTINGENT RIGHTS. Rights which are only to come into existence on an

47. Webster Dict. [*quoted* in Tatham *v.* Philadelphia, 11 Phila. (Pa.) 276, 277, 33 Leg. Int. (Pa.) 220].

48. Webster Dict. [*quoted* in Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554].

"Contingent liability" under a bankrupt act see *In re* Loder, 4 Ben. (U. S.) 305, 308, 15 Fed. Cas. No. 8,457; Boyd *v.* Robins, 4 C. B. N. S. 749, 93 E. C. L. 749.

49. Farris *v.* Stoutz, 78 Ala. 130, 133; Fretwell *v.* McLemore, 52 Ala. 124, 140.

"A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability. Sargent *v.* Kimball, 37 Vt. 320, 321 [*quoted* in Curley *v.* Hand, 53 Vt. 524, 526]. See also Brown *v.* Dunn, (Vt. 1903) 55 Atl. 364, 366 [*citing* Curley *v.* Hand, 53 Vt. 524; Sargent *v.* Kimball, 37 Vt. 320, 321], where it is said, construing Vt. Stat. § 2517: "A contingent claim . . . is one that cannot be proved as a debt before the commissioners, or allowed by them, because the liability is dependent upon some future event which may or may not happen, and therefore cannot be determined within the time allowed for proving claims before the commissioners." And see Sears *v.* Wills, 7 Allen (Mass.) 430.

"A claim dependent upon a future contingency — on the happening of an event which may never happen — does not accrue until the event happens; until then it is not a claim." Farris *v.* Stoutz, 78 Ala. 130, 133.

50. Sayre *v.* Glenn, 87 Ala. 631, 632, 6 So. 45 [*citing* Woodward *v.* Herbert, 24 Me. 358; French *v.* Morse, 2 Gray (Mass.) 111].

"Contingent debts and contingent liabilities" under bankruptcy statutes see Zimmer *v.* Schleehauf, 115 Mass. 52. And see, generally, BANKRUPTCY.

Further as to "contingent debt" see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 134, note 44.

51. Jemison *v.* Blowers, 5 Barb. (N. Y.) 686, 692.

"Contingent demand" under bankrupt laws see French *v.* Morse, 2 Gray (Mass.) 111, 114; Magwire *v.* Riggin, 44 Mo. 512, 516. And see, generally, BANKRUPTCY.

Further as to "contingent demand" see ATTACHMENT, 4 Cyc. 451.

52. Webster Dict. [*quoted* in Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554].

May properly be denominated "mere possibilities," more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree contingent. Verdier *v.* Roach, 96 Cal. 467, 474, 31 Pac. 554.

53. As used in a bequest to a religious society see Atty.-Gen. *v.* Union Soc., 116 Mass. 167, 169.

54. Dunwoody *v.* U. S., 22 Ct. Cl. 269, 280.

55. People *v.* Yonkers, 39 Barb. (N. Y.) 266, 272.

56. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's life-time is "contingent," and in case of his death is not transmissible to his representatives. Black L. Dict.

event or condition which may not happen or be performed until some other event may prevent their vesting.[57] (See, generally, CONSTITUTIONAL LAW.)

CONTINGENT USE.[58] Such an use as may by possibility happen in possession, reversion or remainder.[59] (See, generally, TRUSTS.)

CONTINUANCE IN OFFICE. Continuing in office under one appointment.[60] (See, generally, OFFICERS.)

57. Cooley Const. L. 332 [*quoted* in People *v.* Adirondack R. Co., 39 N. Y. App. Div. 34, 56, 56 N. Y. Suppl. 869; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 673, 16 S. Ct. 705, 40 L. ed. 838].

58. **Distinguished from executory devise** see 2 Bl. Comm. 334.

59. 1 Coke (Thomas ed.) 121; Comyns Dig. tit. Uses, K, 6 [*quoted* in Jemison *v.* Blowers, 5 Barb. (N. Y.) 686, 692].

60. Smith *v.* Waterbury, 54 Conn. 174, 176, 7 Atl. 17 (construing a constitutional provision); Mumford *v.* Rice, 6 Munf. (Va.) 81, 82; U. S. *v.* Giles, 9 Cranch (U. S.) 212, 239, 3 L. ed. 708. See also State *v.* Murphy, 32 Fla. 138, 197, 13 So. 705, where it is said: "The words 'continued in office' imply not the beginning of a new and different holding, but the prolongation of one already existing."

A provision in the bond of a treasurer of a corporation, whose office is annual, securing his fidelity, during his "continuance in office," means no longer time than the year for which he was chosen, and such further time as is reasonably sufficient for the election and qualification of his successor; it cannot be extended to embrace an indefinite period by reëlection or otherwise. Mutual Loan, etc., Assoc. *v.* Price, 16 Fla. 204, 26 Am. Rep. 703.

CONTINUANCES IN CIVIL CASES

By Robert Grattan

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Stay of Proceedings, see ACTIONS.

I. DEFINITION.

A continuance is "the adjournment of a cause from one day to another of the same or a subsequent term." [1]

II. RIGHT TO CONTINUANCES IN GENERAL.

Continuances of causes are not favored by the courts, and when granted, the grounds alleged must be such that the court may clearly see that a postponement of the cause will result in a furtherance of justice.[2] It is difficult to lay down any general rule. The right to obtain a continuance is frequently very much abused, and it is proper that courts should be vigilant in preventing such abuse;[3] while on the other hand it is important that the fair exercise of the right should not be denied, for it is of the first importance to the correct administration of jus-

1. 1 Bouvier L. Dict. See also 3 Bl. Comm. 316. In Stephen Pl. § 59, in treating of proceedings in an action, the learned author says: "During this oral altercation a contemporaneous official minute in writing was drawn up by one of the officers of the court, on a parchment roll, containing a transcript of all the different allegations of fact to the issue inclusive. And, in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading. These chiefly consisted of what were called the 'continuances' of the proceedings — the nature of which was as follows: There were certain purposes for which the law allowed the proceedings to be adjourned, or continued over from one term to another, or from one day to another in the same term; and when this happened, an entry of such adjournment to a given day and of its cause was made on the parchment roll; and by that entry the parties were also appointed to reappear at the given day in court. Such adjournment was called a continuance. Thus the award of the mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of the court on an issue in law, were each of them continuances, and were entered as such on the roll." And see CONTINUANCES IN CRIMINAL CASES, *post* p. 163.

Other definitions are: "The adjournment or postponement of an action pending in a court to a subsequent day of the same or another term." Black L. Dict.

"Also the entry of a continuance made upon the record of the court, for the purpose of formally evidencing the postponement, or of connecting the parts of the record so as to make one continuous whole." Black L. Dict.

"**Continuance, in the common law, is** of the same signification with prorogatio in the civil; as continuance till the next assize. (Terms de la Ley, Am. ed. p. 114.)" Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42.

2. Childs *v.* Heaton, 11 Iowa 271; James *v.* Arhuckle, 8 Iowa 272; State *v.* Tilghman, 6 Iowa 496; Brady *v.* Malone, 4 Iowa 146; Rice *v.* Hodge, 26 Kan. 164; Symes *v.* Irvine, 2 Dall. (U. S.) 383, 23 Fed. Cas. No. 13,714. See also Peck *v.* Moody, 33 Tex. 84. It is clearly the intention of the statutes on this subject, while protecting the courts from imposition and unnecessary delays, to secure a reasonable opportunity to litigants to try their causes on the merits, to the end that justice may be done; and while no definite rule can be laid down embracing all the different circumstances under which continuances should be granted, this spirit and intention should always be borne in mind; for this much at least is certain: that where the circumstances are such as would authorize the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect, a continuance should be granted. Light *v.* Richardson, (Cal. 1893) 31 Pac. 1123.

Where it appears that no judgment was entered of record in the court below, but that a verdict was returned by the jury, a continuance will be allowed to enable the appellant to apply to the court below to have the judgment entered as of the term at which the verdict was returned and the appeal granted. Kelsey *v.* Berry, 40 Ill. 69.

3. Penne *v.* Tourne, 2 La. 462.

Absence of court stenographer.—A continuance should not be granted merely because the court stenographer is "unwell," and that there is no one else capable of taking his place, especially where the application is unverified. Callahan *v.* Billat, 68 Mo. App. 435.

Convenience or delicacy.— Litigants are required to be vigilant in the prosecution or defense of their causes, and will not be permitted to delay trials to subserve their own convenience or for trifling reasons. Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517. So a cause will not be continued from mere motives of delicacy. Simons *v.* Sheftall, R. M. Charlt. (Ga.) 90.

Intoxication of party.— It is not commendable practice for a court to stop the trial of a cause and continue the same on the ground that the plaintiff is intoxicated. Charles *v.* People's Ins. Co., 3 Colo. 419.

tice.[4] It has been the policy of the courts to always deny an application for a continuance when a delay of the cause is unnecessary and could effect no beneficial result.[5] Thus a continuance will not be granted where there is no defense to the action,[6] where the applicant has made default,[7] or where a cause clearly decisive of the case at bar has already been disposed of.[8] So a continuance will not be granted for the purpose of obtaining evidence which would not affect the result,[9] to obtain a judgment which could not be used in the suit in which the continuance is sought,[10] or to bring in new parties who have no interest in the suit.[11]

4. Penne *v.* Tourne, 2 La. 462.

Failure to seal bill of exceptions.— When the judge who presided at the trial of the cause dies without having sealed and sent up the bill of exceptions, the cause may be continued, to enable the party to have it sealed by another member of the court below. McCandless *v.* McWha, 20 Pa. St. 183.

Uncontrollable circumstances.— Where parties have been diligent in their efforts to be ready for trial, but have been prevented by circumstances beyond their control, the court should grant them a continuance. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

5. *California.*— Harper *v.* Lamping, 33 Cal. 641.

Georgia.— Lane *v.* Partee, 41 Ga. 202.

Illinois.— Stringham *v.* Parker, 159 Ill. 304, 42 N. E. 794; Slade *v.* McClure, 76 Ill. 319; Marble *v.* Bonhotel, 35 Ill. 240.

Iowa.— Zalesky *v.* Home Ins. Co., 102 Iowa 613, 71 N. W. 566; James *v.* Arbuckle, 8 Iowa 272; Atkins *v.* McCready, 8 Iowa 214.

Kansas.— Markson *v.* Ide, 29 Kan. 700.

Louisiana.— Desblieux *v.* Darbanneaux, 2 Mart. N. S. 215.

Pennsylvania.— Corkrey *v.* Beideman, 2 Phila. 236, 14 Leg. Int. 45.

Texas.— Siddall *v.* Goggan, 68 Tex. 708, 5 S. W. 668; Texas Transp. Co. *v.* Hyatt, 54 Tex. 213; Williams *v.* Talbot, 27 Tex. 159; Claiborne *v.* Yoeman, 15 Tex. 44; Titus *v.* Crittenden, 8 Tex. 139.

Virginia.— Chew *v.* Beverly, 4 Hen. & M. 409.

See 10 Cent. Dig. tit. "Continuance," § 1 *et seq.*

6. Garlington *v.* Fletcher, 111 Ga. 861, 36 S. E. 920; James *v.* Arbuckle, 8 Iowa 272; Claiborne *v.* Yoeman, 15 Tex. 44; Titus *v.* Crittenden, 8 Tex. 139.

Limitation of rule.— The rule that an application for continuance will not be regarded when made by a defendant who has interposed no defense except a general denial is limited to cases in which the general denial constitutes no defense. Where under a general denial the defendant would be allowed to introduce rebutting evidence, it is sufficient to authorize the consideration of an application for continuance. Texas Transp. Co. *v.* Hyatt, 54 Tex. 213.

Result of proceedings elsewhere.— Where the matter stated in the affidavit shows no present defense to the action, it was held improper to continue the cause to await the result of proceedings elsewhere, which might or might not so result as to entitle the defendant to a credit upon his indebtedness, established in the suit in which the continuance was asked. Field *v.* Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

7. Duncan *v.* Hobart, 8 Iowa 337; James *v.* Arbuckle, 8 Iowa 272; Atkins *v.* McCready, 8 Iowa 214.

All pleadings withdrawn.— Where a party has withdrawn all his pleadings, there is nothing to support an application for a continuance. Siddall *v.* Goggan, 68 Tex. 708, 5 S. W. 668.

Answer admitting claim.— Where the defendant by his answer admits the justice of the plaintiff's claim, a continuance should be refused. Duncan *v.* Hobart, 8 Iowa 337.

8. Markson *v.* Ide, 29 Kan. 700.

9. Stringham *v.* Parket, 159 Ill. 304, 42 N. E. 794; Nebraska Land, etc., Stock Co. *v.* Burris, 10 S. D. 430, 73 N. W. 919. Thus a continuance will not be granted to obtain evidence to support an answer which, if proved to be true, is no defense to the action (Claiborne *v.* Yoeman, 15 Tex. 44); where the testimony of an absent witness in view of the evidence produced on the trial was not probably true (Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249); where the evidence when obtained cannot benefit the party seeking it (Stringham *v.* Parker, 159 Ill. 304, 42 N. E. 794; Life Ins. Clearing Co. *v.* Altschuler, 55 Nebr. 341, 75 N. W. 862; Williams *v.* Talbot, 27 Tex. 159; Titus *v.* Crittenden, 8 Tex. 139); where a continuance was asked on account of the absence of a witness whose testimony is not material (Ware *v.* Kelley, 22 Ark. 441; Harper *v.* Lamping, 33 Cal. 641; Marble *v.* Bonhotel, 35 Ill. 240); where testimony expected of an absent witness was hearsay (Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249); where the evidence desired is inadmissible under the pleadings (Nebraska Land, etc., Stock Co. *v.* Burris, 10 S. D. 430, 73 N. W. 919); or where the application presented such a state of circumstances as to reasonably preclude all hope of procuring testimony of the witnesses if the continuance was allowed (Buchanan *v.* McClain, 110 Ga. 477, 35 S. E. 665; Slade *v.* McClure, 76 Ill. 319; Wilkins *v.* Beadleston, 33 Misc. (N. Y.) 489, 67 N. Y. Suppl. 683).

10. Desblieux *v.* Darbonneaux, 2 Mart. N. S. (La.) 215.

11. Ellis *v.* Harrison, (Tex. Civ. App. 1899) 52 S. W. 581.

III. KINDS OF CONTINUANCES.

A. For Cause Shown. The most usual kind of continuance with which the courts are required to deal is where the relief is asked on some specified ground and cause is shown why the applicant is entitled to a postponement of the cause.[12]

B. On Court's Own Motion. There is some diversity of holding in respect to the power of the trial court to grant a continuance on its own motion. In one jurisdiction, without mentioning any statutory provision, it was held within the discretion of the court to grant a continuance of its own motion where the continuances of the party had been exhausted.[13] In another jurisdiction, under a statute giving the court discretionary power to grant continuances "whenever the cause alleged by the party applying for it appears sufficient to justify the same," it was held that the court could not without an application from one of the parties arbitrarily force a continuance upon them.[14] So in another jurisdiction it was held that where none of the parties appeared on the day set for hearing, the court might of its own motion continue the case indefinitely.[15]

C. By Consent, Agreement, or Stipulation — 1. In General. Consent of the parties to an action, or their attorneys, has been usually held to authorize a continuance.[16] A case may be postponed by the agreement of the parties acting for themselves or through their attorneys and with the consent of the court,[17] but an agreement by the parties that a cause shall be continued does not operate as a postponement without the sanction of the court, and does not of itself bind the court.[18] A party is therefore not justified in assuming that a cause will be postponed simply because he has agreed with his adversary that it shall be. Nor is he authorized to assume that opposing counsel acted in bad faith because the court declined to sanction an agreement to a postponement.[19]

2. Verbal Agreements or Stipulations. Verbal agreements or stipulations between parties or their attorneys for the continuation of a pending cause are not favored by the courts and are not bound to be regarded.[20] In order that the court

12. See *infra*, IV.

13. Wood *v.* McGuire, 21 Ga. 576.

14. State *v.* Posey, 17 La. Ann. 252, 87 Am. Dec. 525.

15. Kiefer *v.* Clark County, 7 Ohio S. & C. Pl. Dec. 31, 4 Ohio N. P. 282.

16. Schrimpton *v.* Bertolet, 155 Pa. St. 638, 32 Wkly. Notes Cas. (Pa.) 429, 26 Atl. 776; King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

Case under rule for trial.— The continuance of a cause, by consent or by order of the court, while it is under a rule for trial or *non prosequitur* does not discharge the rule; and such a rule continues until it is expressly discharged. King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

Rule mandatory.— Under a rule of court which provides that "no cause after being placed on the trial list, shall be continued more than once by consent of counsel or parties," the court is bound to grant at least one continuance, if both parties consent. Schrimpton *v.* Bertolet, 155 Pa. St. 638, 32 Wkly. Notes Cas. (Pa.) 429, 26 Atl. 776.

17. Meagher *v.* Gagliardo, 35 Cal. 602.

Nominal party.— An agreement made by a person to allow a continuance of a cause, the person being neither a party nor attorney of a party, but having an interest in the action, is not binding on a nominal party who has also a substantial interest. Anderson *v.* Citizens' Nat. Bank, 68 Tex. 645, 5 S. W. 503.

Notice of trial.— If a cause has been continued from term to term by consent, it is the duty of the parties to be ready for trial at any subsequent time; and notice that it is intended to try the cause is not required from either party. King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

18. Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906.

19. Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906.

20. *Alabama.*—Collier *v.* Falk, 66 Ala. 223.

California.— Peralta *v.* Mariea, 3 Cal. 185.

Georgia.— Ford *v.* Holmes, 61 Ga. 419.

Iowa.— Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24.

New York.— Griswold *v.* Lawrence, 1 Johns. 507.

South Carolina.— Hort *v.* Jones, 2 Bay 440.

Texas.— Price *v.* Lauve, 49 Tex. 74.

See 10 Cent. Dig. tit. "Continuance," § 12.

Issue as to actual agreement.— Plaintiff's motion for a continuance founded upon an alleged oral agreement of counsel made out of court, but denied by defendant's counsel, is properly refused, the court not being bound by such agreements, especially where counsel differ as to what the agreement actually was. Clark *v.* Dekker, 43 Kan. 692, 23 Pac. 956.

Resolutions of bar association.— Resolu-

shall recognize such an agreement as ground for continuing the case the same must be in writing[21] and of such a definite nature that the court may construe its terms.[22]

D. By Operation of Law — 1. In General. All causes not tried or otherwise disposed of during a term stand continued as of course;[23] the court does not lose jurisdiction thereof by reason of delay in bringing them to trial,[24] and it is not necessary to have a special order of continuance entered in the cause.[25]

2. After Reversal by Appellate Court. After a cause has been remanded by an appellate court, the subsequent continuances are usually regulated by statute or rule of court.[26] Sufficient time will usually be allowed to elapse between the reversal and the beginning of the new trial for a party to make reasonable preparation;[27] but a further continuance will not be granted on the ground that

tions of a bar meeting touching the disposition of cases invoked in an application for a continuance, and not as a written agreement filed in the case, will not be enforced. Price *v.* Lauve, 49 Tex. 74.

The statutes of some jurisdictions expressly require an agreement for a continuance to be in writing. Collier *v.* Falk, 66 Ala. 222; Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24.

21. Strong *v.* District of Columbia, 3 MacArthur (D. C.) 499; Griswold *v.* Lawrence, 1 Johns. (N. Y.) 507.

Verbal agreement misleading.— In an action to try title, when there is no written agreement by counsel in regard to notice of filing deeds, if plaintiff's counsel is misled by a verbal agreement, or what he understood to be such, the court may postpone the trial to allow further time for giving the notice; but this will not give defendant a right to demand a continuance when the case is called a second time. Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467.

22. Hort *v.* Jones, 2 Bay (S. C.) 440.

Defective signature.— A stipulation signed by one of several plaintiffs does not necessitate a continuance. Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067.

23. *Alabama.*— Greer *v.* McGehee, 3 Port. 398.

Arkansas.— Carley *v.* Barnes, 11 Ark. 291.

Georgia.— Smith *v.* Thompson, 3 Ga. 23.

Illinois.— Updike *v.* Armstrong, 4 Ill. 564.

Indiana.— Crabb *v.* Atwood, 10 Ind. 331; Trew *v.* Gaskill, 10 Ind. 265.

Missouri.— Watson *v.* Walsh, 10 Mo. 454.

Nebraska.— Strickler *v.* Foegel, 40 Nebr. 773, 59 N. W. 384.

See 10 Cent. Dig. tit. "Continuance," § 3.

See also *infra*, VII, A.

No court held.— Where executors give notice to the circuit court on a certain day in the term (being the fourth day), for an order to sell lands for debts, and file their petition before the first day of the term, but no court was held at that term, the proceeding is continued by operation of law. Whitman *v.* Fisher, 74 Ill. 147.

Order of reference.— An order of reference virtually continues a cause in court from term to term so long as it remains in force. Mendenhall *v.* Smith, Minor (Ala.) 380.

24. Strickler *v.* Foegel, 40 Nebr. 773, 59 N. W. 384.

25. Greer *v.* McGehee, 3 Port. (Ala.) 398; Updike *v.* Armstrong, 4 Ill. 564; Trew *v.* Gaskill, 10 Ind. 265; Watson *v.* Walsh, 10 Mo. 454. And see *infra*, VII, A.

Not assignable as error.— It is no ground of error that a judge who was incompetent to sit in a cause granted a continuance thereof, where it would have been continued by operation of law had no action been taken. Stone *v.* Robinson, 9 Ark. 469.

26. Walker *v.* Floyd, 30 Ga. 237; McNeeley *v.* Hunton, 30 Mo. 332.

The Georgia act of Jan. 22, 1852, "to regulate the practice of the Supreme Court and of the Superior Courts of this State," etc., provides, "That when any cause shall be sent back to the Superior Court by the Supreme Court, the same shall be in order for trial at the first Term of the Superior Court next after the decision of the said Supreme Court. And where either party may have exhausted their continuances on the appeal, the said Superior Court shall have full power and authority to grant one continuance to said party as the ends of justice may require." Walker *v.* Floyd, 30 Ga. 237, 239; Young *v.* Harrison, 21 Ga. 584.

Where, in accordance with the usage of the circuit court, a case reversed and remanded from the supreme court was continued until the next term after the judgment of revision was filed, it was held that there was no error. McNeeley *v.* Hunton, 30 Mo. 332.

27. Younghlood *v.* Youngblood, 76 Ga. 840.

Not matter of right.— A party will not be entitled to a continuance as a matter of right because a return of a cause with a mandate from the supreme court to the circuit court had not been filed before the term. The party is only entitled to sufficient time to prepare for trial. Dodge *v.* Deal, 28 Ill. 303.

Change of venue.— Where the mandate of the court of appeals has been on file in the lower court ten days before the trial begins, a continuance should not be granted to allow defendant to apply for a change of venue. Newcomb-Buchanan Co. *v.* Baskett, 4 Ky. L. Rep. 828.

Report of decision.— The fact that a full report of the decision of the supreme court in a case remanded for a new trial has not been received is not a sufficient ground of continuance in the court below. Walker *v.* Floyd, 30 Ga. 237.

the parties were ignorant of the remanding and hence unprepared to go to trial.[28]

IV. GROUNDS FOR CONTINUANCE.

A. In General. The grounds upon which a continuance of a cause will be granted are usually regulated by statute in the several states,[29] or by rules of court specially relating to continuance, so far as they are not in conflict with some positive statutory requirement.[30]

B. Defect of Parties. Where all the parties in interest are not before the court the case may be continued to bring them in,[31] unless it shall appear that

28. Murray *v.* Whittaker, 17 Ill. 230.

29. *Alabama.*— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

California.— Jaffe *v.* Lilienthal, 101 Cal. 175, 35 Pac. 636.

Connecticut.— Stoyel *v.* Westcott, 3 Day 349 note.

Florida.— Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.

Georgia.— Southern Bell Telephone, etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; Hill *v.* Clark, 51 Ga. 122; Kitchens *v.* Hutchins, 44 Ga. 620; Long *v.* McDonald, 39 Ga. 186; Crawford *v.* Bradley, 35 Ga. 184; Walker *v.* Floyd, 30 Ga. 237; Young *v.* Harrison, 21 Ga. 584; Printup *v.* Mitchell, 19 Ga. 586; Bartee *v.* Andrews, 18 Ga. 407.

Illinois.— Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736; Evans *v.* Marden, 154 Ill. 443, 40 N. E. 446 [*affirming* 54 Ill. App. 291]; Chicago Public Stock Exch. *v.* McCloughry, 148 Ill. 372, 36 N. E. 88; Wicker *v.* Boynton, 83 Ill. 545; Litchfield Coal Co. *v.* Taylor, 81 Ill. 590; Stockley *v.* Goodwin, 78 Ill. 127; St. Louisville, etc., R. Co. *v.* Teters, 68 Ill. 144; Knickerbocker *v.* Knickerbocker, 58 Ill. 399; Duncan *v.* Niles, 32 Ill. 541; Link *v.* Architectural Iron Works, 24 Ill. 551; Ronndtree *v.* Stnart, 1 Ill. 73; Lindsey *v.* Lindsey, 40 Ill. App. 389; Switzer *v.* Tottenville, 4 Ill. App. 219.

Indiana.— Whitehall *v.* Lane, 61 Ind. 93; Trew *v.* Gaskell, 10 Ind. 265; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Phillips *v.* Phillips, 5 Ind. 190; Lewis *v.* Richey, 5 Ind. 152; Edwards *v.* Hough, 5 Ind. 149; Morris *v.* Graves, 2 Ind. 354; Dare *v.* McNutt, 1 Ind. 148; Whisler *v.* Hicks, 5 Blackf. 100, 33 Am. Dec. 454.

Iowa.— Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791; Connor *v.* Griffin, 27 Iowa 248; McCormick *v.* Rusek, 15 Iowa 127, 83 Am. Dec. 401; Des Moines Branch State Bank *v.* Van, 12 Iowa 523; Childs *v.* Heaton, 11 Iowa 271; Breckenridge *v.* Brown, 9 Iowa 396; Drnmmond *v.* Stewart, 8 Iowa 341; Duncan *v.* Hobart, 8 Iowa 337; State *v.* Tilghman, 6 Iowa 496; Brady *v.* Malone, 4 Iowa 146.

Kansas.— Cook *v.* Larson, 47 Kan. 70, 27 Pac. 113; Rice *v.* Hodge, 26 Kan. 164; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Kentucky.— Cobb *v.* Curts, 4 Litt. 235; Watts *v.* McKenny, 1 A. K. Marsh. 560.

Massachusetts.— Blanchard *v.* Wild, 1 Mass. 342.

Mississippi.— Maury *v.* Commercial Bank, 5 Sm. & M. 41.

Missouri.— Tunstall *v.* Hamilton, 8 Mo. 500; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

New York.— Jordan *v.* Healey, 19 N. Y. Suppl. 240, 46 N. Y. St. 198, 22 N. Y. Civ. Proc. 157; Jarvis *v.* Felch, 14 Abb. Pr. 46.

Oregon.— Young *v.* Patton, 9 Oreg. 195.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65.

Texas.— Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599.

Virginia.— Stearns *v.* Richmond Paper Mfg. Co., 86 Va. 1034, 11 S. E. 1057.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

See 10 Cent. Dig. tit. "Continuance," § 6 *et seq.*

30. *Alabama.*— Humes *v.* O'Bryan, 74 Ala. 64.

Massachusetts.— Craigie *v.* Mellen, 4 Mass. 587.

Missouri.— Colhoun *v.* Crawford, 50 Mo. 458.

Ohio.— U. S. L. Ins. Co. *v.* Wright, 33 Ohio St. 533.

Pennsylvania.— Schrimpton *v.* Bertolet, 155 Pa. St. 638, 26 Atl. 776; Fritz *v.* Church, 3 Phila. 236, 15 Leg. Int. 341.

Texas.— Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Payne *v.* Cox, 13 Tex. 480; Texas Cent. R. Co. *v.* Williams, (Civ. App. 1894) 26 S. W. 856.

Wisconsin.— Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

See 10 Cent. Dig. tit. "Continuance," § 6 *et seq.*

31. Simpson *v.* Watson, 15 Mo. App. 425 [*overruled* on another point in Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052]; Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193; Chameau *v.* Riley, Coop. Ch. 336.

Petition of intervention.— In Ikerd *v.* Postlewhaite, 36 La. Ann. 236, it was held error not to grant a delay of fifteen minutes before dismissing a suit by consent of the parties, to enable one asserting an interest in the subject-matter to file a petition of intervention, subject to the right of either original party to cause the dismissal of the intervention by proper exception.

Representatives of deceased partner.— A continuance will be granted to allow the representatives of a deceased partner in the firm which sues, to be made parties, even when his death is suggested by defendant's counsel

such continuance can serve no useful purpose or is asked merely for the purpose of delay.[32]

C. Insufficient Service of Process. In the absence of any special statutory authorization, it has been held that where service of process is defective, the court may properly allow a plaintiff further time to perfect such service;[33] but a defendant who sets up no valid defense, and makes no showing that he is unprepared for trial is not entitled to a continuance merely because summons was served by leaving a copy at his residence in his absence, and because he received no notice of the suit until the day before the commencement of the term.[34] A statute which provides that where there is a return of "not found" as to any of the defendants, such return shall be suggested on the record, and the plaintiff may continue the cause as to them for another summons at his option and proceed against the other defendants who were properly served, applies only where the liability is several, or joint and several, and not where the liability is joint only.[35] Under a rule of court providing that an appearance to object to the substance or service of the notice shall render any further notice unnecessary, but may entitle the defendant to a continuance if it shall appear to the court that he has not had the full timely notice required, of the substantial cause of action stated in the petition, parties who have appeared in answer to the deficient notice are not entitled to a continuance as of course, if they are notified of the cause of action. If the defect relates only to the time of appearance, ground for continuance must be shown.[36] Under a statute declaring that persons jointly or severally liable on the same instrument may be included in the same action, at plaintiff's option, and that where summons is not served on all the defendants when they are severally liable, the plaintiffs may proceed against the defendants served, it was held that it was no ground for continuing a case on defendant's motion that no service of summons had been made or attempted to be made on some of the defendants.[37]

D. Delay in Filing Pleadings. Delay in filing pleadings in almost every instance operates as a surprise to the opposite party, and on such ground a continuance will usually be granted.[38] A party is expected to prepare his pleadings

after the evidence is closed and the argument begun. Babcock *v.* Williams, 10 La. 394.

32. Spencer *v.* Pierce, 5 R. I. 63; Cabell *v.* Hamilton-Brown Shoe Co., 81 Tex. 104, 16 S. W. 811; Powell *v.* Haley, 28 Tex. 52; National Bank of Commerce *v.* Galland, 14 Wash. 502, 45 Pac. 35.

Applications of rule.— The fact that one of two or more partners is not made a party to the suit will not necessitate a continuance as to that one, where the action may proceed to judgment against the parties already before the court. Southmayd *v.* Backus, 3 Conn. 474. In an action of trespass to try title which had been pending five years, it was held that a continuance asked by the defendant to make his landlord, who was a nonresident, a party, was properly refused, as defendant could make any defense open to his landlord. Powell *v.* Haley, 28 Tex. 52. In an action on an indemnity bond it is proper to refuse to continue the cause in order to enable the defendants to make the principals in the indemnity bond parties defendant, where it would be impossible to obtain service on such principals because they are nonresidents and no binding judgment could be rendered against them by the court. Cabell *v.* Hamilton-Brown Shoe Co., 81 Tex. 104, 16 S. W. 811.

33. Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757 [*following* Mitchell *v.* Southwestern, etc., R. Co., 75 Ga. 398].

Mistake of clerk.— Where, on a motion to vacate a judgment for illegality, on the ground that process was not served on defendants, plaintiff asked a continuance and offered to prove by defendants that they in fact intended to waive process, but did not do so through a mistake of the clerk who wrote the acknowledgment of service of the declaration, it was held erroneous to refuse such continuance. Little *v.* Ingram, 16 Ga. 194.

34. Kelly *v.* Mason, 4 Ind. 618.

35. Erwin *v.* Scotten, 40 Ind. 389. But *compare* Sutton *v.* Hayes, 7 Blackf. (Ind.) 543, holding that where in an action of trespass against three defendants jointly if the writ is returned "not found" as to one, the plaintiff is entitled to a continuance in order that the process might be served on the absent defendant.

36. Des Moines Branch State Bank *v.* Van, 12 Iowa 523.

37. Lux *v.* McLeod, 19 Colo. 465, 36 Pac. 246.

38. Simon *v.* Myers, 68 Ga. 74; Jefferson *v.* Alexander, 84 Ill. 278; Stratton *v.* Henderson, 26 Ill. 68; Hawthorn *v.* Cooper, 22 Ill.

before the trial of the cause and where at a late period new pleadings are introduced into the action he must be prepared to grant his adversary additional time to meet the changed conditions.[39] The question whether the delay in filing pleadings has operated as such a surprise as to defeat a party's right of preparation is a question within the discretion of the court,[40] the determination of which is to be arrived at in view of the diligence employed and the means at hand, whereby an alleged surprise might have been avoided.[41] In all such cases, however, to authorize the allowance of a continuance the delayed pleadings must be substantially new and unexpected,[42] and of such a character that they affect the issues of the action.[43]

225; Coffeen Coal, etc., Co. *v.* Kaubrick, 56 Ill. App. 591; Coffeen Coal, etc., Co. *v.* Barry, 56 Ill. App. 587; Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327. In Rankin *v.* Cooper, 1 Browne (Pa.) 253, the attorney for the defendant objected to the jury being sworn on the ground that issue was not properly joined. It was an action of assumpsit; the defendant had pleaded "*non assumpsit* and payment and a release" to which the plaintiff had replied "*non solvit.*" The attorney for the plaintiff answered that he would reply *instanter*, "*non est factum*" to the plea of release; which being done, the defendant made affidavit that he was taken by surprise. In this case the court ordered the case continued. See also *infra*, IV, U, 1.

Denial of itemized account.— The filing on the eve of trial of an affidavit denying an itemized account filed by the adverse party, which operates as a surprise and renders necessary additional evidence affords ground for a continuance. Grimes *v.* Watkins, 59 Tex. 133.

39. Veatch *v.* Harbaugh, 28 Fed. Cas. No. 16,905, 1 Cranch C. C. 402.

Case at issue.— A continuance will not be granted because no declaration is filed in a case that is at issue. Wenn *v.* Adams, 2 Dall. (Pa.) 156, 1 L. ed. 329; Goodwin *v.* White, 1 Browne (Pa.) 272. But if at the last calling of a cause for trial the issue be not made up and no rule to plead has been laid, the court will continue the cause at the request of the defendant, although it be the fifth term after the appearance term. Morgan *v.* Voss, 17 Fed. Cas. No. 9,811, 1 Cranch C. C. 109.

Judgment for want of proper plea.—Where defendant has been at one term in such default in pleading that plaintiff might have taken judgment for want of proper plea, when defendant at a subsequent term files a proper plea, plaintiff may have a continuance for that cause only. Crew *v.* Newland, 3 T. B. Mon. (Ky.) 135.

Rule for trial or non prosequitur.— Where defendant, after procuring a rule for trial or *non prosequitur* at a certain day, before that day files a new plea, the plaintiff will be entitled to a continuance notwithstanding the rule. Halhead *v.* Ross, 1 Dall. (Pa.) 405, 1 L. ed. 197.

40. Williams *v.* Niagara F. Ins. Co., 50 Iowa 561.

41. A statute allowing service by defendant on plaintiff of demand to serve upon defendant copies of all writings upon which the declaration is founded comprehends actions on contract only, and not actions of ejectment; consequently the failure of plaintiff to respond to a demand given in such an action is no ground for a continuance. Copperthwait *v.* McCord, 6 Fed. Cas. No. 3,216, 2 McLean 143.

Motion for more specific statement.—Where plaintiff files with his declaration, ten days before the commencement of the term, a copy of the account sued on, containing the item, "To goods, wares and merchandise sold and delivered, $1,000," if the defendant desires a more specific statement of account, he should move for such a statement, and a motion for a continuance on the ground that no copy of the account sued on was filed is properly overruled. Chicago Stamping Co. *v.* Mechanical Rubber Co., 83 Ill. App. 230.

42. Meredith *v.* Lackey, 14 Ind. 529; Gulf, etc., R. Co. *v.* Schneider, (Tex. Civ. App. 1894) 28 S. W. 260.

Plea in reconvention.— In an action to restrain the enforcement of a judgment, where defendant answers and pleads in reconvention the cause of action on which the judgment was rendered, and the case is called for trial within a few minutes after such plea is filed, plaintiff is entitled to a continuance to prepare a defense to the cross-action. Gulf, etc., R. Co. *v.* Schneider, (Tex. Civ. App. 1894) 28 S. W. 260.

Setting up new demand.— After a continuance, and in vacation, the plaintiff amended by bringing in a new defendant. The latter answered setting up a new demand against the original defendant. It was held that the original defendant was entitled to a reasonable continuance to answer that demand, the pleading setting it up being in the nature of a complaint. Meredith *v.* Lackey, 14 Ind. 529.

43. Where a reply is merely a reiteration of the allegations of a former reply, to which there has been a rejoinder, the fact that the last reply and defendant's rejoinder were filed only a short time before the trial, and that defendant had no notice of such reply, does not entitle defendant to a continuance. Pine Mountain Iron, etc., Co. *v.* Rice, 32 S. W. 473, 17 Ky. L. Rep. 1012.

Setting aside writ of inquiry.— When the writ of inquiry is set aside by the defendant, the plaintiff may have the cause continued at the defendant's costs. McCulloch *v.* Debutts, 16 Fed. Cas. No. 8,736, 1 Cranch C. C.

E. Withdrawal of Pleadings. In case the pleadings are withdrawn a short time before trial, it necessarily follows that such party must be prepared to grant his adversary a continuance;[44] and where a party abandons or withdraws an issue a short time before trial and amends his pleadings, the opposite party is entitled to a continuance.[45]

F. Absence of Papers From File. The absence of papers from the files is a good ground for continuance where there has been no fault or negligence on the part of the applicant;[46] but their absence or loss is not a ground for continuance when occasioned by the default of the applicant.[47]

G. Failure to File Security For Costs. The mere failure to give security for costs before the commencement of the suit or before the calling of the cause does not of itself furnish any ground for continuance.[48] It should also be made to appear that the defendant was unprepared to make his defense in consequence of there being no previous security or costs.[49] It is the duty of the defendant to demand security, if he so desires; and if no such security is demanded within a reasonable time, it is no ground for continuance that such security is not given when the case is called.[50]

H. Incompetency of Jurors. The incompetency of a juror may be the cause of a continuance,[51] and especially is this true where the general panel has been

285; Beck *v.* Jones, 20 Fed. Cas. No. 1,206, 1 Cranch C. C. 347. So in Wise *v.* Groverman, 30 Fed. Cas. No. 17,910, 1 Cranch C. C. 418, it was held that if after a plea of *nil debet* by the appearance bail the principal comes in and gives special bail and pleads the same plea, the plaintiff was entitled to a continuance of course, as on setting aside a writ of inquiry.

44. Taylor *v.* Heffner, 4 Blackf. (Ind.) 387; Dempsey *v.* Harrison, 4 Mo. 267; Risher *v.* Thomas, 1 Mo. 739.

45. Bunding *v.* Blumenthous, 8 Mo. 695; Dempsey *v.* Harrison, 4 Mo. 267; Risher *v.* Thomas, 1 Mo. 739.

46. House *v.* Greathouse, 10 Ky. L. Rep. 317.

Destruction of papers.— If because of the destruction of papers the defendant has been unable to ascertain the precise nature of the suit he is entitled to a continuance. Suggett *v.* State Bank, 8 Dana (Ky.) 201.

Documents annexed to petition.— Where plaintiff fails to produce, on a day ordered, certain documents annexed originally to the petition, and his attorney swears that they are lost and that steps have been taken to prove their contents, and there is no presumption that the documents have been withdrawn by plaintiff, the suit should not be dismissed, but a continuance granted. Tucker *v.* Peebles, 10 La. 403.

Providential cause.— The miscarriage of the mail in the transmission of papers to the clerk is no ground for continuing a cause, unless shown to be from providential cause. Shackelford *v.* Hays, 3 Ga. 415.

47. Wright *v.* Clark, 2 Greene (Iowa) 86; Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687.

Papers charged to applicant.— Where the original papers in the case, including the deposition of a witness, were lost and stood charged in the clerk's receipt book to the attorney of defendant, who in open court disavowed all knowledge of them and declared his belief that they were returned to the clerk, and the defendant made application for a continuance in order to retake the deposition of said witness, which application was refused, it was held that the court below might well refuse it; since the party making the application ought to satisfy the court that the necessity for it had not been occasioned by his fault. Baker *v.* Johnson, 16 Tex. 133.

Withdrawal of plea.— It is no ground for continuance that defendant's attorney has withdrawn his plea from the clerk's office and it is lost, and that he is not prepared to establish a copy because he has forgotten the defense and because his client is absent. In such case the court might have properly granted reasonable time, but there is no ground for a continuance. Jones *v.* Vines, 59 Ga. 491. See also McLoughlin *v.* King, 56 Ga. 213.

48. Cox *v.* Hunt, 1 Blackf. (Ind.) 146; Smith *v.* Snoddy, 2 A. K. Marsh. (Ky.) 382; Clarke *v.* Rutledge, 2 A. K. Marsh. (Ky.) 381; Christ *v.* Mark, 3 Bibb (Ky.) 296; Cox *v.* Fenwick, 3 Bibb (Ky.) 183; Grahame *v.* Douglas, Wright (Ohio) 738; Hawkins *v.* Willbank, 11 Fed. Cas. No. 6,247, 4 Wash. 285. See also Bennett *v.* Bennett, 3 Fed. Cas. No. 1,317, 3 Cranch C. C. 647. It is enough that security be filed before trial. Smith *v.* Snoddy, 2 A. K. Marsh. (Ky.) 382 [*following* Cox *v.* Fenwick, 3 Bibb (Ky.) 183].

49. Cox *v.* Hunt, 1 Blackf. (Ind.) 146; Cox *v.* Fenwick, 3 Bibb (Ky.) 183; Graham *v.* Douglas, Wright (Ohio) 738.

Failure to give security after order.— Where a plaintiff is ordered to give security for costs, and fails so to do until the next term, the defendant at that term is entitled to a continuance. Jacobs *v.* Sale, Gilm. (Va.) 123.

50. Hawkins *v.* Willbank, 11 Fed. Cas. No. 6,247, 4 Wash. 285.

51. Fisher *v.* Philadelphia, 4 Brewst. (Pa.) 395; Young *v.* Alexandria Mar. Ins. Co., 30 Fed. Cas. No. 18,164, 1 Cranch C. C. 566.

discharged;[52] but where another juror may be substituted the motion should be denied.[53]

I. Prejudice. Prejudice on the part of the judge[54] or jury has never been considered a ground of continuance,[55] nor will a continuance be granted because a report of the recent trial of another cause depending on the facts and principles has been published in a newspaper.[56]

J. Want of Preparation — 1. In General. While want of preparation, when presented in connection with a reasonable excuse, will sometimes be considered a good ground of continuance,[57] yet in order to entitle himself to relief for such cause the applicant must show some precise legal or strong equitable reason.[58] As a general rule applications based upon this ground will be refused,[59] especially

Illness after retirement.— If a juror be taken suddenly ill after the jury have retired, the jury may be discharged and the cause may be continued to the next term. Young *v.* Alexandria Mar. Ins. Co., 30 Fed. Cas. No. 18,164, 1 Cranch C. C. 566.

52. Fisher *v.* Philadelphia, 4 Brewst. (Pa.) 395.

53. Hook *v.* Stovall, 26 Ga. 704.

54. Simons *v.* Sheftall, R. M. Charlt. (Ga.) 90.

55. Palmer *v.* Bogan, Cheves (S. C.) 52.

56. Hurst *v.* Wickerly, 12 Fed. Cas. No. 6,940, 1 Wash. 276. See also Willis *v.* Farrer, 3 Y. & J. 381. It was held in Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226, 20 Ky. L. Rep. 634, that it was no abuse of discretion to refuse a continuance asked by defendant corporation, the publisher of a newspaper, on the ground that prejudice existed against it by a large class of citizens because of its attitude during a recent political campaign.

57. *California.*— Turner *v.* Morrison, 11 Cal. 21.

Georgia.— Georgia Northern R. Co. *v.* Tifton, etc., R. Co., 108 Ga. 784, 33 S. E. 643.

Kentucky.— Allen *v.* Pollad, 22 S. W. 436, 15 Ky. L. Rep. 52.

Virginia.— New York L. Ins. Co. *v.* Davis, 94 Va. 427, 26 S. E. 941.

United States.— Palmer *v.* U. S., 18 Fed. Cas. No. 10,695, Hoffm. Land Cas. 216.

See 10 Cent. Dig. tit. "Continuance," § 14. And see *infra*, IV, U, 1.

Appointment of guardian ad litem.—Where the court has but just appointed a *guardian ad litem*, it is a proper exercise of judicial discretion to continue the cause in order to afford an opportunity for that preparation necessary to a fair trial of the cause. Blythe *v.* Blythe, 25 Iowa 266.

Declaration of adversary.— Where a party has not prepared for trial because, from the declarations of his adversary, he expected a compromise, the court will not order on a trial. Cornogg *v.* Abraham, 1 Yeates (Pa.) 18.

No opportunity for cross-examination.— If a party has had no opportunity to cross-examine a witness against him whose deposition is taken under the act of congress the court will continue the cause. Dade *v.* Young, 6 Fed. Cas. No. 3,534, 1 Cranch C. C. 123.

58. Bailey *v.* Wilner, 107 Ga. 364, 33 S. E. 434; Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940; Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, Wall. Sr. 1. See also Palmer *v.* Caywood, (Nebr. 1902) 89 N. W. 1034.

Complication of causes.— Where the matters involved in a chancery cause are complicated and important, and owing to the sickness of a party and of her agent, who has had control of her interests, she has been unable to prepare for trial, and since the preceding term, owing to the prevalence of smallpox in the vicinity, and the sickness of her counsel and witnesses, she could not procure the necessary depositions, a continuance should be granted her, although the cause was continued on her motion at the last term. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

59. *Georgia.*— Bailey *v.* Wilner, 107 Ga. 364, 33 S. E. 434; Gunn *v.* Gunn, 95 Ga. 439, 22 S. E. 552; Brown *v.* Winship, 20 Ga. 693.

Illinois.— Pardridge *v.* Wing, 75 Ill. 236.

Kansas.— Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940.

Kentucky.— Stemmons *v.* King, 8 B. Mon. 559; Barnet *v.* Kennedy, 1 A. K. Marsh. 239; Simms *v.* Alcorn, 1 Bibb 348; Shipp *v.* Gale, Hard. 224; Louisville, etc., R. Co. *v.* Abell, 14 Ky. L. Rep. 239; Reid *v.* Ingalls, 10 Ky. L. Rep. 195.

Louisiana.— McPherson *v.* Robinson, 4 La. 563.

New Mexico.— Beall *v.* Territory, 1 N. M. 507.

Texas.— St. Louis Brewing Assoc. *v.* Walker, 23 Tex. Civ. App. 6, 54 S. W. 360.

Virginia.— Hogshead *v.* Baylor, 16 Gratt. 99.

West Virginia.— Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

United States.— Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, Wall. Sr. 1.

See 10 Cent. Dig. tit. "Continuance," § 14.

Change of venue.— The neglect of a party to prepare for trial because of the issuance of an order for a change of venue is no ground for a continuance, where the order was not filed in time so as to remove the cause. Shipp *v.* Gale, Hard. (Ky.) 224.

Poverty as excuse.— Where a defendant in divorce appeared by attorney and asked for alimony, her poverty is not an excuse for failing to prepare for the final hearing. Brotherton *v.* Brotherton, 41 Iowa 112.

Surprise and inconvenience.— Surprise of

where the want of preparation is coupled with unexcusable ignorance [60] or negligence on the part of the party seeking relief.[61] A continuance should not be granted when it appears that ample time and opportunity for preparation has elapsed before the case was called for a hearing, and the party seeking the continuance had exercised no diligence whatever in even endeavoring to be ready.[62]

2. Change of Counsel. One of the most frequent causes for alleged want of preparation is found in the employment of new counsel before the date set for trial. The rule in this regard does not vary from the general proposition already laid down. Where the recently retained counsel could have, by the exercise of reasonable diligence, prepared himself for the trial, the application should be denied;[63] otherwise the rights of the applicant will be protected and the case postponed.[64]

K. Pendency of Other Actions or Proceedings — 1. In General. As a general rule a continuance should be granted upon facts that show that justice requires that the cause should await the trial and conclusion of another suit between the same parties;[65] but the parties to the two actions must be identi-

one of the counsel of the defendant and personal inconvenience are no grounds for a continuance of a cause, where the other counsel of the defendant is ready, and the want of preparation of the other counsel is merely that he has not examined the papers in the case or considered the questions of law involved. Hogshead *v.* Baylor, 16 Gratt. (Va.) 99. See also Salina Bank *v.* Alvord, 32 N. Y. 684.

60. Barnet *v.* Kennedy, 1 A. K. Marsh. (Ky.) 239.

Service upon agent.— A person who authorizes an agent to acknowledge service for him of all suits that should be brought against him, returnable to a particular term of the court, cannot continue the case on the ground that he did not know of the institution of the suit, and that he was ignorant of facts which he might have ascertained by examining the complaint on which service was acknowledged, and had not therefore looked up his witnesses and prepared for trial. Brown *v.* Winship, 20 Ga. 693.

61. *Illinois.*— Pardridge *v.* Wing, 75 Ill. 236.

Kentucky.— Barnet *v.* Kennedy, 1 A. K. Marsh. 239; Simms *v.* Alcorn, 1 Bibb 348.

New Mexico.— Beall *v.* Territory, 1 N. M. 507.

New York.— Schram *v.* Rudnick, 37 Misc. 821, 76 N. Y. Suppl. 891.

United States.— Greigg *v.* Reade, 10 Fed. Cas. No. 5,804, Crabbe 64.

Complicated suit.— A defendant in a suit involving complicated matters, who does not employ counsel for more than eight months from the service of the petition, and who then negotiates with an attorney whose business engagements prevent him from giving immediate attention to the case, is not entitled to a continuance to prepare a defense. Gunn *v.* Gunn, 95 Ga. 439, 22 S. E. 552.

62. Bailey *v.* Wilner, 107 Ga. 364, 33 S. E. 434.

63. Pennsylvania Co. *v.* Rudel, 100 Ill. 603. See also *infra*, IV, P.

Memoranda for new counsel.— It is not error to refuse a postponement asked for on the ground that new counsel, who have recently been employed in consequence of the death of the original counsel, have not yet been able to obtain papers which were placed in his keeping, and which are important for use on the trial, where such papers are not competent as evidence, but can only be used as memoranda for the information and aid of counsel. Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

64. Allen *v.* Pollad, 22 S. W. 436, 15 Ky. L. Rep. 52; Fenwick *v.* Brent, 8 Fed. Cas. No. 4,732, 1 Cranch C. C. 280.

Rights of infants involved.— In an action to set aside a conveyance of land from a father to his children, where the answer presents a valid defense and shows that the rights of infants are involved, a continuance should be awarded to allow proofs to be taken on the father's affidavit that he had just learned that the attorney employed by him to conduct the defense had failed to prepare the case for trial and that he had employed another to do so. Allen *v.* Pollad, 22 S. W. 436, 15 Ky. L. Rep. 52.

65. McLauthlin *v.* Smith, 176 Mass. 46, 57 N. E. 216; Clark *v.* Clough, 62 N. H. 693; Williams *v.* Wright, 20 Tex. 499. *Compare* Clappier *v.* Banks, 11 La. 593. And see, generally, Abatement and Revival, 1 Cyc. 10.

Attachment on trustee process.— Where an heir's interest in the assets of the administrator is attached on trustee process before a decree of distribution is made, the suit may be continued until sufficient opportunity has been given for the settlement of the administrator's account and a decree of distribution. Wheeler *v.* Bowen, 20 Pick. (Mass.) 563. See also Winthrop *v.* Carlton, 8 Mass. 456.

Cross-actions pending.— Where cross-actions are pending, either of them may be continued on the defendant's motion until he shall obtain judgment in his action, if he will use due diligence that his judgment may be set off against that of the other party. Winslow *v.* Hathaway, 1 Pick. (Mass.) 211; Adams *v.* Manning, 17 Mass. 178.

Delay of judgment.— Where, in an action

cal,[66] the issues must be the same,[67] and it is essential that the entire relief demanded and sought for in the first action can be awarded in the other.[68] It seems that the granting of a continuance or motion to stay in such cases is governed by the same rules as in the plea of another action pending,[69] and the test lies in the fact whether the evidence would support both actions.[70] The granting or refusal of a stay of proceedings in such cases is in a measure discretionary with the court,[71] but this discretion should not be so extended as to deprive a party of all remedy for his cause of action.[72]

2. In State and Federal Courts. Where suits are pending in the federal and state courts, a continuance of the suit in the state court will not be granted, unless the parties and subject-matter are the same.[73] And in a case in the federal circuit court depending upon the local law, a continuance will not be granted to

upon a promissory note, it appeared that the defendant had assigned his property in trust to pay the note in suit after certain other debts; that there was no express stipulation in the assignment on the part of the creditors; and that the plaintiff assented to the assignment and claimed the benefit of it, but that it was not executed by him, and that no part of the proceeds had been received by him, it was held that the court might grant a delay of the judgment to give a reasonable time for the property to be converted into money and applied according to the terms of the assignment. Rice *v.* Catlin, 14 Pick. (Mass.) 221.

Indictment pending.— That the attorney-general is about to proceed by indictment against the defendant has been held good ground for the continuance of a suit growing out of the facts charged in the indictment. Anthony *v.* Clarke, 1 R. I. 284. But in Johnson *v.* Wardle, 3 Dowl. P. C. 550, 1 Hurl. & W. 219, it was held that the court would not delay the trial of an action until after the trial of an indictment for perjury in a matter relating to the cause.

66. People *v.* Northern R. Co., 53 Barb. (N. Y.) 98; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533, 46 N. Y. St. 893. See also Cates *v.* Mayes, (Tex. 1889) 12 S. W. 51. And see *infra*, IV, K, 2.

67. Toplitz *v.* Miller, 32 Fed. 744.

Affidavit denying identity of issues.— The rule of Oct. 1, 1887, for the government of the calendar of the circuit court for the southern district of New York, provides that cases must be tried when reached in their regular order according to date of issue and place on the calendar. It was held, on motion to stay the trial of certain cases for the term, on the ground that a case pending in the supreme court involved the same issues, that the rule would not be departed from where the affidavit for the purposes of the motion filed by the defense denied the identity of the issues. Toplitz *v.* Miller, 32 Fed. 744.

68. People *v.* Northern R. Co., 53 Barb. (N. Y.) 98; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533, 46 N. Y. St. 893.

Under Cal. Code Civ. Proc. § 1193, requiring a building contractor to defend at his expense actions brought against the property which was the subject of the contract for work alone or materials furnished by subcontractors, the owner is entitled to set off the expense incurred in defending lien foreclosure suits by subcontractors against the contractor's claim based on a *quantum meruit*, where the contract was invalid because of the contractor's failure to record it as required by Cal. Code Civ. Proc. § 1183, and hence it was error for the court to refuse to continue the contractor's claim until the subcontractor's suits had been determined. Macomber *v.* Bigelow, 123 Cal. 532, 56 Pac. 449.

69. See Dawley *v.* Brown, 79 N. Y. 390; Stowell *v.* Chamberlain, 60 N. Y. 272; Kelsey *v.* Ward, 16 Abb. Pr. (N. Y.) 98 [*cited* in Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 362, 20 N. Y. Suppl. 533, 46 N. Y. St. 893]. And see Abatement and Revival, 1 Cyc. 10.

70. Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Suppl. 533, 46 N. Y. St. 893.

71. People *v.* Northern R. Co., 53 Barb. (N. Y.) 98.

Action pending in another state.— It is not an abuse of discretion to refuse a continuance on the ground that another action was pending for the same cause of action in another state, where the court was not requested to grant it until after the jury were impaneled. Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309.

72. McDonald *v.* U. S., 42 Wis. 340.

Abuse of discretion.— Where after granting a stay of proceedings in an action for damages caused by flowage, to await the decision in a pending suit against a different defendant by the same plaintiff in the same court for the same damages, the court granted a stay of proceedings in the latter case on the application of the defendant in the former, it was held an abuse of discretion. McDonald *v.* U. S., 42 Wis. 340.

73. Loring *v.* Marsh, 15 Fed. Cas. No. 8,514, 2 Cliff. 311. See also Farnsworth *v.* Western Union Tel. Co., 1 N. Y. St. 80, holding that the trial of an action pending in the state courts will not be postponed on the ground that there is another suit pending in the federal courts involving the same questions, where it appears that the action in the state courts involves additional matters and will have to be tried regardless of the decision of the federal court.

await the construction of the law in a case pending in the state court, since the federal court may determine its construction.[74] Where actions between the same parties and in relation to the same subject-matter are pending in the state and federal courts, the action in the state court may be continued for a reasonable time to await the determination of the action brought in the federal court, where the subject-matter of the action is peculiarly within the jurisdiction of the court for whose decision the delay is sought.[75] So it has been held that where after the commencement of a suit in the federal courts, the defendant who claimed under a tax-title filed a bill in the state court against the plaintiff's lessor, a non-resident, and by publication procured a decree of the title, no notice being given to the party nor his counsel in the case of which the defendant had full notice, a continuance of the suit might properly be granted the plaintiff to enable him to reverse the decree in the state court.[76]

3. PROCEEDINGS PENDING IN EQUITY. The question whether a continuance will be granted on the ground that a suit is pending in equity which would determine the rights of the parties is a matter within the discretion of the court,[77] depending in a large measure upon whether or not a refusal will work injustice to the applicant.[78] A continuance will not be granted because a suit for the same matter is pending in equity, where a plea of such suit would not avail as an abatement.[79] Where the same court possesses both equity and common-law jurisdiction, the proper method of securing a postponement of an action at law, on the ground that a suit is pending in equity, is by injunction on the equity side to stay proceedings at law.[80]

4. PENDENCY OF APPEAL. As a general rule it is no ground for a continuance that an appeal has been taken and is pending in another cause between the same parties or between some of the parties and third persons;[81] but it has been held that a continuance may be granted, where a case pending on appeal between some of the parties and a third person involves the determination of a question which is controlling in the case in which a continuance is asked.[82] Trial courts have ample power, when it is apparent that injustice may be done, to grant continuances until a case pending in the appellate court, sought to be used as a bar or estoppel, is determined.[83]

74. Loring *v.* Marsh, 15 Fed. Cas. No. 8,514, 2 Cliff. 311.

75. Rose *v.* Nevada County Super. Ct., 65 Cal. 570, 4 Pac. 577.

76. Calladay *v.* McKinsey, 4 Fed. Cas. No. 2,318, 5 McLean 166.

77. Gear *v.* Shaw, 1 Pinn. (Wis.) 608.

Filing of cross-bill.— Where a master's report is made and awaiting confirmation, and the cause is ready for hearing, and a defendant files a cross-bill containing the same allegations as his answer, with a few additional averments of facts known to defendant when his answer was filed, and no reason is shown why the cross-bill was not filed with the answer, it is not error to refuse a continuance until the cross-bill is answered and matured against a new party brought in thereby. A continuance of a cause ready for hearing on the original bill, upon the filing of a cross-bill, is not a matter of right. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801.

78. Franks *v.* Wanzer, 25 Miss. 121.

Repeated continuances.— The fact that a suit was pending in a court of equity between the same parties, and involved the same subject-matter, is not ground for granting a continuance in an action at law to a party who had already had repeated continuances. Sanford *v.* Cloud, 17 Fla. 532.

79. Davis *v.* Hunt, 2 Bailey (S. C.) 412.

80. Gear *v.* Shaw, 1 Pinn. (Wis.) 608.

81. Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Cates *v.* Mayes, (Tex. 1889) 12 S. W. 51.

Review of interlocutory order.— The pendency of attempted review by error proceedings of an order in a case not final is no reason for the postponement of a trial of the cause on its merits. Doolittle *v.* American Nat. Bank, 58 Nebr. 454, 78 N. W. 926.

82. E. F. Kirwan Mfg. Co. *v.* Truxton, 1 Pennew. (Del.) 409, 42 Atl. 988.

83. Willard *v.* Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294. Thus, where the appeal has been taken in good faith and sufficient bond given, if the introduction of the judgment in another case would have the effect of permitting the judgment creditor, through the means of another action, to collect his judgment, the trial court should always, on the proper showing being made, continue the trial until after the case pending in the appellate court has been determined. Standard Implement Co. *v.* Stevens, 51 Kan. 530, 33 Pac. 366.

Breach of executor's bond.— Where the

L. Proceedings to Enjoin Actions. A court of law may in a proper case grant a continuance to allow a party who has an equitable defense to enjoin the proceedings at law.[84] The court is vested with discretion in the matter,[85] but should allow no continuance where there has been an unreasonable delay or lack of diligence.[86]

M. Proceedings For Discovery. Under a statute of Indiana providing that either party may propound interrogatories to be filed with the pleadings relative to the matter in controversy, and require the opposite party to answer the same under oath, and that the court may enforce the answer by attachment or otherwise, it has been held that the mere failure to answer interrogatories filed with pleadings is no cause for a continuance;[87] in case of a refusal or neglect to answer, an attachment should be taken out, and the party in default in answering will not be allowed to object to the delay occasioned by his own default because an attachment was not issued at an earlier date.[88] By the express provisions of the Alabama statute, if answers to interrogatories are not filed in time, are not sufficiently full or are evasive, it is within the discretion of the court either to attach the party and cause him to answer fully in open court or continue the cause until further answers are made or direct a nonsuit or judgment by default to be entered.[89] Under the Georgia statute where interrogatories are prepared, filed, and commission attached, and where notice of the same has been duly given, if the discovery sought is material and such as the law requires to be made, if it be not made, a continuance at the instance of the opposite party should be granted.[90] In no event, however, should a continuance be granted, unless there has been a compliance with the statute to compel discovery.[91] A suit at law should not be delayed because a bill of discovery filed in aid thereof has not been answered, where there has been undue delay in seeking the discovery[92] Nor

principal breach alleged in an action on the bond of a non-resident executor is the failure to comply with a decree of the surrogate for the payment of money, and an appeal has been taken to the court of appeals from a judgment of the supreme court affirming such decree, the action will, on application of the surety, be stayed till the determination of the appeal. Hood *v.* Hayward, 3 N. Y. St. 153.

84. Dudley *v.* Love, 35 Ga. 148; Purington *v.* Frank, 2 Iowa 565. *Compare* Vandersteegen *v.* Witham, 8 Dowl. P. C. 369, 9 L. J. Exch. 174, 6 M. & W. 457.

Amendment of bill for injunction.— Where defendant's bill to enjoin an action at law was held insufficient for want of an averment which the party could have made, and his counsel moved for a continuance of the action at law until he could amend the same, it was held that the motion should have been allowed. Dudley *v.* Love, 35 Ga. 148.

85. Purington *v.* Frank, 2 Iowa 565.

86. Richardson *v.* Harvey, 37 Ga. 224.

87. Cleveland *v.* Stanley, 13 Ind. 549; Cleveland *v.* Hughes, 12 Ind. 512; Rice *v.* Derby, 7 Ind. 649; Lenk *v.* Knott, 7 Ind. 230.

88. Cleveland *v.* Hughes, 12 Ind. 512; Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620. See also Rice *v.* Derby, 7 Ind. 649.

89. Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 18 So. 827; *Ex p.* McLendon, 33 Ala. 276; *Ex p.* Grantland, 29 Ala. 69; Pool *v.* Harrison, 18 Ala. 514.

90. Brown *v.* Mercier, 82 Ga. 550, 9 S. E. 471. And see Lucas *v.* Tarver, 32 Ga. 267.

Interrogatories in another state.— It has been held that a continuance should be granted to obtain an answer from another state to material interrogatories, although the court is ignorant as to whether the state provides compulsory process to compel a witness resident there to answer interrogatories from another state. Johnson *v.* Baldwin, 30 Ga. 816. But in another case it was held that a continuance would not be granted to enable a party by proceedings for contempt in the courts of another state to compel a witness to testify there by deposition. Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875.

91. Brown *v.* Mercer, 82 Ga. 550, 9 S. E. 471; Martin *v.* Anderson, 21 Ga. 301. See also Ga. Code, § 3810 *et seq.*

92. Ross *v.* Norvell, 3 Munf. (Va.) 170. See also Swearingen *v.* Swearingen, Wright (Ohio) 108, where it was said that if the party hold back his bill for a discovery until the cause is called for trial, and he would wait for the answer, it is incumbent upon him to excuse his delay and show cause why time should be given him.

Affidavit must excuse delay.— Where a defendant, after answer filed, files interrogatories to the plaintiff just before the commencement of the term, under circumstances rendering it impossible for the plaintiff to answer them at that term, the defendant's affidavit for a continuance on the ground that the answers are material to his defense should account satisfactorily for the delay in propounding the interrogatories. Hipp *v.* Robb, 7 Tex. 67.

will a suit at law be continued where the bill seeks general relief as well as discovery.[93]

N. Proceedings to Take Depositions. A continuance will usually be granted to allow a party to take depositions,[94] if the testimony sought is material,[95] and the applicant has been guilty of no negligence in procuring the desired evidence.[96] Every party is expected to prepare his case for trial before the cause is reached, and where depositions are necessary for the proper presentation of his cause, he must take the proper legal measures to secure them by the issuance of a commission,[97] and such personal supervision as the exigencies of the case may require.[98] The question as to what will constitute due diligence in any particular

93. Bennett *v.* Wilson, 3 Fed. Cas. No. 1,326, 1 Cranch C. C. 446.

94. *Colorado.*— Hirsch *v.* Ferris, 1 Colo. 402.

Georgia.— Johnson *v.* Baldwin, 30 Ga. 816.

Illinois.— Lyon *v.* Boilvin, 7 Ill. 629.

Indiana.— Terre Haute, etc., R. Co. *v.* Norman, 22 Ind. 63; Kenton *v.* Spencer, 6 Ind. 321; West *v.* Thornburgh, 6 Blackf. 542; Andrews *v.* Jones, 3 Blackf. 440.

Iowa.— Holbrook *v.* Fahey, 51 Iowa 406, 1 N. W. 662.

Louisiana.— Calhoun *v.* Mechanics', etc., Bank, 28 La. Ann. 260; Tarleton *v.* Bringier, 15 La. Ann. 419.

New York.— Perkins *v.* Whitney, 12 N. Y. Suppl. 184, 34 N. Y. St. 951.

United States.— Marsh *v.* Hulbert, 16 Fed. Cas. No. 9,116, 4 McLean 364.

See 10 Cent. Dig. tit. "Continuance," § 38.

Under Iowa Code (1873), § 2742, as amended by Acts 17th Gen. Assembl. c. 145, providing that in equitable actions wherein issue of fact is joined the court may order the evidence to be taken in the form of depositions, or either party may take his testimony by depositions, and section 2745 providing that the appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages, etc., it was held that in actions to foreclose mortgages the court may, on request of a party at the appearance term, order the evidence to be taken in the form of depositions and grant a continuance for the purpose. Holbrook *v.* Fahey, 51 Iowa 406, 1 N. W. 662.

95. Perkins *v.* Whitney, 12 N. Y. Suppl. 184, 34 N. Y. St. 951; Marsh *v.* Hulbert, 16 Fed. Cas. No. 9,116, 4 McLean 364. See also Johnson *v.* Baldwin, 30 Ga. 816; Terre Haute, etc., R. Co. *v.* Norman, 22 Ind. 63.

Party offering himself as witness.— In Young *v.* Kent Cir. Judge, 116 Mich. 10, 74 N. W. 206, it was held that a defendant in an action by a non-resident was not entitled to have its prosecution stayed until he could take plaintiff's deposition, where plaintiff offered himself as a witness in court, and the purpose of taking the deposition was to discover whether there was any defense and to prepare for trial.

96. *Colorado.*— Hirsch *v.* Ferris, 1 Colo. 402.

Georgia.— White *v.* Beasland, 42 Ga. 184; Martin *v.* Anderson, 21 Ga. 301; Moody *v.* Davis, 10 Ga. 403. See also Johnson *v.* Baldwin, 30 Ga. 816.

Illinois.— Fisher *v.* Greene, 95 Ill. 94.

Iowa.— Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41.

New York.— Bouchereau *v.* Le Guen, 2 Johns. 196.

Pennsylvania.— Cooper *v.* Mitchell, 1 Phila. 73, 7 Leg. Int. 110.

Texas.— Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455; Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367; McMahon *v.* Busby, 29 Tex. 191; Hogan *v.* Burleson, 25 Tex. Suppl. 35; San Antonio, etc., R. Co. *v.* Bowles, (Civ. App. 1895) 30 S. W. 89; Texas, etc., R. Co. *v.* Hoskins, 2 Tex. App. Civ. Cas. § 66.

Virginia.— Fiott *v.* Com., 12 Gratt. 564.

United States.— Marsh *v.* Hulbert, 16 Fed. Cas. No. 9,116, 4 McLean 364.

See 10 Cent. Dig. tit. "Continuance," § 38 *et seq.*

97. Jackson *v.* Woodworth, 18 Johns. (N. Y.) 135; Cooper *v.* Mitchell, 1 Phila. (Pa.) 73, 7 Leg. Int. (Pa.) 110; San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

Alleged fraud of adverse party.— Where a commission to France has been issued, but not returned for two years, affidavit of defendant's counsel that he believes the delay is caused by the act of the plaintiff is not sufficient ground for continuing the trial. Bouchereau *v.* Le Guen, 2 Johns. (N. Y.) 196.

New commission.— Where a commission had been obtained to procure the evidence of a witness, and, on a rule taken on the opposite party to show cause why the depositions should not be read on the trial of the cause, the objection was made that they were not signed by the deponent, and this objection was sustained by the court, it was held that in the absence of any neglect attributable to the party taking out the commission he was entitled to a new commission, and to a continuance of the cause in the meantime. Tarleton *v.* Bringier, 15 La. Ann. 419.

98. Finnerty *v.* Coughlin, 53 Iowa 751, 5 N. W. 704.

Mistake of clerk.— The fact that an attorney is obliged on account of a press of business and absence from home to intrust the service of notices for taking depositions to a clerk, who makes a mistake, occasioning the suppression of the depositions, does not entitle him to a continuance for the purpose of

case depends upon the facts and circumstances presented to the court.[99] To authorize a suit to be continued on account of an outstanding commission, it must appear that no unnecessary delay was suffered to intervene after the commencement of the suit, for a party can never take advantage of his own negligence.[1]

O. Absence of Parties — 1. In General. It is unquestionably an important privilege of a party to be present at the trial of his cause, which should not be denied on a proper application made, unless for weighty reasons;[2] but the mere desire of a party to be present at the trial of his case, or the desire of his attorney to have him there, is not a sufficient reason in itself for a continuance of the case.[3]

retaking the same. Finnerty *v.* Coughlin, 53 Iowa 751, 5 N. W. 704.

99. *Colorado.*— Hirsch *v.* Ferris, 1 Colo. 402.

Georgia.— Martin *v.* Anderson, 21 Ga. 301; Moody *v.* Davis, 10 Ga. 403.

Illinois.— Fisher *v.* Greene, 95 Ill. 94; Lyon *v.* Boilvin, 7 Ill. 629.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41.

Pennsylvania.—Cooper *v.* Mitchell, 1 Phila. 73, 7 Leg. Int. 110.

Texas.— Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455; San Antonio, etc., R. Co. *v.* Bowles, (Civ. App. 1895) 30 S. W. 89; Texas, etc., R. Co. *v.* Hoskins, 2 Tex. App. Civ. Cas. § 66; Hogan *v.* Burleson, 25 Tex. Suppl. 35.

Virginia.— Fiott *v.* Com., 12 Gratt. 564.

See 10 Cent. Dig. tit. "Continuance," § 39.

Commission one week before trial.— An application for continuance because of the delay in receiving a deposition from New York is properly refused where it appears that the suit was begun four months before the trial, and the commission issued but one week before the trial. San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

1. Cooper *v.* Mitchell, 1 Phila. (Pa.) 73, 7 Leg. Int. (Pa.) 110.

Commission of adversary.— A party cannot claim a continuance for the non-return of his adversary's commission. St. Joseph's College *v.* Lee, 4 La. 228.

Commission on terms.— Where a party procures a commission to take testimony on the terms that whether it be returned or not the cause shall not on that account be continued at the next term, yet, if it be returned executed at the next term, the adverse party has a right to a continuance till he can examine the testimony, that he may have opportunity to disprove it, if he deems it necessary. Norwood *v.* Owings, 1 Harr. & J. (Md.) 296.

Notice of trial.— It is no objection to giving notice of the trial of a cause that there is a commission to take depositions out, but if there has not been sufficient time for the return of the commission the judge will postpone the trial without costs. Stokes *v.* Garr, 17 N. J. L. 451.

2. Pate *v.* Tait, 72 Ind. 450.

After several continuances at request of opposite party.— In Mayton *v.* Guild, (Tex. Civ. App. 1894) 29 S. W. 218, upon the case being called, plaintiff's counsel stated that his client, who lived in another city, had been notified by letter of the date of the trial, but had not appeared, and that counsel could not go to trial without his actual presence; that the case had been called at previous terms; and that plaintiff had always been present and ready for trial, but that the case had always been continued at defendant's instance. Under such circumstances it was held that in denying that request and dismissing the suit for want of prosecution the court erred.

Principal on note.— An action against the sureties on a note alone, judgment having already been rendered against the principal, will not be continued because the latter is absent for providential cause, although the counsel for the sureties state that they cannot go safely to trial without such principal, such counsel further stating that they did not represent him in the case. Lumpkin *v.* Calloway, 101 Ga. 226, 28 S. E. 622.

3. *California.*— Queirolo *v.* Queirolo, 129 Cal. 686, 62 Pac. 315; Rubens *v.* Mead, (1898) 53 Pac. 432; Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Cohn *v.* Brownstone, 93 Cal. 362, 28 Pac. 953; Wilkinson *v.* Parrott, 32 Cal. 102.

Colorado.— Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

Georgia.— Barker *v.* Marietta Guano Co., 112 Ga. 305, 37 S. E. 379; Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646; Gunn *v.* Gunn, 95 Ga. 439, 22 S. E. 552; Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648; National Exch. Bank *v.* Walker, 80 Ga. 281, 4 S. E. 763; Clay *v.* Barlow, 73 Ga. 787; Cauthen *v.* Barnesville Sav. Bank, 69 Ga. 767; Hays *v.* Hamilton, 68 Ga. 833.

Illinois.— Hazen *v.* Pierson, 83 Ill. 241; Telford *v.* Brinkerhoff, 45 Ill. App. 586; Schlesinger *v.* Nunan, 26 Ill. App. 525.

Indiana.— Davis *v.* Luark, 34 Ind. 403; Jacobs *v.* Finkel, 7 Blackf. 432; Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

Iowa.— Brandt *v.* McDowell, 52 Iowa 230, 2 N. W. 1100.

Kansas.— Tucker *v.* Garner, 25 Kan. 454; Paulucci *v.* Verity, 1 Kan. App. 121, 40 Pac. 927.

Kentucky.— Chambers *v.* Handley, 3 J. J. Marsh. 98; Townsend *v.* Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901.

Louisiana.— Richardson *v.* Dinkgrave, 26 La. Ann. 651; Kohn *v.* Short, 18 La. Ann. 291; Hills *v.* Jacobs, 7 Rob. 406; Lizardi *v.* Arthur, 16 La. 577; Raby *v.* Brown, 14 La. 247.

Such a desire may grow out of mere curiosity, or from the mere general interest any party to litigation has in its results, without any expectation of the party being able himself, in any way, by his presence and counsel, to give material aid in the case.[4] A party is bound to attend to the trial of his cause at his own peril,[5] and the granting or refusal of a continuance on account of absence depends upon the sufficiency of the excuse presented.[6] In the absence of a reasonable and sufficient excuse, the usual rule should be adhered to and the party left to suffer the

Minnesota.— West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639.

Missouri.— Owens *v.* Tinsley, 21 Mo. 423; Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 629; Gerber *v.* McCoy, 23 Mo. App. 295.

New Jersey.— Smith *v.* Burnet, 17 N. J. Eq. 40.

New York.— Post *v.* Wright, 1 Cai. 111.

North Carolina.— Crites *v.* Lanier, 1 N. C. 110.

Pennsylvania.— Cowperthwaite *v.* Miller, 2 Phila. 219, 14 Leg. Int. 36.

Texas.— Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Stevens *v.* Perrin, 19 Tex. Civ. App. 554, 47 S. W. 802; Mayton *v.* Guild, (Civ. App. 1894) 29 S. W. 218; Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517.

Washington.— McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062.

West Virginia.— McDonald *v.* Peacemaker, 5 W. Va. 439.

Wisconsin.— Allis *v.* Meadow Springs Distilling Co., 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

See 10 Cent. Dig. tit. "Continuance," § 41 *et seq.*

Arrival during trial.— Where a postponement of a trial was asked until a certain hour to procure the attendance of the defendants as witnesses in their own behalf, and refused, and the trial extended beyond the hour, and one of the defendants arrived after the hour and testified, it was held no error to refuse the request. Hazen *v.* Pierson, 83 Ill. 241.

Continuance procured by fraud.— It is no error to refuse to continue the case after the setting aside of a continuance procured through fraud, on the ground that counsel for the movant, after the first continuance was granted, notified his clients that they need not appear on the day set for the trial, and for that reason they were not present. Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

Preponderance of evidence.— That an absent party defendant was a necessary witness in order that the defendants should have the preponderance of evidence on a certain disputed fact is insufficient ground for continuance. Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

4. Paulucci *v.* Verity, 1 Kan. App. 121, 40 Pac. 927. See also Harris *v.* Rose, 26 Ill. App. 237. In Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901, an administrator appeared before the commissioner appointed for the purpose of making a settlement of his account, but refused to settle his accounts as agent of the intestate, and without settling either account went to England and was unable to return for eighteen months. In the meantime the accounts were made up, and on the entry of the decree a continuance was asked, on the ground that because of his illness and absence he had been prevented from attending in person and submitting his evidence. It was held that the continuance was properly denied, because his personal attendance was not necessary to a fair settlement, as all of his books and papers were accessible to his counsel, and his act in leaving the state was voluntary.

5. Raby *v.* Brown, 14 La. 247; West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639.

Conscientious objections to day of trial.— The conscientious scruples of a Jew to appear and attend to the trial of his cause on Saturday is no ground for a continuance. Philips *v.* Gratz, 2 Penr. & W. (Pa.) 412, 23 Am. Dec. 33.

Oath to amended plea.—In Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517, exceptions to defendant's special plea having been sustained, he was granted leave to amend, and the trial of the cause was postponed two days to enable him to prepare his amendment. When the cause was again called, defendant's counsel made application to continue on the ground that defendant was absent from court, and that his counsel had used diligence to inform him that his presence at court was necessary to make oath to the truth of the matters alleged in the amended plea. Under such circumstances it was held that the application was proverly overruled, as it was defendant's duty to be present at court, and give attention to his defense.

6. Light *v.* Richardson, (Cal. 1893) 31 Pac. 1123.

No instruction as to future attendance.— In Light *v.* Richardson, (Cal. 1893) 31 Pac. 1123, the defendant and his witnesses were present at the time fixed for trial, but his attorney was absent from sickness. The court stated that the case would be continued on that account, and the defendant and his witnesses left without instructions as to future attendance. The next day the attorney was still sick, and the defendant and his witnesses did not appear. Under such circumstances it was held that the absence of defendant and his witnesses was excusable, and that a continuance should have been granted.

The absence of a party must be accounted for before a cause will be continued on this ground. Helm *v.* Voils, 58 Kan. 816, 49 Pac.

consequences of his own neglect.[7] The presence of a party to an action to aid and assist his counsel in the trial of the cause is not ordinarily considered essential; and the absence of a party, not as a witness, but simply as an aid to counsel, is rarely regarded as a ground for continuance.[8] It must be made to appear that the presence of the absent party is indispensable to a fair trial of the merits of the cause,[9] that injustice may result to the applicant in the event of a refusal of the delay,[10] and that a postponement is not asked for the mere purpose of delay.[11]

2. ON BUSINESS. Absence on business of an ordinary character is no ground for a postponement;[12] and even absence from the state will not ordinarily be considered a sufficient ground,[13] unless some good excuse in addition is alleged as the reason for the non-appearance.[14]

662; Donallen *v.* Lennox, 6 Dana (Ky.) 89; Post *v.* Wright, 1 Cai. (N. Y.) 111; Crites *v.* Lanier, 1 N. C. 110.

7. Wilkinson *v.* Parrott, 32 Cal. 102; National Exch. Bank *v.* Walker, 80 Ga. 281, 4 S. E. 763; Hays *v.* Hamilton, 68 Ga. 833; Hazen *v.* Pierson, 83 Ill. 241; Tilford *v.* Brinkerhoff, 45 Ill. App. 586.

8. *Illinois.*— Harris *v.* Rose, 26 Ill. App. 237.

Kansas.— Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921.

Pennsylvania.—Jones *v.* Little, 2 Dall. 182, 1 L. ed. 340.

West Virginia.— Logie *v.* Black, 24 W. Va. 1.

United States.— Edwards *v.* Nichols, 8 Fed. Cas. No. 4,296, 3 Day (Conn.) 16, Brunn. Col. Cas. 43.

9. *California.*— Queirolo *v.* Queirolo, 129 Cal. 686, 62 Pac. 315; Rubens *v.* Mead, (1898) 53 Pac. 432; Jaffe *v.* Lilienthal, 101 Cal. 175, 35 Pac. 636.

Georgia.— Morse *v.* Lowe, 111 Ga. 274, 36 S. E. 688; Cauthen *v.* Barnesville Sav. Bank, 69 Ga. 767.

Illinois.— Hazen *v.* Pierson, 83 Ill. 241; Schnell *v.* Rothbath, 71 Ill. 83; Telford *v.* Brinkerhoff, 45 Ill. App. 586; Waarich *v.* Winter, 33 Ill. App. 36.

Kentucky.— Townsend *v.* Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901.

Pennsylvania.— Cowperthwaite *v.* Miller, 2 Phila. 219, 14 Leg. Int. 36.

West Virginia.— Logie *v.* Black, 24 W. Va. 1.

See 10 Cent. Dig. tit. "Continuance," § 41 *et seq.*

10. See McAlexander *v.* Hairston, 10 Leigh (Va.) 507.

Insanity of party.— Where defendant becomes insane pending an action against her for divorce, the action should be continued if there is any hope of recovery. Stratford *v.* Stratford, 92 N. C. 297.

11. Schaffer *v.* Schaffer, 5 N. Y. Suppl. 544, 24 N. Y. St. 645.

Delay a question for court.— After several ineffectual attempts by plaintiff to have the trial of her action postponed the cause was marked ready for trial, without objection by her attorneys. When it was reached for trial, her attorney again applied for further postponement on the ground of her illness, and a postponement was had for three days to enable defendants to ascertain the true condition of her health. Subsequently affidavits were produced and oral evidence taken, and the trial judge, being satisfied that plaintiff's application was merely for delay, refused further postponement and allowed defendants to take a dismissal. Under such circumstances it was held that the exercise of the trial court's discretion would not be interfered with, particularly as it did not appear but that the plaintiff could begin a new action by paying costs. Schaffer *v.* Schaffer, 5 N. Y. Suppl. 544, 24 N. Y. St. 645.

12. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639. And see *infra*, IV, O, 5.

Divorce proceedings.—While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience. Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

13. Wick *v.* Weber, 64 Ill. 167; West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639; Smith *v.* Burnet, 17 N. J. Eq. 40.

14. Stoyel *v.* Westcott, 3 Day (Conn.) 349; Donallen *v.* Lennox, 6 Dana (Ky.) 89; Blanchard *v.* Wild, 1 Mass. 342; Robertson *v.* Woolley, 6 Wash. 156, 32 Pac. 1060.

Absence at commencement of suit.— By statute in some jurisdictions, where the defendant is out of the state at the time the suit is commenced against him, and does not return before the time for trial, the action must be continued. Stoyel *v.* Westcott, 3 Day (Conn.) 349; Blanchard *v.* Wild, 1 Mass. 342.

Cause reached on irregular call of docket.— On calling a cause for trial, defendant's attorney objected to pleading or going to trial, on the grounds set forth in his affidavit, that some three weeks before defendant had applied to him to know if the cause would be tried during that term, that he told him that from the crowded state of the docket he did not think it possible, that another attorney told defendant the same thing, that, upon that belief, defendant had left the state on business without preparing for trial

3. Because of Illness of Party. The illness of a party is not *ipso facto* a cause for continuance of the cause;[15] but where a party's presence at the trial is indispensable and the character of his illness is such as to render his presence at the trial impossible a continuance should be granted,[16] if it appears that he has been guilty of no negligence.[17] A continuance is properly refused where it appears that the party is not too ill to attend trial.[18] The fact of illness must be established by some satisfactory sworn statement,[19] either in the shape of an affidavit[20]

further than speaking to an attorney to appear for him, and that he had not returned. The affiant also showed that the cause had been reached by an irregular call of the docket, whereby many contested cases had been passed over, and not tried, continued, or disposed of, in which the parties were demanding trials, and which if tried would have consumed the whole term. Under such circumstances it was held that a continuance should have been granted. Donallen *v.* Lennox, 6 Dana (Ky.) 89.

Temporary absence.—Where defendants are guilty of no unreasonable delay in filing their answers, their motion, made before the cause is set for trial, for a continuance to the next term of court, will be granted, upon affidavit showing that the principal defendant — the manager of the business out of which the suit grew, and the person with whom all the transactions were had — is necessarily, but only temporarily, absent from the state. Robertson *v.* Woolley, 6 Wash. 156, 32 Pac. 1060.

15. *California.*— Queirolo *v.* Queirolo, 129 Cal. 686, 62 Pac. 315; Rubens *v.* Mead, (1898) 53 Pac. 432.

Georgia.— Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646.

Illinois.— Wick *v.* Weber, 64 Ill. 167.

Kentucky.— Townsend *v.* Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901.

Missouri.— J. H. Rottman Distilling Co. *v.* Van Frank, 88 Mo. App. 50; Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 629.

Pennsylvania.— Jones *v.* Little, 2 Dall. 182, 1 L. ed. 340.

United States.— Nones *v.* Edsall, 18 Fed. Cas. No. 10,290, 1 Wall. Jr. 189; Edwards *v.* Nichols, 8 Fed. Cas. No. 4,296, 3 Day (Conn.) 16, Brunn. Col. Cas. 43.

See 10 Cent. Dig. tit. "Continuance," § 42.

Illness of copartner.— It is no error to refuse a continuance asked by one of two defendants sued as copartners, where the only showing is that defendant, who was a nonresident of the state, desired to attend the trial, but was unable to do so on account of sickness. Paulucci *v.* Verity, 1 Kan. App. 121, 40 Pac. 927.

Party actually present.— A judgment will not be disturbed for error in refusing a continuance on account of the illness of a party, if it appears that such party was in fact present and testified on the trial. Pick *v.* Ketchum, 73 Ill. 366.

16. Mathews *v.* Willoughby, 85 Ga. 289, 11 S. E. 620; Connell *v.* Sharpe, 32 Ga. 443; McMahan *v.* Norick, (Okla. 1902) 69 Pac. 1047. See also Elliott *v.* Field, 21 Colo. 378, 41 Pac. 504. In Mathews *v.* Willoughby, 85 Ga. 289, 11 S. E. 620, it was held error to refuse a continuance when counsel stated that he could not go to trial without his client's presence, and presented the affidavit of a physician that he had visited the client on the previous day, that he had pneumonia, and would be unable to attend court for five or six days — also the affidavit of another person that he had seen the client the morning of the trial, and that he was very sick and unable to come to court.

In Pennsylvania it has been held that whenever application is made for the continuance of a cause, on account of the illness of a party and witness, unless it clearly appears on the day of the trial that the illness is too severe to admit of the taking of a deposition it is entirely proper to refuse relief; the most the court can do in such case is to hold the case over until the deposition can be taken. Smith *v.* Cunningham, 9 Phila. 96, 30 Leg. Int. 12.

17. J. H. Rottman Distilling Co. *v.* Van Frank, 88 Mo. App. 50.

18. Spann *v.* Torbert, 130 Ala. 541, 30 So. 389.

19. Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927; Westfield *v.* Westfield, 19 S. C. 85; McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062.

Hearsay evidence.— An affidavit that a third person had told the affiant that defendant was sick is insufficient to show such sickness as ground for continuance. McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062.

Unverified letter.— The court properly directed a cause, regularly reached, to proceed to trial in the absence of defendant and his counsel, where the only showing accounting for such absence was an unverified letter of defendant requesting a continuance because of his sudden illness. Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927.

Unverified message.— In Westfield *v.* Westfield, 19 S. C. 85, where, on the calling of the calendar, the appellant was present and acting as his counsel, and the case was set for the next day to suit his convenience, and on the next day he sent a message to the judge saying that he was unwell and unable to appear, and an officer was denied admission to the house, a notice that the judge would proceed to try the case in his absence at a certain hour was held sufficient indulgence.

20. Jaffee *v.* Lilienthal, 101 Cal. 175, 35 Pac. 636; Schnell *v.* Rothbath, 71 Ill. 83; Waarich *v.* Winter, 33 Ill. App. 36; Harlow *v.* Warren, 38 Kan. 480, 17 Pac. 159.

or the certificate of a physician that satisfies the court of the inability of the party to be present.[21] From the very nature of the relief asked the decision of the question must necessarily rest almost entirely within the discretion of the trial court,[22] and such discretion will not be interfered with unless the same has been abused to the extent of prejudicing the applicant's right to a fair trial of the cause.[23]

4. Because of Illness in Family. The granting of a continuance for illness in the family of a party to the cause is a matter within the discretion of the trial court, and such discretion will not be reviewed where the circumstances of the case are not such as to show that it has been abused.[24]

5. Absence in Public Service — a. In General. Inability of a party to be present at the trial, because of absence in the public service, does not as matter of right entitle him to a continuance;[25] nevertheless, the court may in its discretion grant a continuance for this reason,[26] and it seems to be customary to do so.[27]

21. A continuance because of the illness of a party was properly refused where the attending physician declined to say that any hurtful results would follow the party's appearance in court. Solomon *v.* State, 71 Miss. 567, 14 So. 461.

22. *Alabama.*— Campbell *v.* White, 77 Ala. 397.

California.— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Illinois.— Harris *v.* Rose, 26 Ill. App. 237.

Kansas.— Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921.

Kentucky.— McClurg *v.* Igleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

New York.— Schaffer *v.* Schaffer, 5 N. Y. Suppl. 544, 24 N. Y. St. 645.

North Carolina.— Skinner *v.* Bryce, 75 N. C. 287.

See 10 Cent. Dig. tit. "Continuance," § 42 *et seq.*

Conflicting evidence.— Where there was much evidence pro and con as to whether an absent party "was able to attend court, and what was his condition," the discretion of a trial judge in refusing to continue a case on the ground of the sickness of such party will not be interfered with; and the fact that on the hearing of a motion for a new trial in the case affidavits were read tending to show that the absent party was in fact sick at the date of the trial will not change the rule. Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646.

23. Fletcher *v.* Collins, 111 Ga. 253, 36 S. E. 646; Harris *v.* Rose, 26 Ill. App. 237; Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921; McClurg *v.* Igleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

No bona fide defense shown.— In Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921, a postponement of a trial on account of the absence of defendant, who it was alleged was unable to attend by reason of personal injuries, was asked. In the affidavit for continuance the inability of defendant to attend was shown, and it was stated that no defense could be made without his personal attendance. There had been a previous trial, and it was not shown that defendant had a *bona fide* defense, that he was a witness to any material fact, or possessed of any knowledge not shared by his counsel. Under such circumstances it was held that the overruling of the motion was not such an abuse of discretion as to justify a reversal.

Several continuances.— It is not an abuse of discretion to refuse defendant a continuance on the ground that he is not in a physical condition to attend court, where there have been several postponements at his instance, and it is not stated that he expects to testify or that his presence is necessary. Townsend *v.* Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901. See also Rubens *v.* Mead, (Cal. 1898) 53 Pac. 432, holding that there is no error in denying continuance because of defendant's sickness; there having been a previous continuance on this ground, on stipulation that there should be no further postponement on that ground, and it not appearing that defendant's presence would have been of any avail.

24. Skinner *v.* Bryce, 75 N. C. 287.

Counter-affidavits.—Denying a continuance because of sickness of defendant's wife is not an abuse of discretion, where the only affidavit in support of the motion was a physician's affidavit, made five days before, wherein the opinion was expressed that defendant could not safely leave home more than six hours at a time for a week, and a counter-affidavit alleged that three days after the physician's affidavit was made defendant went eight miles from his home on business and that his home was not more than ten miles from the place of holding court. Matthews *v.* Bates, 93 Ga. 317, 20 S. E. 320.

25. Crawford *v.* Bradley, 35 Ga. 184; Nones *v.* Edsall, 18 Fed. Cas. No. 10,290, 1 Wall. Jr. 189.

26. Nones *v.* Edsall, 18 Fed. Cas. No. 10,290, 1 Wall. Jr. 189. See also Crawford *v.* Bradley, 35 Ga. 184.

27. Clark *v.* Woodbury, 23 Iowa 61; Butler *v.* McCall, 15 Iowa 430; Lucas *v.* Casady, 12 Iowa 567; Johnson *v.* Offutt, 4 Metc. (Ky.) 19; Donnell *v.* Stephens, 35 Mo. 441; Geyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762; Republica *v.* Matlack, 2 Dall. (Pa.) 108, 1 L. ed. 310; Short Mountain Coal Co. *v.* Boas, 1 Pearson (Pa.) 44.

See 10 Cent. Dig. tit. "Continuance," § 44.

b. Under Special Statutory Provision. In some states continuances are provided for by statute in cases where parties are engaged in public service;[28] but it seems that in such cases the party must claim his privileges of postponement, and when he fails to do so it will constitute a waiver which will conclude him.[29]

6. Absence Because of Imprisonment. The court may grant a continuance where a party has been confined without the limits of the state, or where for any reason he has had no opportunity to instruct his counsel in his defense;[30] but no continuance will be granted where ample opportunity for the preparation of the defense has existed and has been neglected by the party and his attorney.[31]

7. Absence Because of Attendance on Another Court. Attendance on another court has never been considered a good cause for continuance.[32]

8. Absence Because of Incorrect Statement of Adversary. Where defendant and his leading counsel are not present at the trial because of an incorrect statement of plaintiff, he should be granted a continuance, and a refusal to do so is an abuse of discretion.[33]

P. Absence of Counsel — 1. In General. Absence of counsel is an excuse little favored by the courts as a ground for a continuance,[34] and in most cases a continuance for such cause will be refused.[35] Especially is this the case where no

28. Iowa.— By statute absence in the military service of the United States is made a ground of continuance for the defendant, where it is made to appear that the defendant's presence is in any degree necessary for a full and fair trial of the cause. Iowa Laws (1862), c. 109; Iowa Laws (1861), c. 7; Clark *v.* Woodbury, 23 Iowa 61; McCormick *v.* Rusck, 15 Iowa 127, 83 Am. Dec. 401; Butler *v.* McCall, 15 Iowa 430; Lucas *v.* Casady, 12 Iowa 567. By Laws (1864), c. 19, the benefits of the act were extended to both plaintiffs and defendants. Clark *v.* Woodbury, 23 Iowa 61. In an action against a firm, one member of which was in the military service of the United States, his copartner appeared and admitted a portion of the plaintiff's claim, and judgment was rendered therefor. It was held on appeal that under the statutes a defendant in the military service of the United States was entitled to a continuance of the action against him during such service, and that a continuance as to one of the firm operated as a continuance against both, and that said judgment should be reversed. Butler *v.* McCall, 15 Iowa 430.

Missouri.— Donnell *v.* Stephens, 35 Mo. 441 [*modifying* Bruns *v.* Crawford, 34 Mo. 330]. Acts (1861), p. 46, relating to suits against persons in the military service, and Acts (1863), p. 30, do not prohibit the commencement of suits against a party in the military service, but stay their prosecution for the time limited. Donnell *v.* Stephens, 35 Mo. 441.

29. Johnson *v.* Offutt, 4 Metc. (Ky.) 19; Geyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762. In Johnson *v.* Offutt, *supra*, at page 21, the court said: "To give the statute that effect, the court, whenever a member is sued, must take judicial notice of the fact, and of its own motion dismiss or continue the cause, which would be impossible. The defendant, to take advantage of his privilege, must show that he is a member; and it can give him but little additional trouble to prepare an answer, if he has a defense, and an affidavit that he cannot prepare for trial without neglecting his legislative duties, or an affidavit showing that he has a defense, but cannot prepare his answer without such neglect; in either of which cases he should have a continuance. But if he has no defense, the rendition of a judgment against him is not in our opinion such a disturbance as the statute was designed to prohibit.

30. Springer *v.* Mendenhall, 3 Harr. (Del.) 381.

Solitary confinement.— Where a party was serving a sentence of solitary confinement and counsel were not permitted to see him, a continuance was held proper. Chandler *v.* Barker, 2 Harr. (Del.) 316.

31. Springer *v.* Mendenhall, 3 Harr. (Del.) 381.

32. Green *v.* Gunn, 95 Ga. 439, 22 S. E. 552.

Service as grand juror.— Even where the party asking the continuance has been summoned and sworn as a juror in another court the continuance was denied. Goodwin *v.* White, 1 Browne (Pa.) 272.

33. Richardson *v.* Boyd, 69 Ark. 368, 63 S. W. 789.

34. Lightner *v.* Menzel, 35 Cal. 452; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; McKay *v.* Marine Ins. Co., 2 Cai. (N. Y.) 384; Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, 1 Wall. Sr. 1.

35. *California.*— Baumberger *v.* Arff, 96 Cal. 261, 31 Pac. 53; Lightner *v.* Menzel, 35 Cal. 452.

Colorado.— Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639; Keegan *v.* Donnelly, 11 Colo. App. 31, 52 Pac. 292.

Georgia.— Hook *v.* Teasley, 72 Ga. 901; Haley *v.* Evans, 60 Ga. 157; Burchard *v.* Boyce, 21 Ga. 6; Horshaw *v.* Cook, 16 Ga. 526.

Illinois.— Northwestern, etc., Aid Assoc. *v.* Priman, 124 Ill. 100, 16 N. E. 98; Graff *v.*

diligence in procuring his attendance is shown,[36] or where the cause is of such a nature that it could be tried by another attorney without special preparation.[37] In all such cases, however, where provision for continuance is not expressly made by statute or rule of court,[38] the granting of a postponement is a matter of discretion with the court, and may be allowed where the circumstances are such as will justify the additional allowance of time.[39]

Brown, 85 Ill. 89; Jarvis *v.* Shacklock, 60 Ill. 378.

Indiana.— Belck *v.* Belck, 97 Ind. 73; Whitehall *v.* Lane, 61 Ind. 93.

Iowa.— Zabel *v.* Nyenhuis, 83 Iowa 756, 49 N. W. 999.

Kentucky.— Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837.

Louisiana.—State *v.* Monceaux, 48 La. Ann. 101, 18 So. 896; Kohn *v.* Short, 18 La. Ann. 291.

Minnesota.— West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639.

Missouri.— St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 49.

New York.— McCready *v.* Lindenborn, 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54 [*affirming* 24 Misc. 606, 54 N. Y. Suppl. 46]; Jackson *v.* Wakeman, 2 Cow. 578; McKay *v.* Marine Ins. Co., 2 Cai. 384; Post *v.* Wright, 1 Cai. 111.

Tennessee.— State *v.* Frost, 103 Tenn. 685, 54 S. W. 986.

Texas.— Page *v.* Arnim, 29 Tex. 53; Hagerty *v.* Scott, 10 Tex. 525; Watkins *v.* Atwell, (Civ. App. 1898) 45 S. W. 404.

Washington.— Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385; Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

United States.—Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, Wall. Sr. 1.

See 10 Cent. Dig. tit. "Continuance," § 51.

Absence with papers.— The mere absence of counsel with the papers of the defendant is not a sufficient ground for the continuance of a cause. Horshaw *v.* Cook, 16 Ga. 526. So the fact that the absent attorney has in his possession letters which would establish the defense does not of itself establish a ground for continuance. Hook *v.* Teasley, 72 Ga. 901.

Business engagements of counsel are no cause for continuance. Burchard *v.* Boyce, 21 Ga. 6; Jackson *v.* Wakeman, 2 Cow. (N. Y.) 578. In Olden *v.* Litzenburg, 1 Phila. (Pa.) 204, 8 Leg. Int. (Pa.) 106, it was held that the professional business that forms a legal ground for the continuance of a cause is confined to an engagement in another court and does not comprehend a professional engagement in another city. See *infra*, IV, P, 5.

Executor newly made party.— An executor who has just been made a party to a pending action will not be granted a continuance because of the unexpected absence of counsel without leave of absence. Haley *v.* Evans, 60 Ga. 157.

36. Whitehall *v.* Lane, 61 Ind. 93; St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 49. In Boyd *v.* Leith, (Tex. Civ. App. 1899) 50 S. W. 618, a party seeking a continuance because of absence of counsel had three attorneys, two of whom were absent; and neither offered to show the cause of their absence, nor that it was unavoidable, and the attorney present swore to the cause of their absence on information and belief only. The motion set up equitable reasons for the continuance, which was largely in the court's discretion. It was held that the continuance was properly refused.

37. Graff *v.* Brown, 85 Ill. 89; Jarvis *v.* Shacklock, 60 Ill. 378; Belck *v.* Belck, 97 Ind. 73.

Allegations of affidavit.— An affidavit for continuance on the ground that new counsel was not familiar with the defense must show that sufficient time had not elapsed after the withdrawal of former counsel for the new counsel to have become familiar therewith. Miller *v.* Harker, 96 Ind. 234.

Complaining party an attorney.— It is not reversible error to refuse a motion for a continuance on the ground of the absence of a counsel and of documents, where the action is a simple one, the complaining party is himself an attorney, and it is not shown that the missing documents constitute material evidence. Keegan *v.* Donnelly, 11 Colo. App. 31, 52 Pac. 292.

38. Hill *v.* Clark, 51 Ga. 122.

Under Greater New York Charter, § 1377, providing that the rules of the supreme court shall apply to municipal courts, where an attorney, pursuant to rule 5 of the supreme court, applies to a municipal court for adjournment and presents an affidavit that he is actually engaged in the supreme court, the justice errs in not granting it. Marsh *v.* Nassau Show-Case Co., 26 Misc. (N. Y.) 837, 56 N. Y. Suppl. 1083.

39. *California.*— Baumberger *v.* Arff, 96 Cal. 261, 31 Pac. 53.

Georgia.—Callaway *v.* Douglasville College, 99 Ga. 623, 25 S. E. 850.

Illinois.— St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.

Indiana.— Belck *v.* Belck, 97 Ind. 73.

Iowa.— Brady *v.* Malone, 4 Iowa 146.

Kansas.— Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36.

Nebraska.— Corbett *v.* National Bank of Commerce, 44 Nebr. 230, 62 N. W. 445.

England.— Bearblock *v.* Tyler, 1 Jac. & W. 225.

See 10 Cent. Dig. tit. "Continuance," § 51 *et seq.*

Refusal to participate in trial.— In Skagit R., etc., Co. *v.* Cole, 2 Wash. St. 57, 25 Pac. 1077, the trial of a cause began in the absence of defendant's principal counsel, with the expectation that he would arrive before any material progress had been made. Dur-

2. Absence Because of Illness. It is usually considered a good ground for continuance that the counsel employed is too ill to conduct the cause when the same is called for a hearing,[40] but in such case it must appear that the particular counsel was necessary to the proper presentation of the cause,[41] and that there

ing the trial defendant asked for a continuance on the ground of his absence, stating that grave apprehensions were entertained that he had been drowned, which was subsequently ascertained to be the fact. Plaintiff opposed the continuance on the ground that the absent counsel had refused to participate in the trial because plaintiff had counseled with him before the commencement of the action as to the matters in controversy therein. It was held that the refusal of the trial court to grant the continuance was not such an abuse of discretion as would justify a reversal of the judgment. So where an attorney notified his client that he could not attend on the day set for trial, it was held no abuse of discretion to deny the motion. Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385.

Substitution of attorneys.— If an attorney be absent under such circumstances as to entitle his client to a continuance on that ground, his substitution of another attorney in his general business is not binding on his clients, so as to deprive them of their continuance. Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243.

Abuse of discretion.— In Hanson *v.* Michelson, 19 Wis. 498, after the cause was called (the defendant not appearing), and after the plaintiff's evidence was in, an attorney appeared for the defendant (not being his attorney of record), and applied for a postponement of a few days until his witnesses could be produced, on the ground that through neglect of the attorneys whom he had employed to attend to the cause he had not been informed that it had been noticed for trial at that term, until after the trial commenced. Under such circumstances it was held that if a judgment had been rendered against the defendant before such application he would have been entitled to relief from it, under Wis. Rev. Stat. c. 125, § 38, and therefore it was an abuse of discretion for the court to refuse the application.

40. *California.*— Thompson *v.* Thornton, 41 Cal. 626.

Georgia.— Printup *v.* Mitchell, 19 Ga. 586.

Illinois.— Graff *v.* Brown, 85 Ill. 89.

Iowa.— Rice *v.* Melendy, 36 Iowa 166.

Kansas.— Markson *v.* Ide, 29 Kan. 700.

Louisiana.— Vicksburg, etc., R. Co. *v.* Scott, 47 La. Ann. 706, 17 So. 249; Marrero *v.* Numez, 3 La. Ann. 54; Smelser *v.* Williams, 10 Rob. 97; Baillio *v.* Wilson, 6 Mart. N. S. 334; Patin *v.* Poydras, 5 Mart. N. S. 639; Barry *v.* Louisiana Ins. Co., 12 Mart. 484.

Virginia.— Myers *v.* Trice, 86 Va. 835, 11 S. E. 428.

United States.— Rhode Island *v.* Massachusetts, 11 Pet. 226, 9 L. ed. 697; Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,131, 1 Ban. & A. 135; Shultz *v.* Moore, 22 Fed. Cas. No. 12,825, 1 McLean 334.

See 10 Cent. Dig. tit. "Continuance," § 52.

Convenience of jurors.— The fact that a trial judge consults the convenience of jurors in denying a motion made by the defendant's counsel for an adjournment on account of his illness does not constitute reversible error, where the judge finally assumes the responsibility of deciding the motion and it appears that the defendant's side of the controversy was fully argued and presented with great ability. McCready *v.* Lindenborn, 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54 [*affirming* 24 Misc. (N. Y.) 606, 54 N. Y. Suppl. 46].

41. Tipton County *v.* Brown, 4 Ind. App. 288, 30 N. E. 925.

After extension of time.— A motion for a continuance on the ground of the severe illness of defendant's attorney who had charge of the case from the commencement, and previous cases involving the same subject-matter, where the facts were shown by affidavits and certificate of a physician, was granted, where made at the first term after joinder of issue, although defendant's time had been extended upon condition that the cause should be put on the calendar and argued at such time as the court would hear it. Rumford Chemical Works *v.* Hecker, 20 Fed. Cas. No. 12,131, 1 Ban. & A. 135.

Attorney present in court.— The refusal to continue a case on account of the inflamed condition of the attorney's eyes is not an abuse of the court's discretion, where he was before the court at the time and immediately proceeded to conduct the trial of the case in person. Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116. But a refusal to grant a continuance where an attorney is too ill to attend is erroneous, even though he had sufficiently recovered to be present before the case was actually tried. Rice *v.* Melendy, 36 Iowa 166.

Competent assistance.— Refusal to adjourn over a day for illness of counsel is not error, where such counsel had competent assistance and his client was not prejudiced thereby. McCready *v.* Lindenborn, 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54 [*affirming* 24 Misc. (N. Y.) 606, 54 N. Y. Suppl. 46].

Rights protected.— Where it appears from the record brought to the appellate court that just prior to the trial of the case in which the continuance was asked another case had been heard before the district court exactly similar, and in which exactly the same points were discussed and considered, and it further appears that the interests of the complaining party were fully protected by the district court in the rendition of the judgment, and that his rights at the trial were not in any manner injuriously affected, the appellate court will not reverse the judgment of the district court for proceeding to hear and dis-

was no time or opportunity to employ other counsel to conduct it.[42] A continuance will not be granted on the mere statement of a party that his attorney is too ill to be present,[43] or on an unverified certificate of a physician.[44] So an affidavit for continuance on this ground should state when the party expects to produce his attorney in court to conduct the case.[45]

3. Absence Because of Illness in Family. The allowance of an application for a continuance, based on the fact of illness in the family of the acting attorney, is usually a matter in the discretion of the trial court; but such application will generally be denied, especially where there is shown no diligence in preparing otherwise for trial.[46]

4. Absence in Public Service. The absence of an attorney in the public service of his state or county is usually a good ground of continuance, whether such service be civil[47] or military;[48] and provision for such cases has in some instances been made by statute.[49] Wherever such right is claimed, whether based upon statute or otherwise, the affidavit is usually required to state that the presence of the attorney is necessary to a fair trial of the cause.[50] If the application is based on the ground that the attorney is a member of the legislature, it

pose of the case in the absence of counsel. Markson *v.* Ide, 29 Kan. 700.

42. Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634 [*affirming* 50 Ill. App. 625]; Jarvis *v.* Shacklock, 60 Ill. 378.

Diligence on part of applicant.— In Thompson *v.* Thornton, 41 Cal. 626, the defendant's attorney was taken ill on the morning of the trial and informed the defendant that he could not try his case, but advised him that he had a good defense on the merits. The defendant endeavored to obtain other counsel to conduct his case, but was unsuccessful. Under such circumstances it was held that the application for a continuance was improperly denied.

Expectation of trial.— Where the ground of a motion for continuance is that the attorney cannot try the case by reason of sickness, it should be shown when the attorney will be able to try the case, and where this is not shown, and there has been sufficient time to employ other counsel, the application should be denied. Condon *v.* Brockway, 50 Ill. App. 625. So where a case had been pending eight years, and further preparation was not desired or expected, the absence of the principal counsel at the hearing because of sickness, it appearing by the affidavit of the clerk that the absent counsel had not been at that court for two years, was held no ground for a motion for a continuance. Adams *v.* Adams, 1 Duv. (Ky.) 167.

43. Hunt *v.* O'Brien, 59 Ill. App. 321.

44. Randall *v.* United L., etc., Ins. Assoc., 14 N. Y. Suppl. 631, 39 N. Y. St. 155.

45. Lamar *v.* McDaniel, 78 Ga. 547, 3 S. E. 409; Smith *v.* Printup, 59 Ga. 610.

Probable object delay.— An affidavit of the indisposition of principal counsel, without any allegation that he was in possession of papers necessary on the trial, will be disregarded, where from the circumstances delay is probably the object. Hooper *v.* Hyams, 1 Rob. (La.) 90.

46. Finch *v.* Billings, 22 Iowa 228.

47. Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Harrigan *v.* Turner, 53 Ill. App. 292; Patin *v.* Poydras, 7 Mart. N. S. (La.) 593.

Recent substitution.— Where a party applies for a continuance on a showing that his counsel is in attendance on the legislature as a member thereof, he is entitled to a continuance as of right, although it may also appear that the attorney was substituted of record in place of another only six days before the session began. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88 [*reversing* 50 Ill. App. 358].

48. Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243. See also Wicker *v.* Boynton, 83 Ill 545 [*citing and explaining* Duncan *v.* Niles, 32 Ill. 541].

Appearance without authority.—A showing that the affiant, an attorney, appeared without authority of the defendant, by request of the defendant's attorney, who had two months before enlisted and was in service in the army in Virginia, and that his absence was unknown to defendant, who was misinformed as to the date court convened, and who had had no opportunity of engaging counsel, is sufficient. Graves *v.* Rayle, 19 Ind. 83.

49. Under Ill. Laws (1872), p. 345, § 46, providing that where a party applying for a continuance files an affidavit that his attorney is in actual attendance upon the sessions of the general assembly, as a member thereof, and that the presence of such attorney in court is necessary to a fair and proper trial of such suit, it was held that the word "may," in the quoted clause, should be construed to mean "shall," and that the court has no discretion in such a case to refuse a continuance. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. See also Ill. Rev. Stat. (1893), c. 110, § 47; Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736; Duncan *v.* Niles, 32 Ill. 541.

50. St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Williams *v.* Baker, 67 Ill. 238; McClory *v.* Crawley, 59 Ill. App. 392.

has been held that it should appear that he had been actually employed prior to the commencement of the session on which he is in attendance.[51]

5. Absence Because of Attendance on Another Court. Ordinarily the fact that an attorney is professionally engaged elsewhere in the trial of a cause does not give an absolute right of continuance.[52] The courtesy existing between members of the bar, and recognized by trial courts, will usually in such cases enable counsel to postpone a cause for a few days in one of the courts so as to enable him to be present at both trials. But this is purely a matter of grace and not of law. The rights of litigants in one court are not to be determined by the condition of the docket in another, nor because an opposing counsel has assumed duties in different courts which may conflict.[53] Cases may of course arise when the denial of the right of continuance might amount to an abuse of discretion;[54] but under such circumstances it is not sufficient to show that the absent attorney was expecting a case to be called in another court, but it must be shown that he is at the time actually engaged in the trial of the other cause.[55]

6. Absence by Agreement or Stipulation. The court is not bound to conform to the private agreements of counsel postponing or delaying the trial of causes contrary to the regular routine of business;[56] but where such agreements are

51. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88 [*affirming* Stockley *v.* Goodwin, 78 Ill. 127]. An affidavit is insufficient which alleges that defendant's attorney is a member of a legislature which is to be in session at a subsequent date. Joiner *v.* Drainage Com'rs, 17 Ill. App. 607.

Failure to allege that the attorney is attending the legislature renders the affidavit insufficient. Mackin *v.* Cody, 68 Ill. App. 108.

52. *California.*— Haight *v.* Green, 19 Cal. 113.

Georgia.— Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; Sharman *v.* Morton, 31 Ga. 34.

Illinois.— Northwestern Benev., etc., Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98 [*affirming* 19 Ill. App. 224]; Culver *v.* Colehour, 115 Ill. 558, 5 N. E. 89; Packer *v.* Wetherell, 44 Ill. App. 95.

Louisiana.— Soey *v.* Soey, 13 La. 424; Brown *v.* Faulk, 12 La. 598; Ingraham *v.* White, 2 La. 294.

Minnesota.— Adamek *v.* Plano Mfg. Co., 64 Minn. 304, 66 N. W. 981.

United States.— Palmer *v.* U. S., 18 Fed. Cas. No. 10,696, 1 Hoffm. Land Cas. 227.

Counsel who have engaged to perform services for a client to prosecute or defend his suit must not assume new duties and relations inconsistent with the duty growing out of such engagement, and should he do so the client must get new counsel or do without him; his absence in attendance upon his new duties will not work a continuance of the cause. Sharman *v.* Morton, 31 Ga. 34.

Reason of rule.— If it were admitted that the fact of the counsel employed and previously attending to the case voluntarily absenting himself from court, for the reason that important professional business required his attention in another court, would be sufficient ground for obtaining the continuance of a cause, it would often be resorted to, greatly to the hindrance and delay of suits and to the prejudice of the rights of the adverse party. Hagerty *v.* Scott, 10 Tex. 525.

53. Northwestern Benev., etc., Assoc. *v.* Prim, 19 Ill. App. 224.

54. In Watkins *v.* Ahrens, etc., Mfg. Co., 38 S. W. 868, 18 Ky. L. Rep. 926, it was held error to deny a continuance and then nonsuit because of failure to prosecute the trial, where the judgment operated as a final determination because of limitations, and plaintiff's failure occurred solely because one of her counsel was engaged in a trial previously begun, and the other was obliged to attend an important cause in the federal court.

Adjournment of regular term.— That the attorney of a party to the suit is engaged in arguing an important cause in another court — the conflict in the hearing being caused by an adjournment of the regular term — has been held good ground for a continuance. Hill *v.* Clark, 51 Ga. 122.

Rule of court.— Under district court rule, 83, the absence of counsel attending a professional engagement in the court of another county is cause for continuance. Fritz *v.* Church, 3 Phila. (Pa.) 236, 15 Leg. Int. (Pa.) 341.

55. Gerlach *v.* Engelhoffer, 7 Phila. (Pa.) 241. See also Rossett *v.* Gardner, 3 W. Va. 531. In Culver *v.* Colehour, 115 Ill. 558, 5 N. E. 89, it was held no error to proceed with a case, in the absence of counsel, who was awaiting a motion in another court, the case having been already postponed from the previous day to suit his convenience and notice having been given him that, unless it could be shown the court that he was actually engaged, the case would be proceeded with.

56. Ford *v.* Holmes, 61 Ga. 419; Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906.

Absence of leading counsel.— A refusal to postpone a trial will not be disturbed where it appears that the leading attorneys had agreed to postpone, the court not having consented, and that the appellant's leading at-

made in open court and with the court's consent and approval, the absence of one of the contracting parties upon the day originally set constitutes a sufficient ground for continuing the case as stipulated.[57]

7. Absence by Leave of Court. The granting of leave of absence from court to counsel, unless for providential cause, is of doubtful propriety, when it affects the rights and interests of other parties, and should be exercised at all times with caution;[58] but where such leave has once been granted no trial should be had while the term of leave remains unexpired.[59]

8. Withdrawal From Cause. It will never be permitted to a party or his attorney to obtain a continuance of a cause beyond the time allowed him by law, by striking out the attorney's appearance at the term at which the cause stands for trial; otherwise by collusion between attorney and client the trial of a cause might be delayed beyond limit.[60]

9. Absence of One of Several Counsel. As a general rule the absence of associate counsel is no ground for a continuance of the cause,[61] especially where there is no showing of diligence to acquaint the remaining counsel with the facts of the case,[62] or that the attorney who is present is not capable of properly conducting the defense.[63] Cases may arise, however, where on account of the number

torney was therefore absent, but appellant was represented by other counsel, who made as good a defense as could have been made with further time. Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906. And see *infra*, IV, P, 9.

Adjournment from open court to chambers.—If counsel is absent without leave, the court may hear and dispose of a motion, although advised of an agreement entered into between the absent counsel and the attorney of the opposite party for postponing the hearing until some time in vacation. The court is not bound to conform to private arrangements of counsel contemplating not a continuance from one term to another, but from open court to chambers. Ford *v.* Holmes, 61 Ga. 419.

57. Denver, etc., R. Co. *v.* Roberts, 7 Colo. App. 290, 43 Pac. 460.

58. Ross *v.* Head, 51 Ga. 605.

59. Ross *v.* Head, 51 Ga. 605; Summerlin *v.* Dent, 36 Ga. 54.

60. Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.

61. *California.*—Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88.

Colorado.— Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639.

Delaware.— State *v.* Adams, 5 Harr. 107.

Georgia.— Darley *v.* Thomas, 41 Ga. 524; Sharman *v.* Morton, 31 Ga. 34; Cooper *v.* Jones, 24 Ga. 473.

Illinois.— Stringam *v.* Parker, 159 Ill. 304, 42 N. E. 794; Gould *v.* Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497 [*affirming* 36 Ill. App. 390].

Indiana.—Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906; Belck *v.* Belck, 97 Ind. 73.

Iowa.— Rosecranes *v.* Iowa, etc., Tel. Co., 65 Iowa 444, 24 N. W. 769.

Kentucky.— U. S. Bank *v.* Carroll, 4 B. Mon. 40; Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837; Ison *v.* Ison, 10 Ky. L. Rep. 38.

Louisiana.— Johnson *v.* Dean, 48 La. Ann. 100, 18 So. 902; Gardner *v.* O'Connell, 7 La. Ann. 453; Graham *v.* General Mut. Ins. Co., 6 La. Ann. 432.

Minnesota.— West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639.

Tennessee.— State *v.* Frost, 103 Tenn. 685, 54 S. W. 986.

Texas.— Hagerty *v.* Scott, 10 Tex. 525; Watkins *v.* Atwell, (Civ. App. 1898) 45 S. W. 404; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

Washington.— Zelinsky *v.* Price, 8 Wash. 256, 36 Pac. 28.

See 10 Cent. Dig. tit. "Continuance," § 57.

Counsel in public service.— The absence of one of the counsel in the legislature is no ground for a continuance. Sharman *v.* Morton, 31 Ga. 34. And see *supra*, IV, P, 4.

Counsel summoned as witness.— A refusal to grant a continuance for the absence of one of two counsel appearing for a complainant because summoned as a witness in another cause was proper. U. S. Bank *v.* Carroll, 4 B. Mon. (Ky.) 40.

62. Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88; Belck *v.* Belck, 97 Ind. 73.

Absence anticipated.— The fact that the senior counsel who has prepared and studied the case and has the papers absents himself from court to attend to important business before another tribunal is not a ground for a continuance, where such absence was anticipated by the party employing him for several weeks before the session of the court. Hagerty *v.* Scott, 10 Tex. 525; Davis *v.* Zumwalt, 1 Tex. App. Civ. Cas. § 596.

63. Gould *v.* Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497 [*affirming* 36 Ill. App. 390].

Assistance in former trial.— The absence of counsel is not ground for continuance, where other counsel, in conjunction with the absent counsel, conducted a former trial of the case, and no prejudice is shown to have resulted from the absence of such counsel. Stringam *v.* Parker, 159 Ill. 304, 42 N. E. 794 [*affirming* 56 Ill. App. 36]. And see McCready *v.* Lindenborn, 165 N. Y. 630, 59

and difficulty of the issues, the absence of leading counsel will be a sufficient ground for granting a continuance.[64]

Q. Death of Parties — 1. DEATH OF PLAINTIFF. The death of plaintiff is such a providential cause as will authorize a continuance, where there is no representative of the estate of such deceased party;[65] but the defendant is not entitled to a continuance as of course on the death of the plaintiff, where the cause is at issue.[66] The death of a party for whose use a suit is brought in the name of another seems not to be a reason for continuance at the instance of such party's representative; but if the defendant object to going to trial because there is no responsible party on the record, the court may in its discretion continue the cause till such party is introduced.[67]

2. DEATH OF DEFENDANT. After the death of the defendant in an action the plaintiff is entitled to a continuance in order to file his bill of revivor against the representatives of the deceased.[68]

R. Death of Counsel. The death of counsel pending the trial of a cause is a good ground of continuance;[69] and especially is this the case where the party has been diligent in trying to employ other counsel, but is unprepared for trial through no fault of his own.[70] Refusal of continuance on account of the death of defendant's chief attorney was proper, where the cause had several times been continued at defendant's instance, and the illness of the attorney was such that his presence at the trial could not be expected.[71] It is not error to refuse a postponement asked for on the ground that new counsel, who have recently been employed in consequence of the death of the original counsel, have not yet been able to obtain papers which were placed in his keeping, and are important for use on the trial, where such papers are not competent as evidence, but can only be used as memoranda for the information and aid of counsel.[72]

S. Absence of Witnesses or Evidence — 1. IN GENERAL. The absence of witnesses or evidence is the most usual ground upon which a motion for a con-

N. E. 1125 [*affirming* 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54], holding that refusal to adjourn over a day for illness of counsel was not error, where such counsel had competent assistance and his client was not prejudiced thereby.

64. Cooper *v.* Jones, 24 Ga. 473; Rice *v.* Melendy, 36 Iowa 166. And see Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906, holding that the absence of the principal counsel in a cause may justify its postponement or continuance, dependent upon the circumstances attending his absence and his peculiar relation to the cause, but a judgment will not be reversed because a postponement or a continuance was refused on account of the absence at the trial of the principal attorney or only attorney in the cause, unless it be made to appear that some real injustice was probably done by the refusal.

Absent by leave.— Cases in which the leading counsel are absent with leave cannot be tried in their absence, unless by consent of the party employing them or by consent of other counsel of such party, but must be continued. Summerlin *v.* Dent, 36 Ga. 54.

65. Worthy *v.* Tate, 42 Ga. 392.

66. Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408; Alexander *v.* Patten, 1 Fed. Cas. No. 171, 1 Cranch C. C. 338.

Death of resident member of firm.— Where the only resident member of plaintiff firm dies pending the suit, the cause will be continued to give defendants an opportunity to lay the rule for security for costs and give the sixty days' notice required. Lambert *v.* Smith, 14 Fed. Cas. No. 8,027, 1 Cranch C. C. 347.

Upon the death of the plaintiff and appearance of his executor, the defendant is not entitled to a continuance. But he may insist on the production of the letters testamentary before the executor shall be permitted to prosecute. Wilson *v.* Codman, 3 Cranch (U. S.) 193, 2 L. ed. 408.

67. Christine *v.* Whitehill, 16 Serg. & R. (Pa.) 98.

68. Smith *v.* Ballard, 3 N. C. 156; Hagarty *v.* Thompson, 1 Wkly. Notes Cas. (Pa.) 576.

69. Hunter *v.* Fairfax, 3 Dall. (Pa.) 305, 1 L. ed. 613.

70. Richardson *v.* Nolan, 7 Mart. N. S. (La.) 103.

Issuance of commission.— Where plaintiff directs a commission to issue as soon as the answer is filed, and his attorney soon after falls sick and dies, and he employs other counsel and forwards the commission, a continuance will be granted four months after issue joined. Richardson *v.* Nolan, 7 Mart. N. S. (La.) 103.

71. Geiger *v.* Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

72. Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

tinuance is based, and whether or not a continuance shall be allowed on this ground is very largely in the discretion of the court,[73] which must take into consideration not only the nature and character of the evidence desired, but also the diligence that has been previously used in its attempted procurement.[74]

2. ILLNESS OF WITNESS. Where a continuance is sought on the ground of the illness of a witness, the illness must as a general rule be of such a nature as will preclude his appearance at the trial;[75] and it seems to be the better practice in such cases to accompany the application with a certificate of a physician to that effect.[76] Where an illness sufficient to prevent attendance is shown it is not necessary to show further that the witness had been subpœnaed or tendered his fees.[77] And if the witness is a material one, a refusal to grant a continuance is reversible error, where it is shown that he cannot attend without danger to his health or life.[78]

3. IMPOSSIBILITY OF ATTENDANCE BECAUSE OF BAD WEATHER. A continuance should be granted when the weather and roads are so bad as to make it impossible for witnesses to attend.[79]

4. NECESSITY OF EVIDENCE. A party seeking a continuance on the ground of the absence of a particular witness or set of witnesses must show that they are essential to a fair trial of the cause, and that he cannot safely go to trial without them;[80]

73. *Kansas.*— Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259; Atcheson, etc., R. Co. *v.* O'Melia, 1 Kan. App. 374, 41 Pac. 437.

Missouri.—Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

New York.— Ten Broeck *v.* Travelers' Ins. Co., 6 N. Y. St. 100; Leggett *v.* Boyd, 3 Wend. 376.

Texas.— Wiggins *v.* Fleishel, 50 Tex. 57; Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517.

Wisconsin.— Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

England.— Turner *v.* Meryweather, 7 C. B. 251, 13 Jur. 683, 18 L. J. C. P. 155, 62 E. C. L. 251.

See 10 Cent. Dig. tit. "Continuance," § 58 *et seq.*

74. See *infra*, IV, S, 13.

75. Post *v.* Cecil, 11 Ind. App. 362, 29 N. E. 222; Michelsen *v.* Spies, 83 Hun (N. Y.) 509, 32 N. Y. Suppl. 17, 65 N. Y. St. 140.

Non-resident witness.— Where there has been no laches in failing to take the deposition of a witness absent in another state, she being sick and unable to testify, and it is shown that her testimony is expected to be procured by the next term, a continuance should be allowed for that purpose. Crittenden *v.* Coleman, 74 Ga. 803.

Short spells of illness.— A case will not be continued on the ground of the sickness of an absent witness shown to have spells of sickness lasting a short time, but to have attended court for the three previous terms, and to have been well and in town the week previous to the motion. Peters *v.* West, 70 Ga. 343.

76. Danielson *v.* Gude, 11 Colo. 87, 17 Pac. 283; Post *v.* Cecil, 11 Ind. App. 362, 29 N. E. 222; Smith *v.* Smith, 132 Mo. 681, 34 S. W. 471.

In Illinois it has been held that if a continuance is asked on the ground of the sickness of a witness, that fact must be shown by affidavit and not by the mere certificate of his physician. Schnell *v.* Rothbath, 71 Ill. 83; Waarich *v.* Winter, 33 Ill. App. 36.

Letter of stranger.— Where a motion for a continuance on the ground that one of the defendants was absent by reason of sickness was denied, the only showing being by a letter of a stranger, it was held there was no error in overruling the motion. McReynolds *v.* McReynolds, 74 Iowa 89, 36 N. W. 903.

77. Douglass *v.* Blakemore, 12 Heisk. (Tenn.) 564; Dillingham *v.* Ellis, 86 Tex. 447, 25 S. W. 618. *Contra*, Soey *v.* Soey, 13 La. 424; Leckie *v.* Crain, 12 La. 432.

Subpœna day before trial.— Where a continuance asked because of the absence of a material witness who had been duly subpœnaed and whose absence was caused solely by his sickness was refused, because the witness had not been subpœnaed and his fees tendered him until the day prior to that on which the cause was set for trial, it was held error. Briggs *v.* Garner, 54 Ind. 572.

78. Wright *v.* Levy, 22 Minn. 466.

79. Chenault *v.* Spencer, 68 S. W. 128, 24 Ky. L. Rep. 141.

80. Harrell *v.* Durrance, 9 Fla. 490; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Tompkins *v.* Burgess, 2 W. Va. 187; Wilson *v.* Kochnlein, 1 W. Va. 145; Union Bank *v.* Riggs, 24 Fed. Cas. No. 14,361, 2 Cranch C. C. 204.

Motion for alimony.— When there was a motion for alimony, pending a bill for divorce, and the defendant in the motion moved to continue, showing that a material witness who lived in the county and had been subpœnaed, etc., was absent without his consent, it was held error in the court to refuse the continuance, on the ground that the granting of alimony was wholly in the discretion of the court, and that there was no necessity for the presence of all the witnesses. Wardlaw *v.* Wardlaw, 39 Ga. 53.

Time to take depositions.— A continuance

and upon the strength of the case thus presented, the court will usually exercise its own discretion as to granting or denying the relief desired.[81]

5. Competency of Evidence. No continuance will be granted where the evidence of the witness if present would be incompetent,[82] or where the witness if produced would be incompetent to testify because of some disability which it is admitted no effort would be made to remove.[83]

6. Materiality of Evidence — a. In General. Where a continuance is sought on the ground of absent witnesses, the facts to be proved by them must be material to the issues involved in the cause;[84] and where they are not material the continuance should be refused.[85]

will not be granted to allow the party applying for it to take a deposition, if the testimony, when obtained, would constitute no defense to the action. Hawley *v.* Stirling, 2 Cal. 470.

Witness desired as expert.— It is not an abuse of discretion to deny an adjournment of a cause on the ground of the absence of a foreign witness, who knows nothing of the facts of the case, but is desired as an expert. Ten Broeck *v.* Travelers' Ins. Co., 6 N. Y. St. 100.

81. See *infra*, V, D, 3.

82. *Colorado.*— Longnecker *v.* Shields, 1 Colo. App. 264, 28 Pac. 659.

Georgia.— Haley *v.* Evans, 60 Ga. 157.

Mississippi.— Gastrell *v.* Phillips, 64 Miss. 473, 1 So. 729.

Missouri.— Cartwright *v.* Culver, 74 Mo. 179.

Pennsylvania.— Corkrey *v.* Beideman, 2 Phila. 236, 14 Leg. Int. 45.

South Carolina.— Lyles *v.* Robinson, 1 Bailey 25.

Texas.— Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. 161; Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

United States.— Warburton *v.* Aken, 29 Fed. Cas. No. 17,143, 1 McLean 460.

See 10 Cent. Dig. tit. "Continuance," § 68.

Copy offered in evidence.— The absence of a defendant to whom had been given an original instrument, a copy of which is offered by plaintiff after notice to produce the original, will not entitle his co-defendants to a continuance, when he if present could not be examined as a witness. Hills *v.* Jacobs, 7 Rob. (La.) 406.

Evidence resting in parol.— So a party will not be granted a continuance to enable him to produce new evidence to contradict the written instrument sued on, where such evidence would be incompetent because resting in parol. Haley *v.* Evans, 60 Ga. 157.

83. Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. 161.

84. *Arkansas.*— McDonald *v.* Smith, 21 Ark. 460.

Colorado.— Dawson *v.* Coston, 18 Colo. 493, 33 Pac. 189; Hewes *v.* Andrews, 12 Colo. 161, 20 Pac. 338; Glenn *v.* Brush, 3 Colo. 26.

Georgia.— Williams *v.* Fambro, 30 Ga. 232.

Illinois.— McKichan *v.* McBean, 45 Ill. 228; Ault *v.* Rawson, 14 Ill. 484.

Indiana.— Nixon *v.* Brown, 3 Blackf. 504.

Kentucky.— Chambers *v.* Handley, 3 J. J. Marsh. 98; McCracken *v.* Church, 1 A. K. Marsh. 273.

Louisiana.— Faulk *v.* Hough, 14 La. Ann. 659.

Michigan.— McNaughton *v.* Evert, 116 Mich. 141, 74 N. W. 486.

Mississippi.— Sellars *v.* Kelly, 45 Miss. 323.

Nebraska.— McDermott *v.* Manley, (1902) 90 N. W. 1119; Johnson *v.* Dinsmore, 11 Nebr. 391, 9 N. W. 558.

Nevada.— Taylor *v.* Nevada-California-Oregon R. Co., 26 Nev. 415, 69 Pac. 858.

New York.— Pensacola First Nat. Bank *v.* Anderson, 55 N. Y. App. Div. 570, 67 N. Y. Suppl. 434; Spangehl *v.* Spangehl, 39 N. Y. App. Div. 5, 57 N. Y. Suppl. 7; Witowski *v.* Maisner, 21 Misc. 487, 47 N. Y. Suppl. 599.

Tennessee.— Turner *v.* Lumbrick, 1 Meigs 7.

Texas.— St. Louis, etc., R. Co. *v.* Freedman, 18 Tex. Civ. App. 553, 46 S. W. 101; Owen *v.* Cibolo Creek Mill, etc., Co., (Civ. App. 1897) 43 S. W. 297.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Williams *v.* Freeland, 2 W. Va. 306; Tompkins *v.* Burgess, 2 W. Va. 187.

United States.— Morgan *v.* Voss, 17 Fed. Cas. No. 9,812, 1 Cranch C. C. 134.

See 10 Cent. Dig. tit. "Continuance," § 69.

Action on promissory note — False date.— In an action on a promissory note, where issue was made by one defendant as surety, by a verified denial of its execution, he asked a continuance of the case because of the absence of a witness by whom he could prove that after he had signed the note, while it was in the possession of his co-defendant, the principal, the latter, in the absence of affiant, but in the presence of the payee, caused a false date prior to the true one to be inserted in a blank left for a date, and then delivered the same to the payee. It was held that the facts were material and a continuance should have been granted. Emmons *v.* Meeker, 55 Ind. 321.

Statement of party to action.— Where the only evidence that the witness was material was the statement of the defendant himself, under advice of counsel, the application was denied. McNaughton *v.* Evert, 116 Mich. 141, 74 N. W. 486.

85. *California.*— Harper *v.* Lamping, 33 Cal. 641.

b. Issues Made by Pleadings. Not only must the absent evidence be material as to the issues of fact involved, but in order to warrant a continuance, the evidence must be material to the issues as made by the pleadings.[86] Thus a continuance will not be granted to obtain evidence upon an issue that has been defectively pleaded[87] or which has never been pleaded at all,[88] or on a point rendered immaterial by the applicant's own pleading.[89] Where the defendant has set up a defense to the action which the absent evidence may even remotely affect, he is entitled to a continuance and a hearing on the testimony desired,[90] but where he

Georgia.— Thomas *v.* Wolfe, 47 Ga. 295; Mann *v.* Waters, 30 Ga. 220.

Illinois.— Stringam *v.* Parker, 159 Ill. 304, 42 N. E. 794 [*affirming* 56 Ill. App. 36]; Dodge *v.* Deal, 28 Ill. 303.

Indiana.— Bird *v.* McElvaine, 10 Ind. 40.

Kentucky.— Chambers *v.* Handley, 3 J. J. Marsh. 98; Grubbs *v.* Pickett, 1 A. K. Marsh. 253.

Mississippi.— Smokey *v.* Johnson, (1888) 4 So. 787.

Texas.— Calhoun *v.* Wright, 23 Tex. 522; White *v.* Leavitt, 20 Tex. 703; Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87; McGehee *v.* Minter, (Civ. App. 1894) 25 S. W. 718.

Virginia.— Nash *v.* Upper Appomattox Co., 5 Gratt. 332.

Washington.— Ward *v.* Moorey, 1 Wash. Terr. 104.

See 10 Cent. Dig. tit. "Continuance," § 69.

Action for injury — Negligence of third person.— In an action for injury alleged to have been caused by defendant's negligence, it is not an abuse of judicial discretion to refuse a continuance asked for on the ground of the absence of witnesses, whose testimony would merely show that the injury was caused by the negligence of third persons as well as by that of defendant. Pacific Express Co. *v.* Lasker Real-Estate Assoc., 81 Tex. 81, 16 S. W. 792.

Chancery practice.— A continuance will not be allowed in chancery to procure witnesses on an issue that has already been tried by a jury, by the applicant's consent, and found against him. Marble *v.* Bonhotel, 35 Ill. 240.

Evidence of immateriality.— The fact that the witness for whose absence the continuance was asked came into court during the progress of the trial and was not examined conclusively shows that his evidence was not material. Keyes *v.* Houston, etc., R. Co., 50 Tex. 169.

Frivolous interrogatories.— A court, exercising its discretion, may refuse an application to continue a cause in order to obtain answers to interrogatories, where the interrogatories are frivolous and intended only for delay. Moncheux *v.* Mistrot, 22 La. Ann. 421.

Signature to deed.— The fact that a witness was absent who could prove the signature to a deed, but not the delivery, and who has not been summoned, is no cause for a continuance, since such testimony is neither relevant nor important. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98.

86. Hill *v.* Austin, 19 Ark. 230; Parkison *v.* Bracken, 1 Pinn. (Wis.) 174, 39 Am. Dec. 296. And see Sullivan *v.* Crouch, 10 Tex. Civ. App. 404, 32 S. W. 144.

87. Hardison *v.* Hooker, 25 Tex. 91; Fowler *v.* Buckner, 23 Tex. 84; Morrison *v.* Stauffer, (Tex. Civ. App. 1895) 32 S. W. 722; White *v.* Waco Bldg. Assoc., (Tex. Civ. App. 1895) 31 S. W. 58.

Pleading held bad on demurrer.— It is not error to refuse a continuance on the ground of the absence of a witness who will testify to facts alleged in a pleading which has properly been held bad on demurrer. Prather *v.* Young, 67 Ind. 480. And so after a demurrer to a pleading has been sustained it is no error to overrule a motion for a continuance to obtain answers for interrogatories framed to elicit evidence to support the pleading demurred to. Swift *v.* Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

88. McCreary *v.* Newberry, 25 Ill. 496; Moore *v.* Hawkins, 6 Dana (Ky.) 289; Anderson *v.* Birdsall, 19 La. 441; Waldo *v.* Beckwith, 1 N. M. 182.

Insufficient assets.— In a summary motion against administrators for money paid by the plaintiff for their intestate, they moved for continuance on the ground that they had qualified only some seven or eight months previous, and so had not had time to settle their accounts of administration; and that they desired to show a want of assets in their defense, without, however, offering any plea or affidavit that the assets were insufficient, it was held that this was no sufficient ground for a continuance. Clements *v.* Powell, 9 Leigh (Va.) 1.

Payment.— When the answer in an action for goods sold and delivered consisted wholly of a denial of their sale and delivery, defendant will not be given a continuance on the ground of the absence of witnesses by whom he expects to prove payment, because payment, not having been pleaded, is not admissible in evidence. Clark *v.* Mullen, 16 Nebr. 481, 20 N. W. 642.

89. Ballston Spa Bank *v.* Milwaukee Mar. Bank, 16 Wis. 120.

90. Lyon *v.* Stevens, 35 Tex. 439.

General bad character — Slander.— Since the defendant in an action of slander may prove under the general issue the general bad character of the plaintiff in mitigation of damages, the defendant's affidavit for a continuance in such case, on account of the absence of witnesses by whom that fact can be proved, cannot be objected to on the ground that the witnesses are not material. Woods *v.* Anderson, 5 Blackf. (Ind.) 598.

Inquest for damages.— A defaulted defend-

sets up no valid defense,[91] or one deemed insufficient in law, his motion should be denied.[92]

7. Evidence That Could Not Alter Result. Evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.[93] And where testimony is important only in connection with certain facts, those facts should be set forth or referred to so that the materiality of the evidence may be apparent to the court.[94]

8. Cumulative Evidence. It is largely discretionary with the court whether or not it shall permit a continuance for the purpose of obtaining cumulative evidence;[95] and an application for a continuance based on this ground is properly refused, where the fact which the witness is expected to prove is established without contradiction by other evidence,[96] where there has been considerable lack of diligence in procuring the testimony of the witness,[97] or where there is no probability that the evidence would change the result;[98] but it has been held erroneous to refuse a continuance on the ground that the testimony of the witness was cumulative in part.[99] So if the only witness present to testify to a point is a party in interest, and the other party contradicts him, it is proper to grant a continuance to bring in disinterested testimony to settle the dispute.[1]

9. Impeaching Testimony. A party cannot by introducing adverse testimony show himself entitled to a continuance for the purpose of procuring a witness to impeach that very testimony.[2] So an application for a continuance is rightly

ant is entitled to produce witnesses on the inquest to show the correct amount due on the note sued on, but not to make out any substantive defense to the right of action, notwithstanding the cause is properly noticed for inquest under the rule and no affidavit of merits is filed, and is therefore entitled to move for a continuance for the absence of witnesses, and the court is bound to entertain and consider his motion. People *v.* Ionia Cir. Judge, 32 Mich. 61.

91. Fowler *v.* Buckner, 23 Tex. 84; Trammel *v.* Pilgrim, 20 Tex. 158; Claiborne *v.* Yeoman, 15 Tex. 44; Titus *v.* Crittenden, 8 Tex. 139; Alexander *v.* Brown, (Tex. Civ. App. 1895) 29 S. W. 561.

92. Under a Texas statute providing that "no application for a continuance shall be heard before the defendant files his defense," it was held that although a general denial is an answer, it can only be said to be a "defense" so far as to put the plaintiff upon proof of his case, and that the continuance might properly be denied. Fowler *v.* Buckner, 23 Tex. 84.

93. *Arkansas.*— Ware *v.* Kelly, 22 Ark. 441.

Georgia.— Burge *v.* Hamilton, 72 Ga. 568; Thomas *v.* Wolfe, 47 Ga. 295; Mann *v.* Waters, 30 Ga. 220.

Illinois.— Stringam *v.* Parker, 159 Ill. 304, 42 N. E. 794 [*affirming* 56 Ill. App. 36]; Grundies *v.* Bliss, 86 Ill. 132; McKichan *v.* McBean, 45 Ill. 228; Updike *v.* Henry, 14 Ill. 378; Hilliard *v.* Walker, 11 Ill. 644.

Kentucky.— Tevis *v.* Eliza, 7 Dana 394.

Louisiana.— Anderson *v.* Birdsall, 19 La. 441; Rogers *v.* Davis, 18 La. 50; Anselm *v.* Wilson, 8 La. 35.

Texas.— Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Coleman *v.* Beardslee, (Sup. 1891) 16 S. W. 1011.

See 10 Cent. Dig. tit. "Continuance," § 71.

It is no reason for the continuance of an action on a note made payable at a particular place that the party asking for it can prove by the absent witness that he had funds for its payment at the place specified four days after the maturity of the note. McCreary *v.* Newberry, 25 Ill. 496.

Partnership debt.— An application for continuance by a defendant to procure evidence of a debt owing defendant by a partnership of which plaintiff is a member is properly denied, as a debt against a partnership cannot be set off against a claim belonging to one of the members thereof. Hilliard *v.* Walker, 11 Ill. 644.

94. Updike *v.* Henry, 14 Ill. 378; Bailey *v.* Hardy, 12 Ill. 459.

95. Caldwell *v.* New Jersey Steamboat Co., 56 Barb. (N. Y.) 425. See also Mutzenburg *v.* McGowan, 10 Colo. App. 486, 51 Pac. 523; Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56.

96. J. S. Mayfield Lumber Co. *v.* Carver, 27 Tex. Civ. App. 467, 66 S. W. 216; Galveston, etc., R. Co. *v.* Robinett, (Tex. Civ. App. 1899) 54 S. W. 263. And see also Taylor *v.* Nevada-California-Oregon R. Co., (Nev. 1902) 69 Pac. 858.

97. Chambers *v.* Beahan, 57 Ill. App. 285; Cooley *v.* Kansas City, etc., R. Co., 149 Mo. 487, 51 S. W. 101; Barbour *v.* Melendy, 88 Va. 595, 14 S. E. 326.

98. Kennedy *v.* Yoe, (Tex. Civ. App. 1897) 39 S. W. 946.

99. Dillingham *v.* Ellis, 86 Tex. 447, 25 S. W. 618. And see Wise County Nat. Bank *v.* Knox, (Tex. Civ. App. 1899) 54 S. W. 276.

1. Maynard *v.* Cleveland, 76 Ga. 52.

2. Galveston, etc., R. Co. *v.* Henning, (Tex. Civ. App. 1897) 39 S. W. 302.

overruled where the testimony on account of which the continuance was desired was of a negative character and intended merely to contradict a witness who had been examined in chief by the opposite party, but on a matter that had been elicited from him on cross-examination by the party seeking the continuance.[3] And so the refusal to allow the withdrawal of a juror and a continuance to enable defendant to procure evidence to impeach a map which had been introduced in evidence, the existence of which is a surprise to him, is not error where the court allowed him a reasonable time after verdict for plaintiff to procure such evidence.[4]

10. Existence of Depositions of Absent Witness. A continuance will not be granted on account of the absence of witnesses whose depositions have already been taken,[5] or where depositions already on file contain all the evidence needed to establish the issue involved.[6]

11. Presence of Witness Before Conclusion of Trial. Where witnesses appear and testify before the trial is concluded, it is not error to refuse a continuance on the ground of their absence before the trial.[7]

12. Documentary Evidence. The absence of documentary evidence is not as a general rule a good ground for continuance, as the same can be produced by process of court by the exercise of due diligence.[8] So also a continuance should be refused where the documents demanded form no necessary part of the evidence,[9] or where from aught that appears the continuance would be unavailing.[10] The court, however, should take into consideration the justice or injustice that may result from a refusal of the motion, and where the applicant has been guilty of no negligence it is no abuse of discretion to allow him time for the production of the document in question.[11]

13. Diligence in Procuring Evidence — a. In General. The courts have been uniform in requiring the parties who ask a continuance on the ground of absence of witnesses or evidence to show due diligence to procure the attendance of such

3. Williams *v.* Talbot, 27 Tex. 159.

4. Morrison *v.* Hedenberg, 138 Ill. 22, 27 N. E. 460.

5. Bond *v.* Hunter, 1 Yeates (Pa.) 284; Goodwin *v.* White, 1 Browne (Pa.) 272; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504.

6. MacDonnell *v.* De Los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792.

7. J. S. Mayfield Lumber Co. *v.* Carver, 27 Tex. Civ. App. 467, 66 S. W. 216.

8. See *infra*, IV, S, 13, n.

Copies of record.— The absence of the clerk of a public officer, with the key of a safe containing documents to be produced by the officer at the trial, is no ground for a continuance. In such case more of an effort should have been made, such as obtaining copies. Slidell *v.* Locke, 18 La. 461.

Papers in possession of jury.— That papers which a party wished to use are in the possession of a jury who had retired to consider their verdict is no ground for a continuance, as, being in the power of the court, the court would direct them to be brought in rather than to continue the cause. Hall *v.* York, 16 Tex. 18.

9. Boyce *v.* Foster, 1 Bailey (S. C.) 540.

10. Wilson *v.* Zook, 69 Miss. 694, 13 So. 351.

Expectation of evidence.— A cause will not be continued because evidence is expected to arise out of an order for a decree of the chancellor beneficial to him who asks a continuance. McMechen *v.* McLaughlin, 4 Harr. & M. (Md.) 166.

11. Higginson *v.* Bank of England, 1 F. & F. 450; Cahill *v.* Dawson, 1 F. & F. 291. In Campbell *v.* McCaskill, 88 Mo. App. 44, it was held that where an application for continuance in replevin discloses that plaintiff's title is evidenced by a mortgage, the original of which was necessary in a pending litigation in another state, and that a copy of the mortgage was received in time to be used, but was defectively certified by the custodian of the records, the refusal of the continuance was an unwise exercise of judicial discretion, as the production of the copy showed plaintiffs were diligent in endeavoring to secure the mortgage as evidence. Campbell *v.* McCaskill, 88 Mo. App. 44.

Certified copies of city records.— The fact that the court adjourned to allow a party to obtain certified copies of city records essential to his defense is not an abuse of discretion. Young *v.* Patton, 9 Oreg. 195.

Fraudulent suppression of evidence.— Where plaintiff fraudulently makes way with evidence of defendant's rights material to the action his proceedings must be stayed until he shall produce it. Premo *v.* Smith, 32 N. Y. Super. Ct. 467, 40 How. Pr. (N. Y.) 480.

Land certificates filed for registry.— Where in an action of trespass to try title the plaintiff moved for a continuance on the ground that his title consisted of certain land certificates and surveys which he had filed for registry and approval, and which had been suspended but would be finally approved, and that due diligence had been used, it was held that the continuance should have been granted. Peck *v.* Moody, 33 Tex. 84.

witnesses or to obtain the evidence.[12] And whether or not due diligence has been

12. *California.*— Tompkins *v.* Montgomery, 123 Cal. 219, 55 Pac. 997; Lightner *v.* Menzel, 35 Cal. 452; Griffin *v.* Polhemus, 20 Cal. 180; Kuhland *v.* Sedgwick, 17 Cal. 123; Hawley *v.* Stirling, 2 Cal. 470; Pierson *v.* Holbrook, 2 Cal. 598.

Colorado.— Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Delaware.— Parrish *v.* Gardner, 3 Harr. 495; Dalany *v.* Boston, 2 Harr. 350.

Florida.— Green *v.* King, 17 Fla. 452; Wynn *v.* Ely, 8 Fla. 232.

Georgia.— Morrison *v.* Morrison, 102 Ga. 170, 29 S. E. 125; Jones *v.* Rome Grocery Co., 99 Ga. 103, 24 S. E. 959; Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52; Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355; McLaws *v.* Moore, 83 Ga. 177, 9 S. E. 615; Boardman *v.* Taylor, 66 Ga. 638; Boyd *v.* McFarlin, 58 Ga. 208; Chancy *v.* Carrigan, 53 Ga. 84; Baldwin *v.* Walden, 30 Ga. 829; McGinnes *v.* McGinnes, 23 Ga. 613; Bailey *v.* Barnelly, 23 Ga. 582.

Idaho.— Alvord *v.* U. S., 1 Ida. 585.

Illinois.— Bailly *v.* Kerr, 180 Ill. 412, 54 N. E. 165; People *v.* Hanson, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580; Grundies *v.* Bliss, 86 Ill. 132; Coffey *v.* Fosselman, 72 Ill. 69; Farmer *v.* Farmer, 72 Ill. 32; Richards Iron Works *v.* Glennon, 71 Ill. 11; Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399; Birks *v.* Houston, 63 Ill. 77; Marble *v.* Bonhotel, 35 Ill. 240; Stevenson *v.* Sherwood, 22 Ill. 238, 74 Am. Dec. 140; Cole *v.* Choteau, 18 Ill. 439; Doc *v.* Johnson, 3 Ill. 522; Chambers *v.* Beahan, 57 Ill. App. 285; Stewart *v.* Miller, 17 Ill. App. 660.

Indiana.— Robinson *v.* Glass, 94 Ind. 211; Louisville, etc., R. Co. *v.* Kious, 82 Ind. 357; Leary *v.* Meier, 78 Ind. 393; Osborn *v.* Storms, 65 Ind. 321; Wolcott *v.* Mack, 53 Ind. 269; Haun *v.* Wilson, 28 Ind. 296; Kirland *v.* Kline, 16 Ind. 313; Nixon *v.* Brown, 3 Blackf. 504.

Iowa.— Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45; George *v.* Swafford, 75 Iowa 491, 39 N. W. 804; Owens *v.* Hart, 66 Iowa 565, 24 N. W. 41; Walker *v.* Scofield, 39 Iowa 666; Boone *v.* Mitchell, 33 Iowa 45; Cole *v.* Strafford, 12 Iowa 345; James *v.* Arbuckle, 8 Iowa 272; Gaylord *v.* Byers, 6 Iowa 557; Widner *v.* Hunt, 4 Iowa 355.

Kansas.— McDonald *v.* Citizens' Nat. Bank, 58 Kan. 818, 51 Pac. 289; Clark *v.* Dekker, 43 Kan. 692, 23 Pac. 956; Parsons' Water Co. *v.* Knapp, 33 Kan. 752, 7 Pac. 568; Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81; St. Louisville, etc., R. Co. *v.* Ranson, 29 Kan. 298; Tucker *v.* Garner, 25 Kan. 454; Moon *v.* Helfer, 25 Kan. 139; Wilkins *v.* Moore, 20 Kan. 538; Payne *v.* Kansas City Nat. Bank, 16 Kan. 147; Swenson *v.* Aultman, 14 Kan. 273; Campbell *v.* Blanke, 13 Kan. 62; Christian Church Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Gill *v.* Buckingham, 7 Kan. App. 227, 52 Pac. 897; Atchison, etc., R. Co. *v.* O'Melia, 1 Kan. App. 374, 41 Pac. 437.

Kentucky.— Thurman *v.* Virgin, 18 B. Mon. 785; McCracken *v.* Church, 1 A. K. Marsh. 273; Nickell *v.* Citizens' Bank, 60 S. W. 925, 22 Ky. L. Rep. 1552; Mattingly *v.* Willett, 44 S. W. 376, 19 Ky. L. Rep. 1746; Simmons *v.* Louisville, etc., R. Co., 18 S. W. 1024, 13 Ky. L. Rep. 941.

Louisiana.— Wetta *v.* New Orleans, etc., R. Co., 107 La. 383, 31 So. 775; Cole *v.* La Chambre, 31 La. Ann. 41; Mills *v.* Fellows, 30 La. Ann. 824; Bonella *v.* Maduel, 26 La. Ann. 112; Lex *v.* Southern Express Co., 23 La. Ann. 59; Cobb *v.* Franks, 6 La. Ann. 769; Brown *v.* Forsyth, 10 Rob. 116; Hills *v.* Jacobs, 7 Rob. 406; McCarty *v.* McCarty, 19 La. 296; Slidell *v.* Locke, 18 La. 461; Biermacki *v.* Mexia, 18 La. 86; Rogers *v.* Davis, 18 La. 50.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516.

Michigan.— Leach *v.* Detroit Electric R. Co., 125 Mich. 373, 84 N. W. 316; McMillan *v.* Larned, 41 Mich. 521, 2 N. W. 662.

Minnesota.—Allen *v.* Brown, 72 Minn. 459, 75 N. W. 385.

Mississippi.—Gibson *v.* State, 59 Miss. 341; Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

Missouri.— Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860; Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Langener *v.* Phelps, 74 Mo. 189; Kelly *v.* Saunders, 35 Mo. 200; Evans *v.* Pond, 30 Mo. 235; Harris *v.* Powell, 56 Mo. App. 24; Schultz *v.* Moon, 33 Mo. App. 329.

Nebraska.— Kansas City, etc., R. Co. *v.* Conlee, 43 Nebr. 121, 61 N. W. 111.

New Mexico.— Waldo *v.* Beckwith, 1 N. M. 182.

New York.— Walbridge *v.* J. De Wing Pub. Co., 71 Hun 613, 24 N. Y. Suppl. 602, 53 N. Y. St. 935; Babcock *v.* Hill, 35 Barb. 52; Gerkhardt *v.* Austin, 28 Misc. 191, 58 N. Y. Suppl. 1072; McKay *v.* Marine Ins. Co., 2 Cai. 384.

Oklahoma.— Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924.

Pennsylvania.— Smith *v.* Cunningham, 9 Phila. 96, 30 Leg. Int. 12; Brice *v.* Shultz, 6 Phila. 264, 23 Leg. Int. 222.

South Carolina.— Bone *v.* Hillen, 1 Mill 197.

South Dakota.— Stone *v.* Chicago, etc., R. Co., 3 S. D. 330, 53 N. W. 189; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Tennessee.— Nashville, etc., R. Co. *v.* Johnson, 15 Lea 677; Rexford *v.* Pulley, 4 Baxt. 364; Bewley *v.* Cummings, 3 Coldw. 232; Leiper *v.* Earthman, (Ch. 1897) 46 S. W. 321.

Texas.— Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035; St. Louis, etc., R. Co. *v.* Woolum, 84 Tex. 570, 19 S. W. 782; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Herman *v.* Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; Western Union Tel. Co. *v.* Rosentreter, 80 Tex. 406, 16 S. W. 25; Little *v.* State, 75 Tex. 616, 12 S. W. 965; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599; Anderson *v.* Citizens'

used is a question for the trial court to determine.[13] Whether reasonable diligence has been used depends on a variety of facts and circumstances, as for instance the time at which the attempt is made by subpœna or otherwise to procure the attendance of the witness,[14] the distance between the residence of the

Nat. Bank, (Sup. 1887) 5 S. W. 503; Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455; Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; Poole *v.* Jackson, 66 Tex. 380, 1 S. W. 75; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568; Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367; Burrow *v.* Brown, 59 Tex. 457; Hunt *v.* Makemson, 56 Tex. 9; Keyes *v.* Huston, etc., R. Co., 50 Tex. 169; Price *v.* Lauve, 49 Tex. 74; Tinsley *v.* Rusk County, 42 Tex. 40; Williams *v.* Talhot, 27 Tex. 159; Pulliam *v.* Webb, 26 Tex. 95; Trammel *v.* Pilgrim, 20 Tex. 158; Baker *v.* Kellogg, 16 Tex. 117; Hall *v.* York, 16 Tex. 18; Lewis *v.* Williams, 15 Tex. 47; Payne *v.* Cox, 13 Tex. 480; Robinson *v.* Martell, 11 Tex. 149; Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741; J. S. Mayfield Lumber Co. *v.* Carver, 27 Tex. Civ. App. 467, 66 S. W. 216; Neyland *v.* Texas Yellow Pine Lumber Co., 26 Tex. Civ. App. 417, 64 S. W. 696; Berry *v.* Burnett, (Civ. App. 1900) 56 S. W. 769; Texas, etc., R. Co. *v.* Bancroft, (Civ. App. 1900) 56 S. W. 606; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249; Galveston, etc., R. Co. *v.* Robinett, (Civ. App. 1899) 54 S. W. 263; East Texas Land, etc., Co. *v.* Texas Lumber Co., 21 Tex. Civ. App. 41, 52 S. W. 645; Crawford *v.* Lozano, (Civ. App. 1898) 48 S. W. 538; Mattfield *v.* Cotton, 19 Tex. Civ. App. 595, 47 S. W. 549; Owen *v.* Cibolo Creek Mill, etc., Co., (Civ. App. 1897) 43 S. W. 297; Threadgill *v.* Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739; Missouri Pac. R. Co. *v.* Kuthman, 2 Tex. App. Civ. Cas. § 463; Texas Express Co. *v.* Scott, 2 Tex. App. Civ. Cas. § 72.

Utah.— Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

Virginia.— Richmond, etc., R. Co. *v.* Humphreys, 20 Va. 425, 18 S. E. 901; Deans *v.* Scriba, 2 Call 415.

Washington.— Oregon R., etc., Co. *v.* Dacres, 1 Wash. St. 195, 23 Pac. 415; Roeder *v.* Brown, 1 Wash. Terr. 112.

West Virginia.— Marmet Co. *v.* Archibald, 37 W. Va. 778, 17 S. E. 299; Buster *v.* Holland, 27 W. Va. 510; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Davis *v.* Walker, 7 W. Va. 447; Williams *v.* Freeland, 2 W. Va. 306; Tompkins *v.* Burgess, 2 W. Va. 187.

Wisconsin.— Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25; Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

United States.— King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

See 10 Cent. Dig. tit. "Continuance," § 74 *et seq.*

13. Allen *v.* Brown, 72 Minn. 459, 75 N. W. 385.

Due diligence illustrated.— In an action against a railroad company for personal injuries caused by the derailment while crossing a bridge of the car in which plaintiff was riding, plaintiff relied on defendant's running at too great a rate of speed, and in not having left openings in the bridge and the approaches thereto to permit the ice and water to pass through in times of high water. It did not appear upon which ground the jury based their verdict for plaintiff. At the trial defendant filed an affidavit for continuance for absence of a material witness, showing reasonable diligence in trying to procure his attendance, and that his absence was due to a fact which did not come to the knowledge of defendant's officer until it was too late to procure his attendance. It showed that the absent witness was an experienced engineer who had recently made careful measurements and surveys of the place of the accident for the purpose of showing the sufficiency of the bridge, its approaches, and the openings thereto; under the circumstances it was held, it not appearing that the judge douhted that the witness would testify, as it was alleged that he was expected to, that due diligence was used or that the affidavit was made in good faith, the refusal to grant a continuance was ground for reversal. Gonring *v.* Chicago, etc., R. Co., 78 Wis. 16, 47 N. W. 18.

Absence of diligence illustrated.— An order refusing a postponement of trial for absence of a witness will not be disturbed on appeal, where it appears that the moving party had for several days previous to the motion answered ready on the call of the day calendar, although knowing of the witness' absence. Walbridge *v.* J. De Wing Pub. Co., 71 Hun (N. Y.) 613, 24 N. Y. Suppl. 602, 53 N. Y. St. 935.

14. *Delaware.*— Miller *v.* Hickman, 1 Pennew. 263, 40 Atl. 192.

Illinois.— Bailey *v.* Kerr, 180 Ill. 412, 54 N. E. 165.

Kentucky.— Chandler *v.* Bush, 59 S. W. 749, 22 Ky. L. Rep. 993; Reid *v.* Farmers', etc., Tobacco Warehouse, 44 S. W. 124, 19 Ky. L. Rep. 1939.

Minnesota.— Allen *v.* Brown, 72 Minn. 459, 75 N. W. 385.

Texas.— Gulf, etc., R. Co. *v.* Mitchell, 18 Tex. Civ. App. 380, 45 S. W. 819.

England.— Anonymous, 3 Taunt. 315.

See 10 Cent. Dig. tit. "Continuance," § 80.

Illustrations of rule.— Where the issues were made up in February, 1868, and application for continuance in June, 1869, and the defendant made no effort to obtain the testimony of absent witnesses until some three months before the sitting of the court, it was held that there was no sufficient diligence shown. Cody *v.* Butterfield, 1 Colo. 377. So where a cause was at issue at the June term, 1859, and continued at the February and June terms, 1860, and no effort was made

witness and the court[15] and care, or the absence of it, in making search or inquiry for the witness.[16] It is the duty of a party to ascertain before trial, not only the residence and place of address of all witnesses material to his cause;[17] but he

by defendant to procure the attendance of his witnesses until near the October term, 1860, it was held not error in the court below to refuse a continuance. Bewley *v.* Cummings, 3 Coldw. (Tenn.) 232. And where, prior to the eighth term, no attempt had been made to secure the attendance or testimony of a witness, it was held no ground for continuance that he was then ascertained to be in another state. Nashville, etc., R. Co. *v.* Johnson, 15 Lea (Tenn.) 677. On the other hand sufficient diligence is shown where it appears that a subpœna was issued for the witness as soon as practicable after learning of his testimony. Reid *v.* Farmers', etc., Tobacco Warehouse, 44 S. W. 124, 19 Ky. L. Rep. 1939. So where defendant who on the day following the filing of the answer issued a subpœna for a witness residing within four blocks of the court-house, which was returned "Not served" (witness having been in town), has exercised proper diligence; and at the trial five days thereafter it was held error to refuse a continuance for absence of said witness. Gulf, etc., R. Co. *v.* Mitchell, 18 Tex. Civ. App. 380, 45 S. W. 819.

In Pennsylvania rule 90 obviously was framed to meet the case of a witness who resides in, and who is actually within, the county within five days of the day of trial, but who is absent from it on that day. It prescribes a rule of diligence as to the search for those witnesses, i. e., the search must commence, subpœna in hand, at least five days before the trial, in order to make out a right to a continuance on the ground of their absence on that day. It has no application to the case of a witness who is within the county on the day of trial. If due diligence has not been used to subpœna him the case must go on without him; if, notwithstanding such diligence, there has been a failure to reach him, the court will hold the case till further efforts can be made. The rule does not apply to a witness confined to his residence by sickness, because it expressly declares that there shall be no continuance if he can be found at his residence. If the rule applied to such witness, it would be necessary not only to take out and serve a subpœna upon him, but to take it out at least five days before the day for the trial. Smith *v.* Cunningham, 9 Phila. 96, 30 Leg. Int. 12.

15. Where a considerable time had elapsed between service of process and the trial term, and it appeared that the witnesses in question lived a five-hours' ride from the court town, and that defendant knew it and had taken no measures to secure their attendance, it was held that due diligence was not shown, and the continuance was rightly refused. Kirland *v.* Kline, 16 Ind. 313.

Where a witness who lived eight miles from the place of trial, was subpœnaed and failed to appear, but defendant did not know of his absence until the witness was called to take the stand, at four-thirty P. M., when a motion was made to continue the case until eighty-thirty A. M. of the following day, it was held that it was not an abuse of discretion for the court to refuse to grant the continuance, although such a motion might appeal to the sympathy of the court. Atchison, etc., R. Co. *v.* O'Melia, 1 Kan. App. 374, 41 Pac. 437.

Judicial notice of distance.— On application for a continuance, the court will notice the distance between the place of trial and the place whence the evidence is to be obtained. Park *v.* Larkin, 1 Overt. (Tenn.) 17.

16. Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353.

Inquiry and search.— To show that proper effort has been made to secure the attendance of a material witness, not appearing to be beyond the jurisdiction of the court, a subpœna should be taken out, and a diligent and honest inquiry and search made to find him and to serve the same a reasonable time before trial (McMillan *v.* Larned, 41 Mich. 521, 2 N. W. 662); so where it appeared that the witness was a telegraph operator and transient man, that he left the county shortly after the suit was brought, that the materiality of his evidence was known at the time of filing the pleadings, and that if inquiries had been directed to the proper quarter his movements could have been traced and his location discovered in less than the two years during which the suit had been pending a continuance was denied. Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353.

In town on day of trial.— A continuance will not be granted for absence of a witness where it appears that on the day the evidence on the trial was closed he was in the town, and had been there two days before, when a subpœna was issued for him. George *v.* Swafford, 75 Iowa 491, 39 N. W. 804.

Declaration filed on last day.— Where suit was begun in September, and the declaration was not filed until May 12 following — on the last day allowed by law — it was error not to allow defendant a continuance at that May term, on showing that material witnesses residing at a distance could not be obtained in time for the trial. Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236.

17. *California.*—Tompkins *v.* Montgomery, 123 Cal. 219, 55 Pac. 997.

Illinois.— Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399; Ward *v.* Yancey, 78 Ill. App. 368.

Iowa.— Brady *v.* Malone, 4 Iowa 146.

Louisiana.— In Cobb *v.* Franks, 6 La. Ann. 769, it was held that where a party gave his counsel the address of a witness in the city, thereby leading him to suppose that the witness could ordinarily be found there, while in reality he was engaged in the up-river trade, and only in the city at long and interrupted intervals, such party would be considered as guilty of laches and not entitled to a con-

must also ascertain all material facts within the knowledge of each witness, and a failure to do so is a want of diligence sufficient to defeat his application for a continuance on the ground of absence of witnesses.[18]

b. Witness in Employ of Applicant. In case the absent witness is in the employ of the party applying, there exists less excuse for his non-appearance at the trial, and a continuance on the ground of absence of such witness will usually be denied.[19]

c. Officers of Court Required as Witnesses. The fact that a desired witness is an officer of the court does not excuse the want of ordinary diligence in procuring his attendance.[20] In such case the same diligence is required in endeavoring to procure attendance as is required in the case of any other witness.[21]

d. Party Required as Witness. A stronger case for a continuance on account of the absence of a witness must be made, if that witness is a party to the action than would be required were he a third person,[22] unless the case presents some

tinuance on the ground of the witness' absence.

Texas.— Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568; Lewis *v.* Williams, 15 Tex. 47; Galveston, etc., R. Co. *v.* Robinett, (Civ. App. 1899) 54 S. W. 263; Crawford *v.* Lozano, (Civ. App. 1898) 48 S. W. 538.

United States.— Smith *v.* Potts, 22 Fed. Cas. No. 13,094, 1 Cranch C. C. 123.

See 10 Cent. Dig. tit. "Continuance," § 77 *et seq.*

Showing as to diligence.— Where a party asks for the continuance of a cause on the ground of the absence of a witness whose residence he does not know, he should show either that he has not had time to ascertain the residence of the witness or that he has used proper diligence to ascertain his residence. James *v.* Arbuckle, 8 Iowa 272.

18. Wynn *v.* Ely, 8 Fla. 232; Chancy *v.* Carrigan, 53 Ga. 84; Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350. Where the defendant knew or had reason to believe long before the trial that certain persons possessed information which might be useful to it at the trial and neglected to procure their testimony, it is not error for the court to refuse a continuance of the cause based upon the ground that the defendant had just become aware, from reading the depositions of such persons offered by the plaintiff, but afterward withdrawn, that they are material witnesses in its behalf. Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

19. *Illinois.*—Anheuser-Busch Brewing Assoc. *v.* Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575.

Indiana.— Cerealine Mfg. Co. *v.* Bickford, 129 Ind. 236, 28 N. E. 545.

Texas.— St. Louis, etc., R. Co. *v.* Woolum, 84 Tex. 570, 19 S. W. 782; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568.

United States.— Stedman *v.* Hamilton, 22 Fed. Cas. No. 13,343, 4 McLean 538.

England.— Wright *v.* McGuffie, 4 C. B. N. S. 441, 93 E. C. L. 441.

See 10 Cent. Dig. tit. "Continuance," § 78.

No service of legal process.— Where defendant is in the habit of securing the presence of its employees as witnesses without legal process, and the cause comes to trial after a year's pendency, and several of its witnesses are not present, defendant cannot complain of the refusal of the court to grant a continuance. Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427.

Non-resident witness.— Where the absent witness is a non-resident of the state, and is in the employ of the party applying, it is no error to refuse to continue beyond a time sufficient to allow the witness to reach the court. Philadelphia F. Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617. In Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568, the defendant sought a continuance for the absence of the testimony of one of its agents. In the application for continuance it was stated that a few days after service on the local agent, and before the principal officers of the company knew of such service, the agent whose testimony was desired went to California on important business for the company, where he was detained for several weeks, and on his return went immediately to Mexico, where he still was, and that there was no time before his departure for California, nor after his return and before his leaving for Mexico, to take his deposition, and that no diligence would have procured his evidence. It was held that the witness being in the employ of the party seeking a continuance, and it electing to keep him otherwise employed than in answering depositions, his employer could not delay a case for the absence of his testimony, and the application for continuance was properly overruled.

20. Adair *v.* Cooper, 25 Tex. 548, as for instance a sheriff.

Attorney.— The mere fact that a witness is an attorney does not of itself justify a relaxation of the diligence required in the procuring attendance of a witness. Parker *v.* Leman, 10 Tex. 116. But if an attorney regularly attended the court and promised to attend as a witness, failure to subpœna him it has been held would not be ground for refusing a continuance because of his absence. Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741. And see White *v.* Lynch, 2 Dall. (Pa.) 183, 1 L. ed. 341.

21. Walker *v.* Floyd, 30 Ga. 237.

22. Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Mantonya *v.* Huerter, 35 Ill. App. 27:

peculiar feature from which some material injustice to the party's rights would result in case of trial without postponement.[23] It is the duty of a party to be present at the trial of his own cause, and his absence will as a general rule be considered as his own peril.[24] Especially is it proper to refuse a request for a continuance where it is not known where the party is[25] or the cause of his absence,[26] where the evidence proposed to be given could not affect the result of the trial,[27] or where he has been guilty of gross negligence.[28]

e. Reliance Upon Promise to Attend. A party has no legal right to rely upon the promise of a witness to attend the trial, without subpœnaing him in advance, and if he acts upon such promise he does so at his own peril and cannot claim a continuance if the witness disappoints him when the cause is called for trial.[29]

Schlesinger *v.* Nunan, 26 Ill. App. 525; Gates *v.* Hamilton, 12 Iowa 50; Winslow *v.* Bradley, 15 Wis. 394. See also Jacobs *v.* Finkle, 7 Blackf. (Ind.) 432; Logie *v.* Black, 24 W. Va. 1. "The fact that the absent witness, if material, who has been duly summoned to appear at the trial, is a party plaintiff or defendant in the suit, cannot prejudicially affect the motion for continuance, unless the court has good grounds to doubt the fairness of the motives of the party moving for the continuance, and to suspect that the object of the motion is mere delay. And in such event, the court may enquire further into the materiality of the witness, require the party to state what he expects to prove by the absent witness, and even send an officer with a rule, or an attachment, if a rule has previously been served, for the absent witness, whether he be a party, who has been summoned as a witness, or any other witness." Harman *v.* Howe, 27 Gratt. (Va.) 676 [*quoted* in Carter *v.* Wharton, 82 Va. 264, 267].

"An application to postpone a trial on account of the absence of a party, stands upon somewhat different grounds from an application to postpone it because of the absence of a disinterested witness. In the latter case a party may use all diligence to have his witness present at the trial, yet fail on account of some neglect of the witness himself. In his own case he can control his own actions, and if not able to be present at the trial can take steps to have his deposition taken." Winslow *v.* Bradley, 15 Wis. 394, 396.

23. Post *v.* Cecil, 11 Ind. App. 362, 3 N. E. 222; Jourdan *v.* Healey, 19 N. Y. Suppl. 240, 46 N. Y. St. 198, 22 N. Y. Civ. Proc. 157; Bosworth *v.* Perhamus, 20 Wend. (N. Y.) 611; Carter *v.* Wharton, 82 Va. 264.

Surgical operation.— It is error to refuse a motion to postpone a case where the moving affidavit shows without contradiction that the moving party was about to undergo a serious surgical operation, which would prevent her presence at the trial, and that she was the sole witness as to a material issue. Michellen *v.* Spies, 83 Hun (N. Y.) 509, 32 N. Y. Suppl. 17, 65 N. Y. St. 140.

24. In Schlesinger *v.* Nunan, 26 Ill. App. 525, 527, the court said: "Where the absent witness is the party himself, very different rules obtain from those which govern cases where the witness is one who is in no way interested in the suit, and whose attendance can be compelled only by the ordinary process of subpœna. A party who is a material witness in his own behalf must have his testimony ready for use at the trial, unless prevented from so doing by some obstacle which by the exercise of reasonable diligence he cannot overcome, and the obstacle should not be one which he has created by his own voluntary act. If he allows considerations of business or pleasure or even regard for his own health to call him away at a time when his suit is liable to be called for trial and he thereby loses the benefit of his own testimony, he must, ordinarily, suffer the consequences."

Short distance from court.— In Richardson *v.* Dinkgrave, 26 La. Ann. 651, a continuance to allow plaintiff's attorney to send for her, a short distance from the court-house, was held properly refused on the ground that it was the duty of a party intending to be heard in his own behalf to be present at the trial, especially where no subpœna has been issued.

25. Davis *v.* Luark, 34 Ind. 403.

26. Mayer *v.* Duke, 74 Tex. 445, 10 S. W. 565.

Transitory party.— Where one of two defendants, pending the suit, left the state and traveled from place to place so rapidly that his deposition could not be taken, it was held that these facts were no ground for continuance. Tucker *v.* Garner, 25 Kan. 454. See also Brandt *v.* McDowell, 52 Iowa 230, 2 N. W. 1100.

27. Cohn *v.* Brownstone, 93 Cal. 362, 28 Pac. 953.

28. Engelstad *v.* Dufresne, 116 Fed. 582, 54 C. C. A. 38.

29. *California.*— Frank *v.* Brady, 8 Cal. 47.

Illinois.— Moore *v.* Goelitz, 27 Ill. 18; Day *v.* Gelston, 22 Ill. 102.

Iowa.— Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682.

Kansas.— Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Wilkins *v.* Moore, 20 Kan. 538; Swenson *v.* Aultman, 14 Kan. 273; Campbell *v.* Banks, 13 Kan. 62.

Missouri.— Langener *v.* Phelps, 74 Mo. 189.

Minnesota.— Mackubin *v.* Clarkson, 5 Minn. 247.

New York.— Freeland *v.* Howell, Anth. N. P. 272.

Pennsylvania.— Herbner *v.* Wynn, 1 Pa. Co. Ct. 538.

f. Failure to Summon Witness. A continuance on the ground of the absence of a material witness will ordinarily be denied, where it does not appear that the applicant has exercised reasonable diligence to subpœna witnesses and obtain their presence at the trial.[30] The question is one within the discretion of the trial court.[31] The law has provided parties with the writ of subpœna[32] and

South Carolina.— Bone *v.* Hillen, 1 Mill 197.

Texas.— Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741; International, etc., Co. *v.* Fisher, (Civ. App. 1894) 28 S. W. 398.

See 10 Cent. Dig. tit. "Continuance," § 90 *et seq.* And see *infra*, IV, S, 13, l, (II).

Exceptional case.—In Bentle *v.* Gerke Brewing Co., 14 Ky. L. Rep. 766, a defendant who was in attendance at court for the purpose of defending the action, after filing his answer, promised his co-defendants, who were relying upon his testimony in support of their separate defense, that he would remain and testify for them, and relying upon that promise they did not have a subpœna issued. When the case was called two days after he filed his answer he was not present, having been frightened away by the threat of plaintiff to prosecute him for perjury in swearing to his answer. Under such circumstances it was held that his co-defendants should have been granted a continuance upon the filing of an affidavit stating these facts and showing the materiality of his testimony.

30. *California.*— Frank *v.* Brady, 8 Cal. 47.

Georgia.— Harrison *v.* Langston, 100 Ga. 394, 28 S. E. 162; Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52; Lumpkin *v.* Respess, 68 Ga. 822; Boardman *v.* Taylor, 66 Ga. 638; Bailey *v.* Barnelly, 23 Ga. 582.

Illinois.— Bailey *v.* Kerr, 180 Ill. 412, 54 N. E. 165; Coffey *v.* Fosselman, 72 Ill. 69; Richards Iron Works *v.* Glennon, 71 Ill. 11; Birks *v.* Houston, 63 Ill. 77; Moore *v.* Goelitz, 27 Ill. 18; Stevenson *v.* Sherwood, 22 Ill. 238, 74 Am. Dec. 140; Eames *v.* Hennessy, 22 Ill. 628; Cole *v.* Choteau, 18 Ill. 439; Lichliter *v.* Russell, 89 Ill. App. 62.

Indiana.— Hutts *v.* Shoaf, 88 Ind. 395; Lane *v.* State, 27 Ind. 108.

Kansas.— Clark *v.* Dekker, 43 Kan. 692, 23 Pac. 956; Wilkins *v.* Moore, 20 Kan. 538.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516.

Mississippi.— Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

Pennsylvania.—Herkner *v.* Wynn, 1 Pa. Co. Ct. 538.

South Carolina.— Bone *v.* Hillen, 1 Mill 197.

Texas.— Gulf, etc., Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161; Rowland *v.* Wright, 64 Tex. 261; McMahan *v.* Busby, 29 Tex. 191; Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741.

Virginia.— Herrington *v.* Harkins, 1 Rob. 591.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

See 10 Cent. Dig. tit. "Continuance," § 79.

The mere act of taking out summonses for witnesses, and handing them to the sheriff, is insufficient ground on which to obtain a continuance. Winchester *v.* Rightor, 12 La. 255.

Upon an application in chancery for a continuance for absence of witnesses, it will not be deemed sufficient diligence that subpœnas were issued for them, unless it appears that their depositions could not have been taken. Marble *v.* Bonhotel, 35 Ill. 240.

31. Farmer *v.* Farmer, 72 Ill. 32; Berry *v.* Burnett, 23 Tex. Civ. App. 558, 56 S. W. 769. A continuance should be granted on account of the absence of a material witness, for whom a subpœna had been issued as soon as practicable after learning of his testimony. Reid *v.* Farmers', etc., Warehouse, 44 S. W. 124, 19 Ky. L. Rep. 1939.

Exceptional case.— Where a witness departs from the state, without the knowledge of the party desiring his testimony, within a few hours after the commencement of suit, the failure to serve him with subpœna cannot be regarded as negligence, so as to prevent a continuance. Hirsch *v.* Ferris, 1 Colo. 402; Miller *v.* Hickman, 1 Pennew. (Del.) 263, 40 Atl. 192.

32. Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741.

Subpœna not served.— A motion for a continuance by a defendant on account of the absence of a witness for whom a subpœna had been taken, but not served, for want of proper directions of the defendant, will not be granted. Golding *v.* The Castro, 20 La. Ann. 458. See also Robert *v.* Brown, 14 La. Ann. 597.

Defective service.— Under Ind. Civ. Code, § 229, no one can serve a subpœna except the sheriff or his deputy, and where a party has made such service himself he is not entitled to a continuance on account of the absence of the witness. Leary *v.* Meier, 78 Ind. 393.

Delivery of subpœna.— Where counsel showed that he delivered a written memorandum to the clerk to issue subpœnas to the sheriff for certain material witnesses, and the clerk deposed that his usual custom was to leave papers for the sheriff at a store, where the sheriff called and had requested papers to be left, that he had no particular recollection of this case, but believed the subpœnas to have been left accordingly, it was held that to refuse a continuance on the ground that there was no proof of the receipt of the subpœnas by the sheriff was error (Deford *v.* Hayes, 6 Munf. (Va.) 390); but a party is not entitled to a continuance on account of the absence of a witness for whom a subpœna was not delivered to the sheriff in compliance with a rule of court requiring a delivery at the latest on the day preceding

process of the court to compel attendance;[33] and if the suitor is negligent and inattentive in the use of the means provided by law to compel attendance he cannot expect indulgence at the hands of the court.[34] The mere writing of letters, sending telegrams to witnesses to attend, or making inquiries will not be sufficient to entitle him to relief.[35]

g. Delay in Issuance of Subpœna. It is the duty of a party to serve his witnesses in time to secure their presence at the trial, and where he has failed for the reason that the subpœna was not issued in due time, his application for a continuance will be denied.[36] The importance of having a witness subpœnaed a reasonable time before trial is manifest. It should be long enough to enable the witness to arrange his affairs, so that he can attend without personal inconvenience or loss on account of business.[37] The time elapsing between the date of issuance or service and the date of trial as affecting the question of due diligence in attempting to procure the attendance of witnesses depends somewhat on the place where the witness is to be found,[38] but under ordinary circumstances an interval of from one to four days will not be held an exercise of due diligence.[39]

the day set for trial (Brown *v.* Forsyth, 10 Rob. (La.) 116).

33. Farmer *v.* Farmer, 72 Ill. 32; Rawl *v.* Wright, 62 Tex. 261; Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741; Davis *v.* Walker, 7 W. Va. 447.

Attachment itself no ground for continuance.— In English *v.* Mullanphy, 1 Mo. 780, 782, the court said: "An attachment in itself is no ground for a continuance. Where it was taken in due season, returnable forthwith, under circumstances which justify the belief that the witness may be brought in during the term, the Circuit Court will, doubtless, either continue the cause, or have it postponed to await the return of the attachment. This must be the meaning of that rule on the subject which provides, that no cause shall await the return of an attachment."

Attachment unavailing.— A continuance will be granted, where a material witness is absent, whose attendance could not be procured by subpœna, where the cause of his inability to attend is such that an attachment for contempt of court would not be issued against him for failing to obey a subpœna; and in such case it is immaterial whether a subpœna has been issued or not. Allen *v.* Downing, 3 Ill. 454.

34. Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Davis *v.* Walker, 7 W. Va. 447.

35. Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Stevenson *v.* Sherwood, 22 Ill. 238, 74 Am. Dec. 140; Hill *v.* Fond du Lac, 56 Wis. 242, 14 N. W. 25.

A letter written two days before the trial, requesting witness "to make it convenient to be here within the next four or five days," failed to show due diligence. International, etc., R. Co. *v.* Fisher, (Tex. Civ. App. 1894) 28 S. W. 398.

36. *Georgia.*— Jones *v.* Rome Grocery Co., 99 Ga. 103, 24 S. E. 959.

Illinois.— Lichliter *v.* Russell, 89 Ill. App. 62.

Indiana.— Osborn *v.* Storms, 65 Ind. 321.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41.

Minnesota.— West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639.

Mississippi.—Gibson *v.* State, 59 Miss. 341.

Missouri.— Schultz *v.* Moon, 33 Mo. App. 329.

Tennessee.—Rexford *v.* Pulley, 4 Baxt. 364.

Texas.— Parker *v.* Campbell, 21 Tex. 763; Hall *v.* York, 16 Tex. 18; San Antonio, etc., R. Co. *v.* Bowles, (Civ. App. 1895) 30 S. W. 89; Campbell *v.* McCoy, 3 Tex. Civ. App. 298, 23 S. W. 34.

See 10 Cent. Dig. tit. "Continuance," § 80.

Service of subpœna one day before trial is not a sufficient showing of diligence. Evans *v.* Pond, 30 Mo. 235.

37. Parker *v.* Leman, 10 Tex. 116.

38. San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

Witness leaving county.— Where it appeared that the suit was commenced four months before the trial; that the subpœna for one witness was not issued till five days before the trial, while he had left the county in the previous month; and that the subpœna for the other witness was not issued till one day before the trial, when it was learned that he had "recently" left the county, it was held that the application was properly overruled. San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

39. *Georgia.*— Jones *v.* Rome Grocery Co., 99 Ga. 103, 24 S. E. 959.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41.

Missouri.— Schultz *v.* Moon, 33 Mo. App. 329.

Tennessee.— Rexford *v.* Pulley, 4 Baxt. 364.

Texas.— Parker *v.* Campbell, 21 Tex. 763; Hall *v.* York, 16 Tex. 18.

See 10 Cent. Dig. tit. "Continuance," § 80.

Service before trial day.— Where one has negligently omitted to take out a subpœna for a witness in time for service before the regular trial day, application for continuance to obtain the testimony should be refused. Gibson *v.* State, 59 Miss. 341.

Three days before trial.— Where a party fails to take out a subpœna until three days

h. Failure of Witness to Attend After Summoned. As a general rule a party is entitled to a continuance where a witness has failed to attend after being duly subpœnaed;[40] but in such case the applicant must have exercised reasonable diligence and have acted in good faith.[41] In some jurisdictions it has been held that in order to entitle the party to a continuance because of the absence of a witness duly summoned it is necessary that an attachment should have been moved for.[42]

i. Inability to Serve Witness With Process. The mere fact that subpœnas have been placed in the hands of an officer for service and returned not found is no ground for continuance;[43] there must be some showing of diligence to entitle the applicant to the relief he seeks.[44]

j. Witness Absenting Himself After Attending Court. The presence of a witness in court at the time of the trial is evidence of a party's diligence in procuring his attendance,[45] and where such witness absents himself during the trial without the procurement of the party the latter is entitled to a continuance.[46]

before the cause comes on for trial, he is not entitled to a second continuance, although the witness be an attorney of the court. Parker *v.* Leman, 10 Tex. 116.

40. Waldrup *v.* Maxwell, 84 Ga. 113, 10 S. E. 597; Fry *v.* Shehee, 55 Ga. 208. In Pennington *v.* Scott, 2 Dall. (Pa.) 94, 1 L. ed. 394, a cause marked for trial was postponed where the defendant, as soon as he had notice of trial, took out a subpœna for a witness at a great distance, and neither the witness nor the person employed to serve the subpœna attended.

Production of papers in lieu of attendance. — In Taylor *v.* Peck, 21 Gratt. (Va.) 11, a defendant in unlawful detainer subpœnaed plaintiff, but promised her she need not attend if she would produce the lease between them at the trial. She was not present at the trial, and her attorneys being asked about the lease admitted having it, but denied its admissibility as evidence. It was held that defendant was entitled to a continuance.

The return of the sheriff must be produced to prove that the witness not appearing was subpœnaed. Gordon *v.* Spencer, 2 Blackf. (Ind.) 286.

41. East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778.

Notification of witnesses. — Under a rule of court requiring every party to notify his witnesses of the day on which his case is set for trial, it was held that a party was not entitled to a continuance as of right for the absence of a material witness, who, although previously subpœnaed, was not notified on what day the case would be tried. Wilson *v.* Burr, 97 Ga. 256, 22 S. E. 991.

Removal of cause. — Witnesses summoned to appear at a court held in one county are not bound to follow the case to another county to which it has been removed, and if there is not a reasonable time in which to obtain their testimony it is good cause for continuance. Dangerfield *v.* Paschal, 20 Tex. 536.

42. Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741; Woods *v.* Young, 30 Fed. Cas. No. 17,994, 1 Cranch C. C. 346. And see Hamilton *v.* Moore, 94 Ga. 707, 19 S. E. 993.

Attachment returnable forthwith. — Where a witness subpœnaed failed to appear, and plaintiff immediately sued out an attachment returnable to the next term and moved a continuance, the continuance was properly denied, there appearing no reason why the attachment should not have been returnable forthwith. English *v.* Mullanphy, 1 Mo. 780.

43. Saul *v.* See, 2 La. 130; Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455; Robinson *v.* Martell, 11 Tex. 149.

Inference from sheriff's return. — A sheriff's return that a witness cannot be found is no ground for a continuance; for the inference is that the sheriff was not informed of the witness' residence or that he had none in the parish; in either case there is laches. Saul *v.* See, 2 La. 130.

44. Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455. See also Evans *v.* Pond, 30 Mo. 235. A defendant, who on the day following the filing of the answer, issued a subpœna for a witness residing within four blocks of the court-house, which was returned "Not served" (witness having been in town), has exercised proper diligence; and at the trial five days thereafter it was held error to refuse a continuance for absence of said witness. Gulf, etc., R. Co. *v.* Mitchell, 18 Tex. Civ. App. 380, 45 S. W. 819.

45. Searls *v.* Munson, 17 Ill. 558; Bentle *v.* Gerke Brewing Co., 14 Ky. L. Rep. 766. *Compare* Fiske *v.* Berryhill, 10 Iowa 203.

Witness not in condition to testify. — The absence from the court-house of a witness who is in town, but not in a situation to testify when called, is sufficient ground to postpone the trial until the next day, without any further showing. Leckie *v.* Crain, 12 La. 432.

46. Searls *v.* Munson, 17 Ill. 558; Bentle *v.* Gerke Brewing Co., 14 Ky. L. Rep. 766; Jordon Shoe Co. *v.* Hilig, 70 Mo. App. 301; Bailey *v.* State, 26 Tex. App. 341, 9 S. W. 758; Burlington F. Ins. Co. *v.* Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406; Dillingham *v.* Chapman, (Tex. Civ. App. 1895) 30 S. W. 677. *Compare* Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133, 3 S. W. 455.

Extent and limits of rule. — This, it has been held in one decision, is so, although the original presence of the witness was not effected by the service of a subpœna. Bentle *v.* Gerke Brewing Co., 14 Ky. L. Rep. 766. While others hold that under these circum-

k. Tender of Fees. The witness should in all cases be tendered his legal fees and expenses of travel when the subpœna is served, and a failure so to do will usually defeat an application for a continuance based upon his absence,[47] unless such payment has been waived by the witness;[48] and especially is this the case where more than one application has been made.[49]

l. Failure to Procure Deposition — (i) *In General.* Where a party cannot produce his witnesses in court and yet desires to rely upon their evidence, it is his duty, in the exercise of reasonable diligence, to secure their depositions, or it must be shown to the satisfaction of the court that the employment of such means would have been ineffectual.[50] Where a witness has remained within the state a

stances it is discretionary with the court whether a continuance should be granted. Sheppard *v.* Lark, 2 Bailey (S. C.) 576. See also Voorhees *v.* Chicago, etc., R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823.

The absence of a witness living in a foreign jurisdiction is not ground for a continuance, he having been present at a previous time during the trial and no subpœna being served on him. Langener *v.* Phelps, 74 Mo. 189.

47. Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785; Ogden *v.* Gibbons, 5 N. J. L. 518; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Texas Transp. Co. *v.* Hyatt, 54 Tex. 213; East Texas Land, etc., Co. *v.* Texas Lumber Co., 21 Tex. Civ. App. 411, 52 S. W. 645; Doll *v.* Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87. In Ogden *v.* Gibbons, 5 N. J. L. 518, 627, the court said: "Can we, under the words of this section, consider a witness lawfully subpœnaed for the purpose of punishment for non-attendance unless the fee be paid or tendered? Clearly not. And can we say that the process has not been legally served when we are about to punish the witness, and yet that it has been legally served when we are inquiring into the default of the party and determining whether he has used due diligence? that it is legal for one purpose and not for another? This would seem an unfit state of things."

Rule under the Texas statute.— On a first application for a continuance on the ground of absent witnesses it is not necessary that their fees have been paid or tendered them. Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33; Texas Transp. Co. *v.* Hyatt, 54 Tex. 213; Houston, etc., R. Co. *v.* Wheeler, 1 Tex. App. Civ. Cas. § 170. In Bryce *v.* Jones, 38 Tex. 205, it was made to appear by counter-affidavits that the case had been regularly reached on the preceding day when the absence of the witnesses became known, and at the request of plaintiffs the case was put off until the next day. The court held that the plaintiffs should have resorted to an attachment, and not having placed themselves in a condition to do so by tendering the witnesses their fees, they were wanting in diligence. The facts of that case were peculiar, and the decision does not necessarily involve the rule that in ordinary cases a first application for a continuance must show that the witness fees were tendered. Texas Transp. Co. *v.* Hyatt, 54 Tex. 213.

The tender of an insufficient amount of witness fees has, so far as the right to a continuance is concerned, the same effect as a failure to make any tender. Kimball *v.* Bryan, 56 Iowa 632, 10 N. W. 218.

48. Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785.

Absence on account of sickness.— In Dillingham *v.* Ellis, 86 Tex. 447, 25 S. W. 618, it was held error to refuse a continuance for the absence of a witness because his fees had not been tendered him, where his absence was caused by sickness and not from unwillingness to attend.

49. Ogden *v.* Gibbons, 5 N. J. L. 518; East Texas Land, etc., Co. *v.* Texas Lumber Co., 21 Tex. Civ. App. 411, 52 S. W. 645.

50. *Georgia.*— McLaws *v.* Moore, 83 Ga. 177, 9 S. E. 615; Boyd *v.* McFarlin, 58 Ga. 208; McGinnes *v.* McGinnes, 23 Ga. 613.

Illinois.— Wilson *v.* King, 83 Ill. 232; Coffey *v.* Fosselman, 72 Ill. 69; Marble *v.* Bonhotel, 35 Ill. 240; Cole *v.* Choteau, 18 Ill. 439.

Indiana.— Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082; Louisville, etc., R. Co. *v.* Kious, 82 Ind. 357.

Iowa.— Argall *v.* Pugh, 56 Iowa 308, 9 N. W. 226; Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597; Boone *v.* Mitchell, 33 Iowa 45.

Kansas.— Clark *v.* Dekker, 43 Kan. 692, 23 Pac. 956; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147; Campbell *v.* Blanke, 13 Kan. 62; Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36.

Louisiana.— Lex *v.* Southern Express Co., 23 La. Ann. 59; Jeter *v.* Heard, 12 La. Ann. 3.

Minnesota.— Holmes *v.* Corbin, 50 Minn. 209, 52 N. W. 531.

Mississippi.— Worsham *v.* McLeod, (1891) 11 So. 107.

Missouri.— Smith *v.* Smith, 132 Mo. 681, 34 S. W. 471; Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860; Langener *v.* Phelps, 74 Mo. 189; Pier *v.* Heinrichoffen, 52 Mo. 333; Globe Mut. Ins. Co. *v.* Carson, 31 Mo. 218; Hamiltons *v.* Moody, 21 Mo. 79; Harris *v.* Powell, 56 Mo. App. 24.

Nebraska.— Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897; Kansas City, etc., R. Co. *v.* Conlee, 43 Nebr. 121, 61 N. W. 111; Peavey *v.* Hovey, 16 Nebr. 416, 20 N. W. 272.

New York.— Hays *v.* Berryman, 6 Bosw. 679; McKay *v.* Marine Ins. Co., 2 Cai. 384.

Oregon.— Savage *v.* Savage, 10 Oreg. 331.

sufficient time for his deposition to be taken, his subsequent departure will constitute no ground of relief at the date of trial.[51] So the fact that a material witness has remained without the state will afford no reason, for in such case the party applying should have issued a commission to take his testimony before the cause was brought on to be heard.[52] It is only in extreme cases, where there has been no negligence or laches on the part of the applicant,[53] or where serious

Pennsylvania.— Clark *v.* Cochran, 1 Miles 282; Smith *v.* Cunningham, 9 Phila. 96, 30 Leg. Int. 12; Koecker *v.* Koecker, 7 Phila. 364.

Texas.— East Line, etc., R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; Read *v.* Allen, 63 Tex. 154; Southern Cotton Press, etc., Co. *v.* Bradley, 52 Tex. 587; McMahan *v.* Busby, 29 Tex. 191; Green *v.* Crow, 17 Tex. 180; Ft. Worth, etc., R. Co. *v.* Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335; Merchant *v.* Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763.

Virginia.— Deans *v.* Scriba, 2 Call 415.

United States.— King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217. *Compare* Symes *v.* Irvine, 2 Dall. (Pa.) 383, 1 L. ed. 425, 23 Fed. Cas. No. 13,714.

England.—Wright *v.* McGuffie, 4 C. B. N. S. 441, 93 E. C. L. 441; Steuart *v.* Gladstone, 7 Ch. D. 394, 47 L. J. Ch. 154, 37 L. T. 575, 26 Wkly. Rep. 277; Worsley *v.* Bisset, 3 Dougl. 58, 26 E. C. L. 49; Ward *v.* Wilkinson, 2 F. & F. 173.

See 10 Cent. Dig. tit. "Continuance," § 87.

Lost lease.— Where plaintiff failed to take the deposition of a witness residing in another county as to the execution of a lost lease, on which his case depended, relying on the presence of the witness, it was held that he was not entitled to a continuance on the ground of surprise, because he was not allowed to show the contents of the lease. Read *v.* Allen, 63 Tex. 154.

Second deposition.— An application for a second continuance on the ground of an absent witness will not be granted, where it appears that the deposition of the witness had been taken, and his presence was desired to explain some portions of it, that no effort had been made to again take his deposition, and that the witness was in the employ of the applicant (East Line, etc., R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804); so where the defendant applied for a continuance on the ground that from a misunderstanding of the interrogatories a deposition formerly taken failed to show all the material facts the witness might have testified to, it was held that as by the exercise of sufficient diligence defendant might have retaken the deposition a continuance would not be granted (Cole *v.* Choteau, 18 Ill. 439).

51. Frank *v.* Brady, 8 Cal. 47; Boone *v.* Mitchell, 33 Iowa 45; King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

52. *Delaware.*— Parrish *v.* Gardner, 3 Harr. 495. *Compare* Johnson *v.* Silletoe, 2 Harr. 305.

Georgia.— Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

Iowa.— Argall *v.* Pugh, 56 Iowa 308, 9 N. W. 226.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Minnesota.— Holmes *v.* Corbin, 50 Minn. 209, 52 N. W. 531.

Missouri.—Langener *v.* Phelps, 74 Mo. 189; Pier *v.* Heinrichoffen, 52 Mo. 333; Hamiltons *v.* Moody, 21 Mo. 79.

Pennsylvania.— Clark *v.* Cochran, 1 Miles 282. Thus where, on the trial of an issue in a divorce case, the respondent, the husband, had been served with a habeas corpus ad testificandum directing him to produce the two daughters of the parties who were at a school near Boston, and he made return that the children had been sent to school more than six months before, and that the libellant, the mother, had visited them there and had free access to them, it was held that as libellant knew of the whereabouts of the children and could have taken their depositions under a commission, she had been guilty of laches in not doing so, and could not obtain a continuance of the cause because of their absence. Koecker *v.* Koecker, 7 Phila. (Pa.) 364.

Texas.— McMahan *v.* Busby, 29 Tex. 191; Green *v.* Crow, 17 Tex. 180; Ft. Worth, etc., R. Co. *v.* Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335; Merchant *v.* Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763.

United States.— King of Spain *v.* Oliver, 14 Fed. Cas. No. 7,812, Pet. C. C. 217.

See 10 Cent. Dig. tit. "Continuance," § 87 *et seq.*

Illness of non-resident.— Where witnesses living out of the state are sick and not able to appear at the trial, and no effort has been made to take their depositions, the fact of their sickness is no ground for a continuance. Hamiltons *v.* Moody, 21 Mo. 79.

Special messenger.— A continuance was properly refused where the party desiring the testimony of a witness absent in a distant parish, instead of taking out a commission to examine him despatched a special messenger to bring the witness; by doing so he took upon himself the risk of the witness being in court on the trial. Jeter *v.* Heard, 12 La. Ann. 3.

53. Miles *v.* Danforth, 32 Ill. 59; McLane *v.* Harris, 1 Mo. 700.

Floods.— Where defendant gave notice of taking the deposition of a material witness and proceeded on his journey to take the testimony, and on arriving at the Missouri river found it so high and full of running ice that it could not be crossed until too late to reach the place of taking the deposition in time, he has shown sufficient diligence to entitle him to a continuance. McLane *v.* Harris, 1 Mo. 700.

injustice would result, that the court will overlook the failure to provide evidence otherwise obtainable through the ordinary channels.[54] Where opportunity has once existed for this course, he cannot, upon the calling of the case, urge the lack of such evidence as a ground of continuance in his favor.[55]

(II) *Reliance Upon Promise to Attend.* The same rule of diligence obtains in regard to the taking of depositions as in the service of subpœnas.[56] A party has no right to rely upon the promise of a witness to attend the trial, but must take his deposition at his own peril.[57]

m. Delay in Procuring Deposition. Delay in taking depositions is no ground for a continuance; the failure to procure such evidence in time for the trial is not such an exercise of diligence as is required;[58] especially is this so where a

Witnesses in military service.— Where an application for a continuance was made upon the ground of the absence of two witnesses, both of whom were, and had been for some time prior to the commencement of the suit, in the military service of the United States, and both of whom had all the time been absent from the state with their regiments, but, owing to the disturbed condition of the country, no deposition was returned, it was held to show sufficient diligence. Miles *v.* Danforth, 32 Ill. 59.

54. Stone *v.* Chicago, etc., R. Co., 3 S. D. 330, 53 N. W. 189.

Substitution of attorneys.— Defendant's affidavit for a continuance on the ground of the absence of non-resident witnesses stated that its and plaintiff's attorneys agreed to take the depositions of the witnesses; that the attorney for plaintiff was unable to attend to the matter at the time agreed upon and requested a postponement; that he subsequently said that he proposed to withdraw from the case, and agreed that no further steps should be taken until the appointment of another attorney; that no notice was given defendant of the substitution of another attorney until three days before the case was called for trial; and that the witnesses or their depositions could be procured should a continuance be granted. It was held that due diligence was shown, and that defendant was entitled to a continuance. Stone *v.* Chicago, etc., R. Co., 3 S. D. 330, 53 N. W. 189.

55. Plaintiff, failing to take the deposition of his co-plaintiff, who was in an advanced stage of consumption, knowing that his testimony would be wanted on the trial, is not entitled to a continuance on account of the absence of such co-plaintiff (Worsham *v.* McLeod, (Miss. 1891) 11 So. 107); so where a witness was afflicted with epilepsy, with occasional intervals of relief, a party was required to show why he could not have taken his deposition during such intervals (Wilson *v.* King, 83 Ill. 232).

56. See *supra*, IV, S, 13, l.

57. *California.*— Yori *v.* Cohn, (1902) 67 Pac. 212, 65 Pac. 945; Lightner *v.* Menzel, 35 Cal. 452.

Delaware.— Parrish *v.* Gardner, 3 Harr. 495.

Georgia.— Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52; Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

Iowa.— Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Kansas.— Campbell *v.* Blanke, 13 Kan. 62; Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36.

See 10 Cent. Dig. tit. "Continuance," § 90.

Co-defendants.— Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken. Mowat *v.* Brown, 17 Fed. 718, 5 McCrary 420.

Employees of applicant.— Where defendant moved for a continuance on the ground of absent witnesses, employees of defendant, and the only excuse for not taking their depositions was that their personal attendance had been promised to defendant's attorneys by the officers of defendant, it was held that the motion was properly denied. Toledo, etc., R. Co. *v.* Stephenson, 131 Ind. 203, 30 N. E. 1082.

Second deposition.— Plaintiff asked for a continuance because of the absence of a material witness, who was also a defendant. The witness's deposition had been taken and lost. It might have been retaken in time for trial by strictly pursuing the statutory method. The delay was caused by the promise of defendant's counsel to cross plaintiff's interrogatories and have the witness present at the trial. It was held that, although plaintiff had not used the utmost diligence, the refusal to grant a continuance, it being the first application, was error. State *v.* Rohmberg, 69 Tex. 212, 7 S. W. 195.

58. *California.*— Pierson *v.* Holbrook, 2 Cal. 598.

Indiana.— Wolcott *v.* Mack, 53 Ind. 269.

Iowa.— Owens *v.* Hart, 66 Iowa 565, 24 N. W. 41. On a motion for a continuance to take testimony in New York, the California court held that a delay of thirty-five days after filing the answer showed a want of due diligence and denied the motion (Pierson *v.* Holbrook, 2 Cal. 598); so, where an Iowa commission had been issued to take a deposition in Oregon in December, 1859, on which no return had been made in June, 1860, it was held that the party applying for a continuance on this ground had not shown

party has been granted time under a prior continuance and makes a second application.[59]

n. Documentary Evidence. Documentary evidence, being as a rule stationary in its character and easy of access upon the exercise of reasonable diligence, it is no error to refuse a continuance for its absence, where no such diligence has been shown.[60] The question as to whether a party has used reasonable diligence in any given case depends upon the legal means at his disposal[61] and the time within which he is required to act.[62]

o. Excuse For Laches. A party who desires a continuance on the ground of

sufficient diligence to entitle him thereto. Cole *v.* Strafford, 12 Iowa 345.

Louisiana.— McCarty *v.* McCarty, 19 La. 296.

Texas.— Western Union Tel. Co. *v.* Rosentreter, 80 Tex. 406, 16 S. W. 25; Hunt *v.* Makemson, 56 Tex. 9.

Utah.— Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

See 10 Cent. Dig. tit. "Continuance," § 88.

Indiana statute.— "Every deposition taken in accordance with the provisions of this article [Ind. Rev. Stat. p. 723, § 286], and intended to be read in evidence, must be filed in the proper Court, at least one day before the time at which such cause in which such deposition is to be used stands on the docket for trial; or, if filed afterward, and claimed to be used on the trial, the adverse party should be entitled to a continuance, at the cost of the party filing such deposition." Dare *v.* McNutt, 1 Ind. 148.

Revival of action.— Where a cause is suspended before trial by the death of one of the parties, the adverse party is not negligent in waiting until it is revived before taking depositions of absent witnesses, although such depositions might be legal if taken before revivor. Jaquith *v.* Davidson, 21 Kan. 341.

59. Where a party applies the second time during the same term for a continuance because of absence of a witness, and it appears that no effort was made to procure the testimony of such witness by deposition until during the term, and after the first application was refused, due diligence is not shown (Hunt *v.* Makemson, 56 Tex. 9); so a continuance was refused where a party had from March to November to take depositions on a previous continuance (Owens *v.* Hart, 66 Iowa 565, 24 N. W. 41).

Expenses not provided for.— A second continuance for absence of witnesses is properly refused where commissions to take depositions out of the state were mailed about six weeks before trial, without sending any money or making any arrangements with the officers. Little *v.* State, 75 Tex. 616, 12 S. W. 965.

60. Morrison *v.* Morrison, 102 Ga. 170, 29 S. E. 125; Steed *v.* Cruise, 70 Ga. 168; Anderson *v.* Citizens' Nat. Bank, (Tex. Sup. 1887) 5 S. W. 503; Stoddart *v.* Garnhart, 35 Tex. 300; Mattfield *v.* Cotton, 19 Tex. Civ. App. 595, 47 S. W. 549; Owen *v.* Cibolo Creek Mill, etc., Co., (Tex. Civ. App. 1897) 43 S. W. 297. See also Gerkhardt *v.* Austin, 28 Misc. (N. Y.) 191, 58 N. Y. Suppl. 1072.

Evidence of title.— A party is chargeable with notice of the materiality of a map or document constituting a part of his claim of title to land, and is not entitled to a continuance to enable him to procure such document. McFaddin *v.* Preston, 54 Tex. 403.

Failure to produce books.— It was important for a plaintiff to prove the exact amount and date of a payment. He summoned a witness whose books would prove it, but did not tell him to bring his books, nor what he wanted to prove by them. The trial having come on, the court held that he was not entitled to a continuance to enable him to procure the books, as he should have seen to it before. He had already been indulged with two continuances. Spengler *v.* Davy, 15 Gratt. (Va.) 381.

61. Alvord *v.* U. S., 1 Ida. 585; Union County *v.* Axley, 53 Ill. App. 670; Park *v.* Larkin, 1 Overt. (Tenn.) 17.

Copy of foreign judgment.— A motion for a continuance for the purpose of allowing a party to secure a copy of a foreign judgment is properly overruled, where the evidence shows that the only steps taken by movant to secure the copy was to write to the clerk of the foreign court six weeks before the trial, requesting him to send such copy, with the fee hill. Union County *v.* Axley, 53 Ill. App. 670.

Illness of custodian of documents.— A continuance will be granted a party to obtain the certificate of the secretary of state, where he shows that he has made one attempt and that the secretary was too ill to attend to the matter. Park *v.* Larkin, 1 Overt. (Tenn.) 17.

United States vouchers.— In Alvord *v.* U. S., 1 Ida. 585, a United States marshal was sued, with his sureties, upon his official bond, for converting to his own use money received for the purpose of defraying the expenses of the courts. He defended upon the ground of having expended the money to pay various accounts for which he claimed that the United States was responsible, and when the case was called for trial asked for a continuance on the ground that he had made application to the accounting officers of the treasury department for vouchers and for a transcript of his accounts, and that his application had been so recently refused that he had not since had time to prepare for trial. It was held that, not having shown that he had used the necessary means to procure his evidence, a continuance was properly refused.

62. In Dunson *v.* Pitts, 67 Ga. 767, it was held no ground for a continuance that complainants, fifteen days after the application

absence of witnesses or evidence must either show that he has made reasonable efforts to procure such evidence or some good reason for not doing so.[63] It is no excuse to set up ignorance of facts,[64] or the party's reliance on a decision in his favor on a question yet in issue.[65]

T. Amendment of Pleadings — 1. In General. Any substantial amendment

for an injunction, "believed that defendants had certain papers" which in answering they had failed to produce.

Correction of deed.— A party's neglect, extending through a period of seven months, to take any steps toward proving the execution of a deed known by him to be an essential link in his chain of title shows a want of diligence sufficient to justify the trial court in denying his application for a continuance, predicated on the absence of such testimony. Poole *v.* Jackson, 66 Tex. 380, 1 S. W. 75. See also Connor *v.* Griffin, 27 Iowa 248.

Insufficient time to procure evidence.— Where a rule is awarded in open court against an attorney to disbar him, and service accepted by him, and a trial and judgment had on the same day, it is error to refuse him a continuance to procure documentary evidence necessary to his defense, which is absent from the county. Walker *v.* State, 4 W. Va. 749.

Supplying missing record.— One who has had from one quarterly term to another to supply a missing record, and who without sufficient reason has neglected to comply with the order, cannot claim a continuance. Kenney *v.* Hannibal, etc., R. Co., 80 Mo. 573.

63. *Illinois.*— Dunlap *v.* Davis, 10 Ill. 84.

Indiana.— Brown *v.* Shearon, 17 Ind. 239; Deming *v.* Ferry, 8 Ind. 418.

Nebraska.— Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

Pennsylvania.— Davidson *v.* Brown, 4 Binn. 243.

Tennessee.— Todd *v.* Wiley, 3 Humphr. 576.

Texas.— Wheeler *v.* Styles, 28 Tex. 240; Osborne *v.* Scott, 13 Tex. 59.

See 10 Cent. Dig. tit. "Continuance," § 89.

Examination of books.— A statement that an absent witness, being an accountant, has not had time to make certain necessary examinations of account-books does not show a valid excuse for failure to procure his attendance. Brown *v.* Shearon, 17 Ind. 239.

Pendency of application for security of costs is not an excuse for failure to subpœna witnesses. Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161.

Sickness does not excuse lack of diligence in procuring testimony, unless it be shown that there was not time between the service of process and the commencement of the illness to enable the party to procure the testimony. Deming *v.* Ferry, 8 Ind. 418.

Excuses held sufficient.— An application for a first continuance will be granted where the affidavit shows facts tending to prove a complete and effectual defense to the plaintiff's action, and where it appears that all reasonable diligence has been used in preparing for trial, and the circumstances of the case sufficiently excuse the want of the ordinary statutory diligence entitling a party to a continuance. Jordan *v.* Robson, 27 Tex. 612. Where defendant in attachment was not served personally, and no copy of the notice was mailed to him, he will be granted a continuance for the purpose of taking depositions, where he heard of the pendency of the action too late to have them taken in time. Lockhart *v.* Wolf, 82 Ill. 37.

64. That the materiality of the evidence for which a continuance is asked was not ascertained by the affiant "until the present term of the court" does not dispense with showing of diligence to procure it. Wheeler *v.* Styles, 28 Tex. 240.

Belief that appeal had been taken.—Where the defendant's affidavit for a continuance stated as a reason why he had taken no steps to procure the testimony of a material witness that he was under the belief that the plaintiff had appealed from the judgment of the court below granting him — the defendant — a new trial, it was held that this ignorance furnished no excuse. Todd *v.* Wiley, 3 Humphr. (Tenn.) 576.

Ignorance of answer.— That the plaintiff did not know what defendant's answer would be, or whether he would answer, is no excuse for failure to bring his witnesses to establish his case, and does not entitle him to a continuance for the absence of his witnesses. Osborne *v.* Scott, 13 Tex. 59.

Ignorance that case would be called.— The fact that a party did not know that his case would be called is no excuse for not issuing subpœnas in time to have his witnesses present. Texas, etc., R. Co. *v.* Snyder, (Tex. Sup. 1891) 18 S. W. 559.

Reliance on co-defendant.— Where one of two defendants asked for a continuance on the ground of surprise, in that he had relied on his co-defendant to furnish evidence to support an auditor's report in favor of the co-defendant, but that the latter had compromised with plaintiff, it was held that the motion was properly denied, since neither defendant had taken steps to have witnesses present to sustain the report. House *v.* Cessna, 6 Tex. Civ. App. 7, 24 S. W. 962.

Witness leaving the state.— That defendant's brother was a material witness, that he had sailed for a foreign port "upon a sudden determination known to this affirmant but a short time, three or four days, before his departure, and has not since returned. That the affirmant did not advert at the time to the circumstance of the said Elijah's testimony being material," is not a sufficient ground for postponing the trial. Davidson *v.* Brown, 4 Binn. (Pa.) 243.

65. Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216; McBride *v.* Willis, 82 Tex. 141, 18 S. W. 205.

of the pleadings that operates as a surprise at the trial will usually entitle a party to a continuance,[66] and a continuance for such cause is usually authorized by statute.[67] In ordinary cases, however, the mere filing of an amended pleading does not of itself entitle the opposite party to a continuance.[68] The amendment

66. *California.*— Polk *v.* Coffin, 9 Cal. 56.
Delaware.—Cirwithin *v.* Mills, 2 Marv. 232, 43 Atl. 151.
District of Columbia.— Strong *v.* District of Columbia, 3 MacArthur 499.
Georgia.— Wheaton *v.* Ansley, 71 Ga. 35.
Illinois.— Downey *v.* O'Donnell, 92 Ill. 559; Lewis *v.* Lanphere, 79 Ill. 187; Kagay *v.* School Trustees, 68 Ill. 75; Link *v.* Architectural Iron Works, 24 Ill. 551; Hawks *v.* Lands, 8 Ill. 227; Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Russel *v.* Martin, 3 Ill. 492; Covell *v.* Marks, 2 Ill. 525.
Indiana.— Danly *v.* Scanlon, 116 Ind. 8, 17 N. E. 158; Kirkpatrick *v.* Holman, 25 Ind. 293; Farrington *v.* Hawkins, 24 Ind. 253; Makepeace *v.* State, 8 Ind. 41; Lewis *v.* Richey, 5 Ind. 152; Edwards *v.* Hough, 5 Ind. 149; Ewing *v.* French, 1 Blackf. 170.
Kansas.— Vale *v.* Trader, 5 Kan. App. 307, 48 Pac. 458.
Kentucky.— Cabanis *v.* Lyon, 3 J. J. Marsh. 332; Cobb *v.* Curts, 4 Litt. 235.
Massachusetts.— Tourtelot *v.* Tourtelot, 4 Mass. 506.
Michigan.— Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893; Jennings *v.* Selden, 53 Mich. 431, 19 N. W. 132.
Missouri.— Colhoun *v.* Crawford, 50 Mo. 458; Tunstall *v.* Hamilton, 8 Mo. 500; Alt *v.* Grosclose, 61 Mo. App. 409; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.
Nebraska.— Dunn *v.* Bozarth, 59 Nebr. 244, 80 N. W. 811.
New York.— Holmes *v.* Lansing, 1 Johns. Cas. 248.
Pennsylvania.— Deshong *v.* Deshong, 186 Pa. St. 227, 40 Atl. 402, 65 Am. St. Rep. 855; Pittsburg, etc., R. Co. *v.* Clarke, 2 Pittsb. 48, 7 Pittsb. Leg. J. 129.
Tennessee.— Fowlkes *v.* Long, 4 Humphr. 511.
Texas.— Kessler *v.* Koakum First Nat. Bank, 21 Tex. Civ. App. 98, 51 S. W. 62; Galveston, etc., R. Co. *v.* Smith, 9 Tex. Civ. App. 450, 29 S. W. 186.
Washington.—Eldridge *v.* Young America, etc., Consol. Min. Co., 27 Wash. 297, 67 Pac. 703.
West Virginia.— Manufacturers', etc., Bank *v.* Mathews, 3 W. Va. 26.
Wisconsin.— Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82; Schumaker *v.* Hoeveler, 22 Wis. 43.
United States.— Wyatt *v.* Harden, 30 Fed. Cas. No. 18,106*a*, Hempst. 17; LeRoy *v.* Delaware Ins. Co., 15 Fed. Cas. No. 8,270, 2 Wash. 223.
See 10 Cent. Dig. tit. "Continuance," § 99.

Amendment by consent.— An amended answer filed by consent of the parties, after the notice of trial has been served, entitles the plaintiff to a continuance. Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

Amendment of bill of particulars.— If defendant is denied a continuance after plaintiff's amendment of his bill of particulars by the insertion of a credit and dates on the debtor side, whereby he is surprised so as not to be prepared for trial, he may properly claim that his rights have been prejudiced. Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893. The defendant cannot, however, have a continuance because a more specific bill of particulars is filed within ten days of the trial term. Phelps *v.* Spruance, 1 Colo. 414.

New ground of defense.— Where the defendant by mistake gave notice of a new ground of defense, in consequence of which the plaintiff sent away a material witness who was still absent, in order to obtain additional testimony, the court granted a continuance, although the plaintiff was under a rule to try or *non pros.*, and although the defendant offered to resume his original ground of defense. Echeveria *v.* Nairac, Wall. Sr. 29, 8 Fed. Cas. No. 4,261.

67. *Alabama.*— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.
Florida.— Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.
Georgia.— Southern Bell Tel., etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; Jones *v.* Henderson, 49 Ga. 170.
Illinois.— Evans *v.* Marden, 154 Ill. 443, 40 N. E. 446 [*affirming* 54 Ill. App. 291]; Litchfield Coal Co. *v.* Taylor, 81 Ill. 590; Link *v.* Architectural Iron Works, 24 Ill. 551.
Indiana.— Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Lewis *v.* Richey, 5 Ind. 152; Edwards *v.* Hough, 5 Ind. 149; Morris *v.* Graves, 2 Ind. 354; Taylor *v.* Heffner, 4 Blackf. 387; Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682.
Kentucky.— Cobb *v.* Curts, 4 Litt. 235; Watts *v.* McKenny, 1 A. K. Marsh. 560.
Michigan.— Crane Lumber Co. *v.* Bellows, 116 Mich. 304, 74 N. W. 481.
Missouri.— Colhoun *v.* Crawford, 50 Mo. 458.
New York.— Rosenberg *v.* Third Ave. R. Co., 47 N. Y. App. Div. 323, 61 N. Y. Suppl. 1052.
Pennsylvania.— Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65.
West Virginia.— Ravenswood Bank *v.* Hamilton, 43 W. Va. 75, 27 S. E. 296.
See 10 Cent. Dig. tit. "Continuance," § 99 *et seq.*

68. *Georgia.*— Atlanta Land, etc., Co. *v.* Haile, 106 Ga. 498, 32 S. E. 606.
Michigan.— Crane Lumber Co. *v.* Bellows, 116 Mich. 304, 74 N. W. 481.

must be of a substantial character,[69] it must appear that the applicant is less prepared to go to trial in consequence of the amendment as allowed than if the amendment had been denied,[70] and that he has a meritorious defense to the claim shown by the new matter as well as the original pleading.[71] The granting of a continuance on the ground of surprise caused by the amendment of pleadings is largely within the discretion of the court, and this discretion will not be disturbed unless it appears that it has been abused.[72]

2. MATERIALITY OF AMENDMENTS — a. In General. The question whether a continuance ought or ought not to be granted in any particular case, because of an amendment, depends upon the materiality of the amendment which is alleged as

Missouri.— Colhoun *v.* Crawford, 50 Mo. 458.

New York.— Rosenburg *v.* Third Ave. R. Co., 47 N. Y. App. Div. 323, 61 N. Y. Suppl. 1052.

West Virginia.— Ravenswood Bank *v.* Hamilton, 43 W. Va. 75, 27 S. E. 296.

See 10 Cent. Dig. tit. "Continuance," § 99 *et seq.*

Leave to recall witness.— Where the declaration is amended after the testimony is all in, and the arguments of counsel concluded, the fact that the defendant needs additional testimony to meet the changed issues is no ground for continuing the cause, where the additional testimony is merely the evidence of a witness who has already testified, and it is not shown that he could not be recalled, and leave to recall him is not asked. Wolfe *v.* Johnson, 152 Ill. 280, 38 N. E. 886 [*affirming* 45 Ill. App. 122].

Unnecessary amendments furnish no ground for continuance. Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278.

69. See *infra*, IV, T, 2 *et seq.*

Action for personal injuries.— Where, in an action for personal injuries received while operating a planing machine, the first paragraph in the complaint alleged that plaintiff had been employed to work at a dangerous machine without being warned of its danger, the filing of an additional paragraph alleging that the machine was not in safe condition, and that plaintiff was injured by reason of its defective condition, will entitle defendants to a continuance on the ground of surprise. Danley *v.* Scanlon, 116 Ind. 8, 17 N. E. 158.

70. *Georgia.*— Atlanta Land, etc., Co. *v.* Haile, 106 Ga. 498, 32 S. E. 606.

Indiana.— Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682.

Iowa.— Foote *v.* Burlington Gas Light Co., 103 Iowa 576, 72 N. W. 755.

Michigan.— Crane Lumber Co. *v.* Bellows, 116 Mich. 304, 74 N. W. 481.

Missouri.— Colhoun *v.* Crawford, 50 Mo. 458; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147.

West Virginia.—Ravenswood Bank *v.* Hamilton, 43 W. Va. 75, 27 S. E. 296.

See 10 Cent. Dig. tit. "Continuance," § 99 *et seq.*

Introduction of new evidence.— Where a continuance is asked for on the ground of surprise caused by the filing of an amendment, it must appear that the amendment makes it necessary to produce evidence which would not have been required if the amendment had not been made. Fisk *v.* Miller, 13 Tex. 224.

Judgment on single count.— The plaintiff's praying judgment by default on the first count of a declaration, after argument of a demurrer to the second count, does not entitle the defendant to a continuance. Alley *v.* Neely, 5 Blackf. (Ind.) 200.

71. Ewing *v.* Beauchamp, 4 Bibb (Ky.) 496; Colhoun *v.* Crawford, 50 Mo. 458; Keltenhaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147; Ravenswood Bank *v.* Hamilton, 43 W. Va. 75, 27 S. E. 296.

72. Snediker *v.* Poorbaugh, 29 Iowa 488; Taylor *v.* Berry, 6 Ky. L. Rep. 523. And see Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

After demurrer sustained.—It is within the discretion of the trial court to refuse a continuance on the ground of surprise caused by matters alleged in an amended petition filed after demurrer had been sustained to the original petition. Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699. But where a demurrer to a bill is sustained, and the plaintiffs amend at bar, and defendants neither demur to the amended bill nor ask for delay, there is no error in not continuing the case for the term. Taylor *v.* Cox, 32 W. Va. 148, 9 S. E. 70.

Different defense.— Where plaintiff filed with his declaration an affidavit showing the nature of his demand and the amount due, and defendant, to avoid judgment by default, filed an affidavit of defense to a certain sum which the plaintiff confessed, it was proper to refuse a continuance thereafter to enable defendant to interpose a different defense to the whole cause of action. Allen *v.* Watt, 69 Ill. 655.

In Pennsylvania it is held that the allowance or refusal of a continuance in case of an amendment is a matter of discretion with the court below, which is not reviewable. Walthour *v.* Spangler, 31 Pa. St. 523; Pittsburgh, etc., R. Co. *v.* Clarke, 2 Pittsb. (Pa.) 48, 7 Pittsb. Leg. J. (Pa.) 129.

Verification of pleading.— After striking from the files a corporation's pleading because not verified by an officer, it is not an abuse of discretion for the court to refuse a continuance for the purpose of procuring a proper verification. Banks *v.* Gay Mfg. Co., 108 N. C. 282, 12 S. E. 741.

a ground of relief. Where the amendment is material to the issues pleaded and no sufficient time has been offered to secure evidence thereon the continuance should in all cases be granted.[73]

b. Formal or Immaterial Amendments. A continuance should not be allowed for merely formal or immaterial amendments or amendments not calculated to surprise or cause prejudice to the adverse party.[74]

73. *Illinois.*— Link *v.* Architectural Iron Works, 24 Ill. 551; Hawk *v.* Lands, 8 Ill. 227; Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Covell *v.* Marks, 2 Ill. 525.

Indiana.— Makepeace *v.* State, 8 Ind. 41.

Kentucky.— Cobb *v.* Curts, 4 Litt. 235; Watts *v.* McKenny, 1 A. K. Marsh. 560.

Michigan.— Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893.

Missouri.— Tunstall *v.* Hamilton, 8 Mo. 500; Alt *v.* Grosclose, 61 Mo. App. 409.

Texas.— Lindsley *v.* Parks, 17 Tex. Civ. App. 527, 43 S. W. 277; Galveston, etc., R. Co. *v.* Smith, 9 Tex. Civ. App. 450, 29 S. W. 186.

United States.— Wyatt *v.* Harden, 30 Fed. Cas. No. 18,106*a*, Hempst. 17.

See 10 Cent. Dig. tit. "Continuance," § 100.

Allegation of warranty.— An amendment of the declaration after the proofs are in and the argument has begun, alleging a verbal warranty in addition to the written warranty sued on, is material, and entitles defendant to a continuance. Jennings *v.* Sheldon, 53 Mich. 431, 19 N. W. 132.

Averment of demand.— Where plaintiff sues on defendant's promise to deliver a certain commodity when requested, and is allowed to amend his declaration by averring a demand, such amendment is material and entitles defendant to a continuance. Ewing *v.* French, 1 Blackf. (Ind.) 170.

Effect of filing demurrer.— An additional paragraph counting on a cause of action accrued since the service of the summons is ground for continuance, but filing a demurrer to the paragraph would be a waiver of the right. Farrington *v.* Hawkins, 24 Ind. 253.

Foreclosure proceedings.— Where a bill for foreclosure is amended after a demurrer is sustained on the ground that there is no allegation as to whether any proceedings at law have been had to recover the mortgage debt the defendant is entitled to a continuance. Edwards *v.* Hough, 5 Ind. 149. Also so held where the amendment alleged that the mortgagee was compelled to pay out money. Lewis *v.* Richey, 5 Ind. 152.

Where an amendment of a libel for a divorce is granted, and a new charge of adultery on a different date is inserted, a continuance will be granted, if the respondent is not prepared to defend against such charge. Tourtelot *v.* Tourtelot, 4 Mass. 506.

74. *Alabama.*— Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

Colorado.— Wilcox *v.* American Sav. Bank, 21 Colo. 348, 40 Pac. 881.

Florida.— Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.

Georgia.—Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139; Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109. And see Lewis *v.* Bracken, 97 Ga. 237, 22 S. E. 943.

Illinois.— Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Dobbins *v.* Higgins, 78 Ill. 440; Kagay *v.* School Trustees, 68 Ill. 75; Rockford, etc., R. Co. *v.* Phillips, 66 Ill. 548; Eames *v.* Morgan, 37 Ill. 260; Hawks *v.* Lands, 8 Ill. 227; Russel *v.* Martin, 3 Ill. 492; Scott *v.* Cromwell, 1 Ill. 25.

Indiana.— Epperly *v.* Little, 6 Ind. 344; Rushville, etc., R. Co. *v.* McManus, 4 Ind. 275; Nimmon *v.* Worthington, Smith 226; Roberts *v.* Ward, 8 Blackf. 333; McKinney *v.* Harter, 7 Blackf. 385, 43 Am. Dec. 96; Tipton *v.* Cummins, 5 Blackf. 571; Beck *v.* Williams, 5 Blackf. 374.

Iowa.— Nelson *v.* Hagen, 72 Iowa 705, 31 N. W. 875.

Kansas.— Rice *v.* Hodge, 26 Kan. 164; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409; Union Pac. R. Co. *v.* Motzner, 8 Kan. App. 431, 55 Pac. 670.

Kentucky.— Clark *v.* Prentice, 3 B. Mon. 584; Eldridge *v.* Duncan, 1 B. Mon. 101; Turpin *v.* Scott, 5 Litt. 6; Watts *v.* McKenny, 1 A. K. Marsh. 560; Ewing *v.* Beauchamp, 4 Bibb 496.

Missouri.—Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718; Harvey *v.* Renfro, 7 Mo. 187; Chambers *v.* Lane, 5 Mo. 289 [*citing* Atwood *v.* Gillespie, 4 Mo. 423]; Merrill *v.* St. Louis, 12 Mo. App. 466.

Montana.— Wormall *v.* Reins, 1 Mont. 627.

Pennsylvania.— Walthour *v.* Spangler, 31 Pa. St. 523; Richards *v.* Nixon, 20 Pa. St. 19.

South Carolina.— McMahan *v.* Murphy, 1 Bailey 535.

Texas.—Fisk *v.* Miller, 13 Tex. 224; Texas, etc., R. Co. *v.* Bagwell, 3 Tex. Civ. App. 356, 22 S. W. 829.

See 10 Cent. Dig. tit. "Continuance," § 101.

Amendment to avoid variance.— In chancery an amendment to avoid a variance and not materially changing the bill is not ground for a continuance. Martin *v.* Eversal, 36 Ill. 222. See also Farwell *v.* Meyer, 35 Ill. 40.

Assignment of note.— The amending of the declaration in a suit on a sealed note by inserting an averment that the maker, defendant, had had notice of its assignment to plaintiff is unnecessary and is no cause for continuance. Helms *v.* Sisk, 8 Blackf. (Ind.) 503.

Cause of action described in different language.— The filing of an amended petition on the same cause of action described in different language is not ground for a continuance of right. York *v.* Clemens, 41 Iowa 95.

3. AMENDMENTS RELATING TO PARTIES. Mere formal amendments as to parties will not as a general rule afford a ground of continuance,[75] nor will amendments consisting in the addition of new parties to the action[76] or the dismissal or discontinuance of the action as to parties already of record.[77] An amendment show

In an action by a female for slander, the plaintiff amended her declaration by asserting that she was "sole and unmarried." It was held that the amendment was wholly immaterial, and no cause for a continuance. Russel *v.* Martin, 3 Ill. 492.

Insertion of attorney's name.— A continuance will not be granted upon allowing plaintiff to amend by inserting his attorney's name and subscription to the declaration, it having been properly indorsed thereon. McMahan *v.* Murphy, 1 Bailey (S. C.) 535.

Signature of party.— The amendment of a petition by allowing plaintiff to sign it does not entitle the defendant to a continuance. Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409; Harvey *v.* Renfro, 7 Mo. 187.

Amendments narrowing issues.— A trial amendment in an action for injuries on the ground of negligence, after all the evidence had been introduced without objection, which evidence was admissible under the complaint as it stood, the amendment merely narrowing the issue by specifying the negligence, and thereby limiting plaintiff's right to recover, to proof of the specific acts of negligence charged, did not entitle defendant to a continuance for surprise. Mirrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718.

Parties are bound to take notice that in all cases amendments will be granted on fair and reasonable conditions, and where there is enough of substance in the defective pleading to fairly apprise the opposite party of what he is required to meet, he cannot claim a continuance on the ground that it has worked a surprise. Magnuson *v.* Billings, 152 Ind. 177, 52 N. E. 803; Parsons Water Co. *v.* Hill, 46 Kan. 145, 26 Pac. 412; Walthour *v.* Spangler, 31 Pa. St. 523; Gillett *v.* Robbins, 12 Wis. 319.

75. *Alabama.*—Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

Georgia.— Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139; Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Illinois.— Evans *v.* Marden, 154 Ill. 443, 40 N. E. 446 [*affirming* 54 Ill. App. 291]; Litchfield Coal Co. *v.* Taylor, 81 Ill. 590.

Indiana.— Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620; Taylor *v.* Jones, 1 Ind. 17; Nimmon *v.* Worthington, Smith 226; Harvey *v.* Coffin, 5 Blackf. 566.

Iowa.— Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791.

Kansas.— Rice *v.* Hodge, 26 Kan. 164.

Kentucky.— Watts *v.* McKenny, 1 A. K. Marsh. 560.

Missouri.— Peabody *v.* Warner, 16 Mo. App. 556; Merrill *v.* St. Louis, 12 Mo. App. 466.

Pennsylvania.— Walthour *v.* Spangler, 31 Pa. St. 525.

South Carolina.— Righton *v.* Sumter, 2 McCord 412.

Texas.— Gulf, etc., R. Co. *v.* Jagoe, (Civ. App. 1895) 32 S. W. 1061.

See 10 Cent. Dig. tit. "Continuance," § 1021.

It is within the discretion of the court to allow a continuance for an amendment substituting proper parties, when the cause of action is not changed. McDermott *v.* Dearnley, 1 Montg. Co. Rep. (Pa.) 69.

Misspelling of party's name.— An amendment of the writ by correcting a misspelling of the plaintiff's name does not entitle the defendant to a continuance. Beck *v.* Williams, 5 Blackf. (Ind.) 374.

76. The joinder, during the trial, of plaintiff's husband, affords no ground for a continuance, where defendant cannot claim surprise. Merrill *v.* St. Louis, 12 Mo. App. 466.

A substitution of the personal representatives of a deceased plaintiff does not entitle defendant to a continuance (Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791); so the revival of an action in the name of the administrator of a deceased defendant, and permitting such defendant to file pleadings, does not necessarily compel a continuance, under Kan. Code, § 437. Rice *v.* Hodge, 26 Kan. 164.

Substantial change of claim or defense.— Where a complaint is amended by substituting parties different from those in whose names the suit was originally brought, the defendant will not be entitled to a continuance, unless such amendment substantially changes the claim or the defense. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620.

To a creditors' bill, new parties complainant, belonging to the class in whose behalf the bill was filed, may be made while the trial is in progress; and if their claims are undisputed their coming in at that stage will be no cause for suspending the trial or for granting a continuance at the instance of defendants. Burns *v.* Beck, 83 Ga. 471, 10 S. E. 121.

Where a lessor and lessee transfer each to the other one half of the damage accruing to them from a railroad company for injuries to their respective interests in land by a prairie fire, and a complaint by the lessor is amended by joining the lessee as a party plaintiff, an application for a continuance on the ground of surprise by the amendment is properly denied. Gulf, etc., R. Co. *v.* Jagoe, (Tex. Civ. App. 1895) 32 S. W. 1061.

77. Amendment of a bill by striking out an unnecessary party, between whom and the other defendants there was no joint interest, does not entitle the other defendants to a continuance. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139; Taylor *v.* Jones, 1 Ind. 17.

A discontinuance as to one defendant is not such an amendment as will entitle the other

ing the character in which a party appears in an action is frequently allowed, and a continuance on the ground of such allowance will almost invariably be denied;[78] but while this is the general rule the defendant may show by affidavit that he was surprised.[79]

4. Amendments Increasing Demand. An amendment of the declaration or petition increasing the demand does not entitle the defendant to a continuance unless he has been misled in preparing his defense;[80] but where the amendment would work a hardship upon the defendant, and operates as a fraud or surprise to him at the trial, unless further time were allowed for preparation, a continuance should be granted.[81]

5. Amendments Withdrawing Part of Demand. Since a withdrawal of part of the demand is calculated to render the defendant better instead of less prepared for trial, an application for a continuance on such ground will not be considered.[82]

6. Amending Description of Instrument. As a general rule an amendment in the description of the instrument sued on will not constitute a ground for continuance,[83] unless the amendment describes a different instrument than the one upon

to a continuance. Evans *v.* Marden, 154 Ill. 443, 20 N. E. 446 [*affirming* 54 Ill. App. 291, where it was held that the remaining defendant could not have a continuance even though he was not present at the trial]; Righton *v.* Sumter, 2 McCord (S. C.) 412.

78. Wilcox *v.* American Sav. Bank, 21 Colo. 348, 40 Pac. 881; Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109; Litchfield Coal Co. *v.* Taylor, 81 Ill. 590; Harvey *v.* Coffin, 5 Blackf. (Ind.) 566.

Fiduciary capacity.— Where plaintiff at trial amends by leave of court so as to designate defendant as "surviving" executor, instead of merely executor, defendant is not entitled to a continuance. Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.

79. Litchfield Coal Co. *v.* Taylor, 81 Ill. 590. And see Denver, etc., R. Co. *v.* Loveland, (Colo. App. 1901) 64 Pac. 381, holding that where during the trial the court erroneously allowed an amendment of the complaint whereby a corporation not previously a party was made defendant, and the corporation then waived the error by an appearance, the court erred in not continuing the case, so as to give the defendant time to prepare an answer and to secure its witnesses.

80. *Georgia.*— Wilson Coal, etc., Co. *v.* Hall, etc., Mach. Co., 97 Ga. 330, 22 S. E. 530. See also Morrison *v.* Morrison, 102 Ga. 170, 29 S. E. 125.

Illinois.— Kagay *v.* School Trustees, 68 Ill. 75.

Indiana.— Rushville, etc., R. Co. *v.* McManus, 4 Ind. 275; Tipton *v.* Cummins, 5 Blackf. 571.

Iowa.— Garlick *v.* Pella, 53 Iowa 646, 6 N. W. 3.

Kentucky.— Eldridge *v.* Duncan, 1 B. Mon. 101.

Pennsylvania.— See Faunce *v.* Lesley, 6 Pa. St. 121.

See 10 Cent. Dig. tit. "Continuance," § 103.

An amendment after verdict, enlarging the *ad damnum* to support the verdict, is material, and gives the defendant the right to a continuance. Brown *v.* Smith, 24 Ill. 196.

Election in trover.— Since plaintiff in a trover suit may postpone his election until the trial whether he will take hire as damages, an amendment on the trial as to the damages which plaintiff elected to take conferred no right on defendant to a continuance on the ground of surprise. Wilson Coal, etc., Co. *v.* Hall, etc., Mach. Co., 97 Ga. 330, 22 S. E. 530.

81. Central R., etc., Co. *v.* Jackson, 94 Ga. 640, 21 S. E. 845; Atwater *v.* Hager, 10 Wkly. Notes Cas. (Pa.) 189. See also Dobson *v.* Southern R. Co., 129 N. C. 289, 40 S. E. 42. Thus where a plaintiff in trespass alleged that defendant blocked up the public road in front of his shop, and just as the case was called for trial filed an additional count alleging special damages arising from the obstruction, defendant was entitled to a continuance at plaintiff's cost. McAfee *v.* McClure, 11 Wkly. Notes Cas. (Pa.) 173. So where two declarations were filed in one suit, and, on a motion being made to compel plaintiff to elect, he was permitted to amend by uniting them and increasing the *ad damnum*, it was held a material amendment, entitling defendant to a continuance. Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236.

82. Crist *v.* Wray, 76 Ill. 204; Lingenfelter *v.* Williams, (Pa. 1887) 9 Atl. 653.

83. Curtis *v.* Sage, 35 Ill. 22; Crane *v.* Graves, 1 Ill. 66; McDonald *v.* Yeager, 42 Ind. 388; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Changing date of bill of exchange is no ground for continuance without showing surprise. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Insurance policy.— Where a complaint on a fire-insurance policy failed to set out the conditions therein, but otherwise correctly described the policy, and on the trial plaintiff was allowed to amend by making the policy a part of the complaint, there was no error in denying the defendant a continuance for surprise. Bonner *v.* Home Ins. Co., 13 Wis. 677.

which the suit was originally instituted.[84] The true test in this class of cases resolves itself into the question whether the adverse party is less prepared to go to trial.[85]

7. Amending Description of Injury. The question whether a continuance will be granted for an amendment in the description of the injury sued for depends upon the previous means of information as to the claim on the part of the applicant;[86] and in the absence of such means of knowledge, whether the charge as contained in the amendment is necessarily included in or follows from the charge as originally made. In the last case it has been the custom of the courts to deny relief;[87] but where the amended charge sets up a cause of action not intimately connected with the original cause, they have granted an extension of time to prepare for the new issues presented.[88]

8. Amendments Relating to Time and Place. Amendments in respect to time and place furnish no ground for granting a continuance, unless it be shown that the opposite party has been surprised thereby.[89]

9. Amendments Changing Form of Action. Where an amendment changes the form of an action it is to be considered a new cause, and the defendant should in all such cases be entitled to a continuance.[90]

10. Absence of Surprise as Ground of Refusing Continuance — a. In General. The keynote of the courts' decisions in this class of cases is the surprise occasioned the adverse party by the amendment as allowed, and in the absence of any showing to that effect the application will be invariably denied.[91] And so where

84. Ohio, etc., R. Co. *v.* Palm, 18 Ill. 22; Covell *v.* Marks, 2 Ill. 525; Wright *v.* Basye, 6 Blackf. (Ind.) 419; Atkinson *v.* State Bank, 5 Blackf. (Ind.) 84; Cabanis *v.* Lyon, 3 J. J. Marsh. (Ky.) 332.

Sealed instrument.— Where a declaration in covenant which did not show the writing declared on to be under seal was amended by inserting words describing the instrument as a writing obligatory, it was held a material amendment, entitling defendant to a continuance. Kelly *v.* Duignan, 2 Blackf. (Ind.) 420.

85. Tribune Pub. Co. *v.* Hamill, 2 Colo. App. 237, 30 Pac. 137; Jones *v.* Henderson, 49 Ga. 170.

86. See Texas, etc., R. Co. *v.* Neal, (Tex. Civ. App. 1895) 33 S. W. 693; Gulf, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1897) 40 S. W. 608.

87. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Texas Cent. R. Co. *v.* Williams, (Tex. Civ. App. 1894) 26 S. W. 856.

88. Vicksburg, etc., R. Co. *v.* Stocking, (Miss. 1891) 10 So. 480; Knabb *v.* Kaufman, 1 Woodw. (Pa.) 319; Armstrong *v.* Factoryville, 10 Pa. Co. Ct. 274.

89. Lindsey *v.* Lindsey, 40 Ill. App. 389; Omaha *v.* Cane, 15 Nebr. 657, 20 N. W. 101; Texas, etc., R. Co. *v.* Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720.

Erroneous description of place.— A continuance on the ground of surprise is properly refused where plaintiff is allowed after commencement of trial to amend his complaint to locate an accident at P, there being no such place as L mentioned in the complaint, and defendant having witnesses present to testify to the occurrence at P. San Antonio, etc., R. Co. *v.* Liitke, (Tex. Civ. App. 1894) 26 S. W. 248.

Materiality of date necessary.— A defendant is not entitled to a continuance on the ground of an amendment changing the date of the injury complained of without showing that the date is material. Omaha *v.* Cane, 15 Nebr. 657, 20 N. W. 101.

90. Caswell *v.* State, (Tex. Sup. 1889) 12 S. W. 219; Cunningham *v.* State, 74 Tex. 511, 12 S. W. 217; Schnertzel *v.* Purcell, 21 Fed. Cas. No. 12,472, 1 Cranch C. C. 246. *Compare* Wood *v.* Bradbury, 42 Leg. Int. (Pa.) 436.

91. *Arizona.*—Jordan *v.* Schuerman, (1898) 53 Pac. 579.

California.— Ellen *v.* Lewison, 88 Cal. 253, 26 Pac. 109.

Georgia.— Wilson Coal, etc., Co. *v.* Hall, etc., Woodworking Mach. Co., 97 Ga. 330, 22 S. E. 530; Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; Jones *v.* Lavender, 55 Ga. 228; Jones *v.* Henderson, 49 Ga. 170; Haines *v.* Curry, 36 Ga. 602.

Illinois.— Cozzens *v.* Chicago Hydraulic Press-Brick Co., 166 Ill. 213, 46 N. E. 788 [*affirming* 64 Ill. App. 569]; Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Driver *v.* Ford, 90 Ill. 595; Lindsey *v.* Lindsey, 40 Ill. 389; Moshier *v.* Knox College, 32 Ill. 155.

Indiana.— Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; North British, etc., Ins. Co. *v.* Rudy, 26 Ind. App. 472, 60 N. E. 9.

Iowa.— George *v.* Swafford, 75 Iowa 491, 39 N. W. 804.

Mississippi.— Vicksburg, etc., R. Co. *v.* Stocking, (1892) 13 So. 469.

Nebraska.— Omaha *v.* Cane, 15 Nebr. 657, 20 N. W. 101.

North Carolina.— Slingluff *v.* Hall, 124 N. C. 397, 32 S. E. 739.

Pennsylvania.— Folker *v.* Satterlee, 2

the original pleadings are full enough to give reasonable premonition that the matter embraced in the amendment exists as a fact, and is likely to be used on the trial, a want of preparation by adverse counsel on the points of law applicable to it is no cause for a continuance on the ground of surprise.[92]

b. Notice of Amendment. In one jurisdiction it has been held that the fact that plaintiff informed defendants of an intended amendment in time for them to have prepared to meet it is no reason for refusing defendants a continuance where the amendment is material, defendants being bound only to prepare to meet the issues made by the pleadings.[93] In another it was held that the court may refuse defendant a continuance because of an amendment, where a copy was served on him nearly a year before trial, although the original was not filed until three days before the trial;[94] but where a party has had no notice of an intended amendment and the same operated as a surprise at the trial he is entitled to a continuance.[95]

c. Amendment to Meet Adversary's Objection. Where the effect of the amendment is merely to put the case exactly where the opposite party claims it should be no continuance should be granted him on the ground of surprise.[96]

U. Surprise at Trial — 1. In General. Surprise at the trial may and frequently does operate as a ground for continuance,[97] unless the surprise is such as

Rawle 213; Johnson *v.* Hulsehart, 3 Phila. 379, 16 Leg. Int. 147.

South Dakota.—J. I. Case Threshing Mach. Co. *v.* Eichinger, (1902) 91 N. W. 82.

Texas.—Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94; Texas, etc., R. Co. *v.* Neal, (Civ. App. 1895) 33 S. W. 693; Texas, etc., R. Co. *v.* Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720; San Antonio, etc., R. Co. *v.* Liitke, (Civ. App. 1894) 26 S. W. 248; Lamb *v.* Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289, 21 S. W. 713.

West Virginia.— Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Wisconsin.— Bouner *v.* Home Ins. Co., 13 Wis. 677.

United States.— Lambert *v.* Smith, 14 Fed. Cas. No. 8,027, 1 Cranch C. C. 347.

See 10 Cent. Dig. tit. "Continuance," § 109.

Discretion of court.—The question of granting a continuance in such cases is in the discretion of the court, and when the defendant does not show that he was surprised and not ready to proceed with the trial, it is no error to refuse the application. Folker *v.* Satterlee, 2 Rawle (Pa.) 213; Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824.

Under Ga. Code, § 3521, providing for a continuance in the case of an amendment to the pleadings or proceedings, it is not improper to refuse such continuance when counsel of the opposite party does not state that "he is less prepared for trial than he would have been if such amendment had not been made, and how, and that such surprise is not claimed for the purpose of delay." Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244. See also Haines *v.* Curry, 36 Ga. 602.

92. Jones *v.* Lavender, 55 Ga. 228. See also Ellen *v.* Lewison, 88 Cal. 253, 26 Pac. 109.

Question not in issue.— When both parties, on the hearing of a suit in chancery, treat a question upon which there is no averment in the bill as though it were in issue, introducing testimony in reference to it, an amendment of the bill by inserting an averment in relation to that matter would occasion no surprise to the defendant, and he could not claim a continuance on account thereof. Moshier *v.* Knox College, 32 Ill. 155.

93. Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24.

94. Southern Bell, etc., Telephone Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202.

95. Phillips *v.* Atlanta, 79 Ga. 431, 4 S. E. 510.

96. Buffington *v.* Blackwell, 52 Ga. 129. To the same effect see Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810.

97. Where a party or his counsel were surprised as to the time or place of holding the court, a continuance ought to be granted, and refusing to grant it is error. Ross *v.* Austill, 2 Cal. 183.

Construction of rule of court.— Where plaintiff in a suit on a note is surprised by an unlooked-for construction of one of the rules of court, on which he had relied in making out his case, and he is thereby unexpectedly required to prove the handwriting of an indorser, a juror will be withdrawn and the cause continued. Sheldon *v.* Bahner, 4 Pa. Co. Ct. 16.

Delay in filing deposition.— Under a statute of Indiana the filing of a deposition less than one day before the case stands for trial entitles the opposite party to a continuance. Dare *v.* McNutt, 1 Ind. 148.

Reliance on party's statements.— It is not an abuse of discretion to refuse to continue an action for personal injuries on the ground of surprise caused by reliance on alleged statements of plaintiff and his counsel that he would abandon his claim for permanent injuries, where he was fully examined as to all of such injuries by a committee of medi-

might have been obviated by the exercise of ordinary care and due diligence on the part of the party asking the continuance.[98]

2. Mistake of Party or Counsel. In the absence of bad faith on the part of a party or his counsel, a mistake of fact will in some cases entitle him to a continuance;[99] but a mistake of law[1] or erroneous advice of counsel is not a sufficient ground for the desired relief.[2]

3. Unexpected Suppression of Evidence. A party will usually be entitled to a continuance where a deposition or other written evidence is unexpectedly suppressed as evidence at the trial.[3] In order to be entitled to such relief, however, the defect for which suppression is allowed must not be of a glaring character,[4]

cal experts appointed at defendant's instance, and the court might infer from all the facts that defendant was not misled by the statements, and the application does not show that he could procure witnesses who would on a second trial testify to the facts expected to be proven by him. Texas Cent. R. Co. *v.* Brock, (Tex. Civ. App. 1895) 30 S. W. 274.

98. Wilcox *v.* Mims, 95 Ga. 564, 20 S. E. 382. See also Miller *v.* Winton, (Tenn. Ch. 1900) 56 S. W. 1049.

Reapportionment of docket.— A court may reapportion the causes on its docket, and such reapportionment will furnish no ground of continuance, unless it can be shown that the party has been taken by surprise. Elliott *v.* Cadwallader, 14 Iowa 67.

99. Earnest *v.* Napier, 15 Ga. 306; Whitaker *v.* Whitaker, 43 S. W. 464, 19 Ky. L. Rep. 1476; Shamberg *v.* Leslie, 41 S. W. 265, 19 Ky. L. Rep. 599.

Where parties subpœna the wrong witness and do not discover their error until the day before the trial, when too late to secure the attendance of the right witness, and his testimony is material, they should be allowed a continuance in the absence of any showing of bad faith on their part. Myers *v.* Trice, 86 Va. 835, 11 S. E. 428.

1. Hall *v.* Mount, 3 Coldw. (Tenn.) 73.

Cases arising under particular statute.— A motion for continuance was properly overruled where made on the ground that the court had announced that no cases arising under a certain statute would be tried, defendant absenting himself for that reason, and the court holding that the case in question did not arise under that statute, although defendant contended that it did. Bone *v.* Graves, 43 Ga. 312.

Written evidence required.— The fact that applicant did not expect that written evidence that he was the choice of the next of kin for administrator would be required is no ground for a continuance. Long *v.* Huggins, 72 Ga. 776.

2. Musgrove *v.* Perkins, 9 Cal. 211; Hall *v.* Mount, 3 Coldw. (Tenn.) 73; Myers *v.* Price, 86 Va. 835, 11 S. E. 428.

3. *Indiana.*— Carpenter *v.* Dame, 10 Ind. 125.

Kentucky.— Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380, 10 Ky. L. Rep. 729.

Nebraska.— Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224.

New Hampshire.— Doe *v.* Doe, 37 N. H. 268.

Texas.— Grigsby *v.* May, 57 Tex. 255; Texas, etc., R. Co. *v.* Boggs, (Civ. App. 1895) 30 S. W. 1089.

United States.— Waskern *v.* Diamond, 29 Fed. Cas. No. 17,248, Hempst. 1.

See 10 Cent. Dig. tit. "Continuance," § 96.

Non-production of papers.— When the evidence to prove a particular fact necessary to support the case is held incompetent at the hearing upon the bill, by reason of the non-production of a paper or want of proof of its loss, the court may in their discretion order the cause to stand over, to enable the party to exhibit further interrogatories, for the purpose of making an exhibit of the paper or accounting for its non-production. Doe *v.* Doe, 37 N. H. 268.

Where depositions are on file over two years, and no objection was made to them until offered as evidence on trial, and the same were suppressed, a continuance should be granted. Such parties may well claim that they were taken by surprise. Grigsby *v.* May, 57 Tex. 255.

Where exceptions which were not filed to the depositions until after the commencement of the trial are sustained and the witness whose deposition it is is unable to attend court, and his testimony is material, a continuance should be granted. Moore *v.* Smith, 88 Ky. 151, 11 S. W. 380, 10 Ky. L. Rep. 729.

4. Haun *v.* Wilson, 28 Ind. 296; Bonella *v.* Madnel, 26 La. Ann. 112.

Illegal commission.— An order refusing to continue will not be disturbed when it appears that the ground alleged was the filing of exceptions to the execution and return of a commission to obtain discovery sued out by defendant; that the exceptions were taken before the cause was begun; that no notice was given to plaintiff; that no commission is attached to the bill, and there is no entry of filing on the interrogatories; and that the interrogatories were not addressed to plaintiff, and did not contain the names of any witnesses, as required by Ga. Code, §§ 3811, 3877, 3900. Hatcher *v.* Mechanicsburg First Nat. Bank, 79 Ga. 538, 5 S. E. 127.

Deposition taken in another action.—Where a deposition taken in another action is attempted to be introduced in evidence, and the trial court refuses to allow its introduction, a refusal to grant defendant a continuance

or one of which the applicant might have had knowledge by the exercise of reasonable diligence.[5]

4. Exclusion of Evidence. The exclusion of testimony as incompetent is not such a surprise as will entitle a party to a continuance[6] in the absence of some peculiar circumstance to take the case out of the general rule.[7] A party is usually supposed to be prepared to prove his case by competent evidence, and the fact that he is surprised by a correct ruling of the court is no ground for a further extension of time.[8]

5. Adversary's Evidence. A party is not entitled to a continuance in every case, where he is surprised by the evidence of his adversary.[9] It is only in cases where such evidence could not have been reasonably anticipated under the pleadings[10] or papers in the case that the court will entertain his application for

on the ground of surprise, to enable him to procure the testimony of the witness whose deposition is excluded, is not an abuse of discretion, and the judgment will not be reversed therefor. Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590.

5. St. Louis, etc., R. Co. *v.* Ransom, 29 Kan. 298; Allen *v.* Hoxey, 37 Tex. 320.

6. McCutchin *v.* Bankston, 2 Ga. 244; Simpson *v.* Johnson, (Tex. Civ. App. 1898) 44 S. W. 1076.

Evidence at former trial.— That testimony admitted at a former trial was rejected on the second trial was no ground for a continuance; there being no objection thereto at the former trial, and the party offering it not showing that he expects to supply its place if granted a continuance. Turner *v.* Tubersing, 67 Ga. 161. So in quo warranto defendant cannot, because of the exclusion of certain deeds of corporations, claim surprise as cause for continuance, on the ground that such deeds were admitted in evidence in a similar proceeding against it, where the record does not disclose such fact, and if they were so admitted the former suit was an application for an injunction, and there was no pleading denying the execution of the deeds. Lyons, etc., Toll R. Co. *v.* People, 29 Colo. 434, 68 Pac. 275.

7. In State *v.* Cooper, (Tenn. Ch. 1899) 53 S. W. 391, complainants and defendants stipulated in a suit to quiet title that exceptions to testimony for irrelevancy and immateriality might be taken at the trial without previously writing them out. At the trial defendants excepted to the introduction of a grant which had been on file for seven years, because it was a copy instead of the original, which was not shown to be lost, destroyed, or beyond complainants' power to produce. The exception being sustained, and complainants claiming surprise, the hearing was suspended for a day, so that affidavits could be filed showing the loss of the original, which was accordingly done. Under such circumstances it was held that, regardless of the stipulation, granting time to file the affidavit was proper.

8. French *v.* Groesbeck, 8 Tex. Civ. App. 19, 27 S. W. 43.

Defective acknowledgment.— Refusing to continue a trial to allow a party to obtain the testimony of a notary to prove the execution of an instrument excluded for defective acknowledgment is not an abuse of discretion. Threadgill *v.* Bickerstaff, 7 Tex. Civ. App. 406, 26 S. W. 739.

9. Branch *v.* Du Bose, 55 Ga. 21; Woodcock *v.* Sutton, 8 Ky. L. Rep. 616; McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381; Straw-Elsworth Mfg. Co. *v.* Cain, 20 Wash. 351, 55 Pac. 321.

Evidence impeaching credibility.— The fact that the defendant is taken by surprise, by evidence impeaching his credibility, is no ground for a continuance or a new trial. Every man is supposed to be able to support his general character for truth and veracity in the community in which he lives, especially when he has lived in that community for several years. Lynes *v.* Reed, 40 Ga. 237.

Extension of time to take testimony.— If a party is surprised by an extension of time to take testimony before a referee, and by the testimony thereby introduced, he should move for a continuance for that reason in order to procure further evidence on his side, but where he has failed to do so he cannot raise the question in the appellate court. People *v.* Holden, 28 Cal. 123. See also McLear *v.* Hapgood, 85 Cal. 557, 24 Pac. 788.

Action for personal injuries.— Where, in an action for personal injuries, plaintiff alleged that by reason of his bruises and hurts he was rendered delirious at times, and defendant had the cause continued for a year, the latter is not entitled to a continuance to take the deposition of absent witnesses to contradict a deposition introduced by the plaintiff at the trial. Texas, etc., R. Co. *v.* Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994.

10. Garrett *v.* Carlton, 65 Miss. 188, 3 So. 376; Amos *v.* Stockert, 47 W. Va. 109, 34 S. E. 821. See also Bronaugh *v.* Bowles, 3 La. 120.

Facts not disclosed by pleadings.— When on the trial the party is taken by surprise by the introduction of evidence legally admissible, to establish facts not disclosed by the pleadings, he has a right to a continuance on proper showing. Davis *v.* Millaudon, 14 La. Ann. 808.

Where non est factum is pleaded, the other party cannot claim to be surprised because the party so pleading goes on the stand and denies the execution of the paper. Gibson *v.* German-American Town Mut. Ins. Co., 85 Mo. App. 41.

Affidavit sufficient to put party on notice.—

further time to prepare himself,[11] and only then where the applicant has been guilty of no negligence in anticipating the testimony or in preparing himself to meet it when introduced.[12] Where a party has been honestly and without indiscretion on his part led to rely upon the testimony of a witness of his adversary, and thus prevented from summoning other witnesses who would testify to the same point, the failure of the witness to testify as expected is good ground to continue the cause;[13] but one having full means of knowing what testimony will be used against him, and who goes to trial without taking means to ascertain it, is not entitled to a continuance, in the absence of any misleading act or declaration on the part of his adversary.[14]

6. APPLICANT'S EVIDENCE. A party is conclusively presumed to be familiar with the testimony to be given by his own witnesses, and in the absence of any unforeseen circumstances[15] a continuance will be denied when asked because such testimony has resulted in a surprise to the applicant.[16]

As defendant some time before the trial filed its affidavit stating that plaintiff claimed to be injured "in her back," and asked for a physical examination of her person, which was granted, evidence of injury to her spinal cord and of injury to her eyes as a result thereof did not entitle defendant to a continuance on the ground of surprise. Louisville, etc., R. Co. *v.* Richmond, 67 S. W. 24, 23 Ky. L. Rep. 2394.

In an action on a note by a transferee where plea of purchase after maturity has been duly filed, it is not error to refuse to continue the case that plaintiff may rebut defendant's evidence as to the time of the transfer. Pinson *v.* Bass, 114 Ga. 575, 40 S. E. 747.

11. Supplemental account by executor.— Where an executor on settlement was given leave to file a supplemental account before the jury was impaneled, a continuance on the ground of surprise was properly refused; the additional items being of the same nature as those in the original account, and capable of being attacked by the same evidence. Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439.

Depositions without notice.— When depositions have been taken by one party without notice to the other, which are first opened at that term, the cause may be continued. Straas *v.* Marine Ins. Co., 23 Fed. Cas. No. 13,518, 1 Cranch C. C. 343.

Abandonment of commission.— A continuance will be granted for surprise where plaintiffs, having abandoned a commission to take testimony abroad, in which defendant joined by filing cross interrogatories, sought at the trial to prove the same facts by another witness. Le Roy *v.* Delaware Ins. Co., 15 Fed. Cas. No. 8,270, 2 Wash. 223.

12. Overcharge on freight.— In Missouri Pac. R. Co. *v.* Kuthman, 2 Tex. App. Civ. Cas. § 463, the plaintiff sued for a penalty on an overcharge on freight. After the trial commenced, plaintiff adduced testimony to prove the contents of the notice of the alleged overcharge, and the indorsement thereon by defendant's agent when he returned the same. Defendant objected to this evidence as secondary, and thereupon plaintiff proved the loss of the notice, whereupon defendant moved to continue the cause on the ground of surprise, and to obtain the testimony of the agent whom plaintiff alleged he had served with the notice. It was held that the motion was properly overruled, as defendant had no right to rely on the plaintiff's producing the notice and indorsement.

Alteration of instrument.— In McLear *v.* Hapgood, 85 Cal. 557, 24 Pac. 788, the defendant moved for a continuance on the ground of surprise, in that there was a material alteration in an instrument executed by him, and introduced in evidence by plaintiff, as he expected to show by a witness, to obtain whose attendance the continuance was asked. It was shown that he saw the instrument with the interlineation coming from plaintiff's possession the day before he moved for the continuance, but proceeded to examine the witnesses as to the execution of the instrument after the plaintiff's evidence was in. It was held that it was not error to refuse the continuance, since the motion came too late.

13. Maynard *v.* Cleveland, 76 Ga. 52.

14. Burrow *v.* Brown, 59 Tex. 457. Where an answer to a bill of discovery had been on file for nearly three months, it was held that the plaintiff could not object to going to trial on the ground that he was surprised by its being produced at the hearing. Robinson *v.* Francis, 7 How. (Miss.) 458.

Withdrawal of depositions.— An application by the defendant for a continuance of the cause upon the ground that it was taken by surprise, by finding certain depositions on file therein, was properly denied after the plaintiff had withdrawn such depositions. Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

15. Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5.

Where a witness is intoxicated on his examination at the trial, the proper practice is to move for a postponement on the ground of surprise. Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5.

16. In Dempsey *v.* Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220, where a witness was called by defendant to prove the execution of a deed, but refused to testify to its authenticity, a motion to continue the case on the ground of surprise was held to be properly denied,

7. Newly Discovered Evidence. Newly discovered evidence has usually been considered a good ground for continuance, especially where the failure of prior information is due to no lack of diligence on the part of the applicant.[17] Where, however, no sufficient excuse is given for not sooner discovering the testimony sought to be obtained relief should be denied.[18] The better practice in such cases is to move for a continuance before the trial has begun;[19] but in some cases the courts have allowed relief even after the trial has commenced.[20]

V. Improper Remarks of Counsel. Improper remarks by counsel in the course of argument, made before a jury has been drawn, but in the hearing of those who have been summoned to serve as jurors, can in no event be cause for a continuance. At most there should merely have been a postponement of the trial until other panels could be drawn from which to select a jury.[21]

V. The Application.

A. Nature and Requisites. Applications for continuances in civil cases are generally regulated by statutory provisions[22] or by rules of court.[23] The appli-

especially where there was no offer to connect the deed with any defense or to show that it could not be established by other testimony.

Evidence of agent.— The refusal to continue a case on the ground of surprise will not be disturbed where the alleged surprise was caused by the evidence of the agent of the applicant. Ætna Ins. Co. *v.* Sparks, 62 Ga. 187.

17. *California.*— Hastings *v.* Hastings, 31 Cal. 95; Berry *v.* Metzler, 7 Cal. 418.

Georgia.— Chester Church *v.* Blount, 70 Ga. 779; Holmes *v.* Dobbins, 19 Ga. 630.

Kentucky.— Allcorn *v.* Rafferty, 4 J. J. Marsh. 220.

Louisiana.— Metoyer *v.* Larenandière, 6 Rob. 139; Davis *v.* Davis, 17 La. 259.

Pennsylvania.— Campbell *v.* Sproat, 1 Yeates 20.

Tennessee.— Potter *v.* Coward, Meigs 22.

United States.— Hourquibee *v.* Gerard, 12 Fed. Cas. No. 6,733, 2 Wash. 164; U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,398.

See 10 Cent. Dig. tit. "Continuance," § 94.

Evidence in intestacy.— In Hourquibee *v.* Gerard, 12 Fed. Cas. No. 6,733, 2 Wash. 164, an action against an administrator was continued because only a few days before trial he had discovered material evidence among the intestate's papers.

Notice to produce instruments.— In Chester Church *v.* Blount, 70 Ga. 779, the plaintiffs in ejectment, having learned after the trial began that defendant's counsel had a deed supposed to have been lost, but which was necessary to complete plaintiff's claim of title, moved to require defendant to deliver the deed. On being overruled they moved for a continuance to give time for a notice to produce, which motion was also overruled. Under such circumstances it was held that the latter motion should have been granted, since the plaintiff was not in laches.

18. Thompson *v.* Autry, (Tex. Civ. App. 1900) 57 S. W. 47.

19. Metoyer *v.* Larenandière, 6 Rob. (La.) 139; Davis *v.* Davis, 17 La. 259.

New evidence not shown to be material.— After the evidence in a case has been closed, and the opening argument of plaintiff's counsel has been made, there is no abuse of discretion in denying a continuance on account of newly discovered evidence, where it does not appear otherwise than by hearsay that the newly discovered witness could or would testify to any material fact whatever, the party or his counsel not having had any personal communication with him. Central R. Co. *v.* Curtis, 87 Ga. 416, 13 S. E. 757.

20. Holmes *v.* Dobbins, 19 Ga. 630.

Mutilated receipt.— The discovery that a receipt on which defendant's defense was based had been mutilated is sufficient ground for a continuance, even after the testimony and argument are heard and the court has announced orally its finding. Hastings *v.* Hastings, 31 Cal. 95.

21. Thompson *v.* O'Connor, 115 Ga. 120, 41 S. E. 242.

22. Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, 9 S. W. 437; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 88 S. W. 599. And see *infra*, V, D, 3.

23. Where the plaintiff in a common-law case, which has been placed on the calendar, and is called in its regular order for trial, desires a postponement until the next term for the purpose of obtaining the testimony of new witnesses, it is not the proper practice to move on affidavits for such postponement. The practice in such case is (by district court rule 240) regulated by the rules of the circuit court (rules 38 and 51), under which the plaintiff alone can notice a jury case for trial, and if when it is called he is not ready, all that is required is that he shall fail to respond, in which case it is marked as "Passed." After the jury for the term has been discharged, defendant may move for a judgment of dismissal, and plaintiff in answer thereto may show his excuse; and if it be deemed sufficient the court can permit him to stipulate to try the cause at the next term. U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,398.

cation is usually made upon motion addressed to the court,[24] supported by an accompanying affidavit.[25]

B. Who May Make Application. As a general rule parties to the record and their attorneys are the only ones whom the court recognizes as having power to continue or discontinue a suit. Third parties, although they may have an interest in the cause, are to be treated as mere strangers.[26]

C. Time For Making Application. Where the time for applying for a continuance is prescribed by statute or rule of court, the application must be made within the time so prescribed or it must show an excuse for the delay.[27] If the application is made within the prescribed time, it will be deemed in time, although the order for continuance is not made until after the expiration for the time for making application.[28] Ordinarily, in the absence of unexpected and excusable delay, the application should be made before issue joined[29] or the jury sworn.[30] A continuance will ordinarily be denied when the application is made after the trial has begun;[31] especially where the applicant could have, by the exercise of reasonable diligence, prepared himself for its earlier presentation.[32]

D. The Affidavit — **1. Necessity For Affidavit.** In most, if not all, jurisdictions, the grounds on which a motion for continuance is based must be set out in writing and verified by affidavit.[33] This is usually required by statute or the

24. Merrick *v.* Britton, 26 Ark. 496; Burlingame *v.* Turner, 2 Ill. 588; Montgomery *v.* Wilson, 58 Ind. 591. It is not the duty of the court to order a continuance on an affidavit filed, unless a motion is made for such continuance. Burlingame *v.* Turner, 2 Ill. 588.

25. Montgomery *v.* Wilson, 58 Ind. 591. See *infra*, V, D, 1.

Affidavit of merits.— In Hill *v.* Prosser, 3 Dowl. P. C. 704, it was held that a motion to postpone on account of the absence of a material witness need not be supported by an affidavit of merits.

26. Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338. See also State *v.* Bosey, 17 La. Ann. 252, 87 Am. Dec. 525. See *infra*, V, D, 2.

Counsel in case.— An attorney who appears only as counsel in a case is not authorized to sign a stipulation for a continuance, even if he be an attorney and counselor of the court in which the suit is pending. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney. Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338.

Interested person not a party.— It is not error to overrule an application for a continuance of the trial of an action, on the ground of the absence of material evidence, when such application is made on behalf of one not a party to the action, although he may be interested in the matter involved therein and in the result of the trial. Burgwald *v.* Donelson, 2 Kan. App. 301, 43 Pac. 100.

27. Randall *v.* Fockler, 52 Iowa 618, 3 N. W. 675; Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Brotherton *v.* Brotherton, 41 Iowa 112; Woolheather *v.* Risley, 38 Iowa 486; Lucas *v.* Casady, 12 Iowa 567; Lesh *v.* Myer, 63 Kan. 524, 66 Pac. 245; Gardner *v.* O'Connell, 7 La. Ann. 453; Benoist *v.* Reyburn, 2 La. Ann. 137.

Under the English practice a motion to postpone the cause should be made before the case comes into the paper for the day. Hodges *v.* Patrick, 22 Wkly. Rep. 390. *Compare* Roberts *v.* West, 11 Price 514.

28. Dick *v.* Kendall, 6 Oreg. 166.

29. Grier *v.* Gibson, 36 Ill. 521; Teeter *v.* Poe, 48 Ill. App. 158; Sumner *v.* Coleman, 20 Ind. 486.

After notice of trial, a defendant cannot put off an ejectment case because costs of a former ejectment have not been paid, without giving notice that he shall move for a continuance. Den *v.* Bacon, 7 Fed. Cas. No. 3,783, 4 Wash. 578.

Misjoinder of parties.— Defendant's application for a continuance on the ground of nonjoinder of parties, made after answer filed, is too late, the want of diligence not being excused. Ryall *v.* Griffin, 2 Tex. Unrep. Cas. 580.

Want of bill of particulars.— After filing a plea in bar, a motion for a continuance for the want of a bill of particulars comes too late. McCarthey *v.* Mooney, 41 Ill. 300.

30. Smith *v.* Holebrook, 2 Root (Conn.) 45; Clinton *v.* Hopkins, 2 Root (Conn.) 25; Leavitt *v.* Kennicott, 54 Ill. App. 633; Broughton *v.* King, 2 La. Ann. 569; Rousseau *v.* Henderson, 12 Mart. (La.) 635; Coleman *v.* Hess, 1 Browne (Pa.) 240.

31. People *v.* Hanson, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580; Porter *v.* Triola, 84 Ill. 325; Leavitt *v.* Kennicott, 54 Ill. App. 633; Broughton *v.* King, 2 La. Ann. 569; Weeks *v.* Flower, 9 La. 379; Rousseau *v.* Henderson, 12 Mart. (La.) 635.

32. Myers *v.* Schneider, 21 Mo. 77; Roswog *v.* Seymour, 7 Rob. (N. Y.) 549.

33. *California.*— Whaley *v.* King, 92 Cal. 431, 28 Pac. 579.

Illinois.— People *v.* Hanson, 150 Ill. 122, 36

rules of procedure in the courts of the several states of the Union.[34] Mere oral[35] or unsworn statements by a party or his attorney will not suffice,[36] especially where such statements are made upon information or belief,[37] or raise a presumption that the motion is made only for delay.[38]

2. By Whom Made. The person by whom the affidavit shall be made is in most cases designated by statute[39] or by rule of court.[40] And where this is the case no other than those so designated may make the affidavit.[41] Ordinarily the

N. E. 998, 37 N. E. 580; Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; Waidner *v.* Pauly, 37 Ill. App. 278; Clause *v.* Bullock Printing Press Co., 20 Ill. App. 113.

Indiana.— Ralston *v.* Lathain, 18 Ind. 303; Meredith *v.* Lackey, 14 Ind. 529.

Kentucky.—In Simms *v.* Alcorn, 1 Bibb. 348, the court said: "The courts of this country may not have been uniform in their practice relative to the manner of swearing; some permitting it to be done orally, others requiring a written affidavit to be filed. Without deciding whether either would not be sufficient to justify a court in granting such motion, we have no hesitation in saying that the mode by affidavit has decidedly the preference, is better supported by precedent, is more consistent with reason, convenience and policy, and ought therefore to be required by the inferior courts."

Louisiana.— Hosea *v.* Miles, 13 La. 107; Reed *v.* Palfrey, 4 La. 161.

Minnesota.— Cheney *v.* Dry Wood Lumber Co., 34 Minn. 440, 20 N. W. 236.

New York.— Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. 382, 38 How. Pr. 451.

Tennessee.—Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735; Hart *v.* Scruggs, 1 Tenn. Ch. 1.

Texas.— Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33.

See 10 Cent. Dig. tit. "Continuance," § 128.

Offer to file affidavit.— In Ryan *v.* People, 62 Ill. App. 355, which was an action of debt upon a bond, leave was given the plaintiff to file a replication to a plea of special performance theretofore filed. The defendant moved for a continuance, and offered to make and file an affidavit that by reason of filing such replication he was unprepared, etc., but did not do so. It was held that no question arose upon such an offer. That the act, not the offer, was what was required by the statute.

34. See *infra*, V, D, 3.

Attachment unavailing.— Under La. Code Prac. arts. 464, 471, a party, unable to procure his witnesses by attachment, must, to obtain a continuance, make the same affidavit as if no such process had issued. Lizardi *v.* Arthur, 16 La. 577.

Facts in knowledge of court.— The New Mexico statute provides that all applications for a continuance shall be supported by oath, unless the facts be within the knowledge of the court, in which case it shall he so stated upon the record. Dold *v.* Dold, 1 N. M. 397.

United States practice.— In the circuit court of the United States a continuance of a cause ready for trial will not he granted except on affidavit according to the English practice. Smith *v.* Barker, 22 Fed. Cas. No. 13,012.

35. *California.*—Stewart *v.* Sutherland, 93 Cal. 270, 28 Pac. 947; Whaley *v.* King, 92 Cal. 431, 28 Pac. 579.

Kentucky.— Carr *v.* Marshall, 1 Bibb 362. In Simms *v.* Alcorn, 1 Bibb 348, 349, the court said: "By requiring the filing of an affidavit, the business of the court is not interrupted, and their time is not lost hy swearing and examining the party in court. Words are so fugitive and evanescent as to be recollected with difficulty; a written affidavit cannot be subject to this inconvenience: it is therefore better calculated to exhibit with precision the case on which the court adjudicated, whenever that adjudication is called in question, and the case to which the applicant actually did depose, whenever it may be necessary to use the same, either for or against him: for him, it is the safest if he is innocent, because it is not so liable to he misunderstood, and cannot be altered; and if he is guilty, for the same reason it is the best evidence to render his guilt manifest." *Compare* Locker *v.* Wigglesworth, 6 J. J. Marsh. 568, where it was held that after a party had been sworn and examined, and under that examination made a statement which entitled him to a continuance, on the ground that he had been misled by the conduct of his adversary, it was error to force him to trial merely because he refuses to put those statements into the form of a written affidavit.

Minnesota.— Cheney *v.* Dry Wood Lumber Co., 34 Minn. 440, 26 N. W. 236.

New York.— Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. 382, 38 How. Pr. 451.

United States.— Read *v.* Haynie, 20 Fed. Cas. No. 11,608, Hempst. 700; Smith *v.* Barker, 22 Fed. Cas. No. 13,012, 3 Day (Conn.) 280, Brunn. Col. Cas. 52.

See 10 Cent. Dig. tit. "Continuance," § 128 *et seq.*

36. Faulk *v.* Wooldridge, 2 La. 98.

37. Hollingsworth *v.* Duane, 12 Fed. Cas. No. 6,614, Wall. Sr. 46.

38. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y.) 382, 38 How. Pr. (N. Y.) 451.

39. Light *v.* Richardson, (Cal. 1893) 31 Pac. 1123; School Directors *v.* Hentz, 57 Ill. App. 648; Beatty *v.* Tete, 9 La. Ann. 129; Penne *v.* Tourne, 1 La. 489; Dall *v.* Mundine, 84 Tex. 315, 19 S. W. 394; Blum *v.* Bassett, 67 Tex. 194.

40. Christian *v.* Mansfield, 25 Ga. 628.

41. School Directors *v.* Hentz, 57 Ill. App. 648.

affidavit may be made by a party to the action,[42] his authorized agent,[43] or attorney.[44] Where the affidavit is made by a person other than the party, the allegations must be within the personal knowledge of the affiant,[45] and a reason should be shown why the affidavit is not verified by the party.[46]

3. Requisites of Affidavit[47] — a. Compliance With Requirements of Statute. The form and requisites of the affidavit for continuance are usually matters regu-

42. Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983 [*citing* Baker *v.* Knickerbocker, 25 Kan. 288]; Brooklyn Oil Works *v.* Brown, 38 How. Pr. (N. Y.) 451.

Affidavit of party himself necessary.— In one of the early North Carolina cases (Sheppard *v.* Cook, 3 N. C. 241), it was held that a cause could not be continued but upon the affidavit of the party himself.

Party in interest.— An affidavit for continuance may be made by the party in interest, although he be not the nominal defendant (Hunter *v.* Kennedy, 1 Dall. (Pa.) 81, 1 L. ed. 46); so, where separate actions had been brought against the drawer and the indorser of a promissory note, the court held the affidavit of the drawer, the defendant in the first suit, of the absence of a material witness, sufficient to postpone the first trial of the action against the indorser (Jackson *v.* Mason, 1 Dall. (Pa.) 135, 1 L. ed. 70).

43. School Directors *v.* Hentz, 57 Ill. App. 648; Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33 [*distinguishing* Robinson *v.* Martell, 11 Tex. 149].

44. *Georgia.*— Roberts *v.* Moore, 27 Ga. 411; Christian *v.* Mansfield, 25 Ga. 628.

Illinois.— Lockhart *v.* Wolf, 82 Ill. 37.

Iowa.— Widner *v.* Hunt, 4 Iowa 355. See also Brandt *v.* McDowell, 52 Iowa 230, 2 N. W. 1100; Gale *v.* Hamilton, 12 Iowa 50.

Louisiana.—Neyland *v.* Neyland, 8 La. Ann. 467; Lizardi *v.* Arthur, 16 La. 577; Penne *v.* Tourne, 2 La. 462; Caulker *v.* Banks, 3 Mart. N. S. 532.

North Carolina.—Wheaton *v.* Cross, 3 N. C. 154. *Contra*, Sheppard *v.* Cook, 3 N. C. 241.

Tennessee.— Guyer *v.* Cox, 1 Overt. 184.

Texas.— Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394; Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33; Stinnett *v.* Rice & Co., 36 Tex. 106; Robinson *v.* Martell, 11 Tex. 149.

England.— Duberly *v.* Gunning, Peake 97, 3 Rev. Rep. 664.

See 10 Cent. Dig. tit. "Continuance," § 129.

Absence from county.— If a surety is sued on a note, and the principal, who would be liable to the surety if judgment was entered, is defending the suit, his attorney may make the showing for a continuance of the case if the principal resides out of the county. Christian *v.* Mansfield, 25 Ga. 628. In such case the absence of the client should be shown. Widner *v.* Hunt, 4 Iowa 355. *Compare* Beatty *v.* Tete, 9 La. Ann. 129.

Attorney's clerk.— In Sullivan *v.* Magill, 1 H. Bl. 637, the court held that it would not receive the affidavit of an attorney's clerk, unless it stated that he was particularly acquainted with the circumstances of the cause and had the management of it.

Non-residence of party.— The attorney's affidavit may be received to move for a continuance, where circumstances excuse the nonproduction of the parties, as where the party is a non-resident. Lockhart *v.* Wolf, 82 Ill. 37; Lizardi *v.* Arthur, 16 La. 577; Penne *v.* Tourne, 2 La. 462.

45. Widner *v.* Hunt, 4 Iowa 355; Read *v.* Haynie, 20 Fed. Cas. No. 11,608, Hempst. 700. See also Lizardi *v.* Arthur, 16 La. 577; Sutton *v.* Wegner, 72 Wis. 294, 39 N. W. 775. *Compare* Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394.

Reason for rule.— "What a client says to his counsel, although it may be sworn to by the latter, is at least an unsworn statement, which the court cannot act on. It would be very dangerous to give it credence, for it would place the continuance of causes within the power of defendants, and without exacting from them any oath at all. All they would have to do would be to tell their counsel what they expected to prove, and for the counsel, having no knowledge of the facts on his part, and swearing to none, to simply swear that the client told him so and so. Such a practice cannot be tolerated: and no continuance can be granted on such an affidavit." Read *v.* Haynie, 20 Fed. Cas. No. 11,608, Hempst. 700.

Cal. Code Civ. Proc. § 595, which provides that "the Court may require the moving party, where application is made on account of the absence of a material witness, to state on affidavit the evidence which he expects to obtain," is not imperative, and should not be required of counsel when he cannot be aided in making the affidavit by his client, who is excusably absent. Light *v.* Richardson, (Cal. 1893) 31 Pac. 1123.

46. Widner *v.* Hunt, 4 Iowa 355; Clouston *v.* Gray, 48 Kan. 31; Penne *v.* Tourne, 2 La. 462; Stinnett *v.* Rice, 36 Tex. 106; Robinson *v.* Martell, 11 Tex. 149. *Contra*, Espy *v.* State Bank, 5 Ind. 274.

Illness of client.— An attorney may, in case of illness of his client, make a showing for a continuance of a case, notwithstanding his client lives in the county. Roberts *v.* Moore, 27 Ga. 411.

47. Forms of affidavit.— *Georgia.*— Johnson *v.* Martin, 28 Ga. 183.

Illinois.— Morgan *v.* Raymond, 38 Ill. 448; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Wade *v.* Halligan, 16 Ill. 507; Adams *v.* Coulton, 3 Ill. 71; Kellyville Coal Co. *v.* Hill, 95 Ill. App. 660, 94 Ill. App. 89; Hopkinson *v.* Jones, 28 Ill. App. 409.

Indiana.— Briggs *v.* Garner, 54 Ind. 572.

Missouri.— Barnum *v.* Adams, 31 Mo. 532.

Nebraska.— Beatrice Sewer Pipe Co. *v.* Erwin, 30 Nebr. 86, 46 N. W. 279.

lated by statute[48] or rule of court.[49] The affidavit must conform to the statutory requirements, and set forth one or more of the particular grounds therein mentioned.[50] In some states the statutory requirements differ according to whether the application is for a first, second, or subsequent continuance, and in such cases the allegations must vary according to the number of continuances asked.[51]

b. Method of Stating Facts. No presumption will be indulged in, in favor of the affidavit as presented.[52] As in the case of a pleading, all intendments, so far as the affidavit is equivocal or uncertain, must be taken against it.[53] Affiant must set forth facts, and not mere conclusions of law,[54] and upon the facts thus stated the affidavit will be strictly construed against him.[55]

c. Showing Good Faith of Applicant. The party applying must in all cases make it appear that his application is made in good faith[56] and not for the purpose

Texas.— Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394; Houy *v.* Gamel, 26 Tex. Civ. App. 123, 62 S. W. 76.

48. See Turner *v.* Eustis, 8 Ark. 119; Carr *v.* Dickson, 58 Ga. 144; Banks *v.* Darden, 18 Ga. 318; Klathenhoff *v.* Ardry, 14 La. 301; Coombs *v.* Brenklander, 29 Nebr. 586, 45 N. W. 929.

49. Sutton *v.* Wegner, 72 Wis. 294, 39 N. W. 775.

50. *Georgia.*— Carr *v.* Dickson, 58 Ga. 144.

Illinois.— Clause *v.* Bullock Printing Press Co., 20 Ill. App. 113.

Missouri.— English *v.* Mullanphy, 1 Mo. 780.

New Mexico.— Kent *v.* Favor, 3 N. M. 218, 5 Pac. 470.

Texas.— Green *v.* Dunman, 35 Tex. 175.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

Precise terms of statute.— The affidavit need not be in the precise terms of the statute, but where the spirit of the statute has been complied with, the same will be sufficient. Coombs *v.* Brenklander, 29 Nebr. 586, 45 N. W. 929; Belcher *v.* Skinner, 28 Nebr. 91, 44 N. W. 78; Payne *v.* Cox, 13 Tex. 480. But *compare* Turner *v.* Eustis, 8 Ark. 119, where it was held that an affidavit concluding with, "the application is not made for delay, but that the law may be administered," when the statute required the language to be "that justice may be done," was insufficient.

51. This is especially so under the Texas statute, where the allegations are essentially different according to the number of the continuances asked. See *infra*, XI, B.

Third continuance.— In Neeper *v.* Irons, 3 Tex. App. Civ. Cas. § 180, it was held no error to refuse a third application for a continuance, where it did not state that the absent testimony could not be obtained from any other source, nor that the continuance was not sought for delay, as required by Tex. Rev. Stat. art. 1278.

Where a witness duly summoned leaves the parish before trial, an affidavit for continuance on that account need not state that the affiant did not know he intended to depart, or could not prevent his departure, before trial, as provided by Code Proc. art. 465. Said article has reference to the case where a witness is in attendance at court under legal process and goes away without a party's knowledge. Klathenhoff *v.* Ardry, 14 La. 301.

52. Fiske *v.* Berryhill, 10 Iowa 203; Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293. On an application for the continuance of a cause the court cannot assume the existence of any fact necessary to authorize it when the applicant fails or is unwilling to set such fact forth in the application. Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599.

53. State *v.* Eisenmeyer, 94 Ill. 96.

The facts are supposed to be within the peculiar knowledge of the affiant, and he is presumed to make statements as favorable to his case as the truth will warrant. State *v.* Eisenmeyer, 94 Ill. 96; Brady *v.* Malone, 4 Iowa 146; Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293; Owens *v.* Starr, 2 Litt. (Ky.) 230.

54. *Georgia.*— Butler *v.* Ambrose, 51 Ga. 152.

Illinois.— McBain *v.* Enloe, 13 Ill. 76; Willard *v.* Petitt, 54 Ill. App. 257.

Iowa.— Brady *v.* Malone, 4 Iowa 146.

Nebraska.— Farmers', etc., Bank *v.* Berchard, 32 Nebr. 785, 49 N. W. 762; Felton *v.* Moffett, 29 Nebr. 582, 45 N. W. 930; Jameson *v.* Butler, 1 Nebr. 115.

Texas.— Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, 9 S. W. 437; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599; Arnold *v.* Hockney, 51 Tex. 46.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

55. Brady *v.* Malone, 4 Iowa 146; Mason *v.* Anderson, 3 T. B. Mon. 293; Owens *v.* Starr, 2 Litt. 230; Langener *v.* Phelps, 74 Mo. 189.

56. *California.*— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Indiana.— Fausett *v.* Voss, 12 Ind. 525.

Kansas.— Cushenberry *v.* McMurray, 27 Kan. 328.

Kentucky.— McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

New York.— Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

See 10 Cent. Dig. tit. "Continuance," § 139.

Failure to take depositions.— An application for a third continuance for the absence of the same witness who in each case failed to attend after being subpœnaed and promising to come, the applicant refusing to take

of delay, and the continuance may be refused if the circumstances cast suspicion on the good faith of the application and induce the belief that it was intended only for delay.[57]

d. Allegations Peculiar to Applications Based on Specified Grounds — (i) *Absence of Counsel.* An affidavit for continuance based on the ground of absence of counsel should state all the facts which are by law made necessary to be shown before a continuance can be granted. It should state that the presence of such counsel is necessary to a fair trial, that the party expects to have his counsel in court at the time to which the continuance is taken, and, if the attorney is absent because of attendance on the legislature, that he is in actual attendance.[58]

(ii) *Absence of Parties.* An affidavit for continuance on the ground of absence of parties must allege that his presence is indispensable to a fair trial of the cause, that the applicant may be prejudiced by failure to obtain a continuance, and that the continuance is not asked for on the mere ground of delay.[59]

(iii) *Absence of Witnesses* — (a) *Statement of Facts Expected to Be Proved.* In order that the court may judge of the materiality of the evidence sought to be introduced at the trial, or expected to be obtained, should the continuance be granted, the affidavit should set forth the substance of the testimony desired.[60]

out an attachment for him, is properly overruled, the witness residing over one hundred miles from the court, and no attempt having been made to take his deposition. Davis *v.* Walker, 7 W. Va. 447.

Failure to take out attachment.— An application for a third continuance on the former affidavit, resworn to on the ground of the absence of the same witness, was properly overruled where it was alleged only that the applicant could not prove his cause of action so fully by any other witness as by the absent one, and at all the continuances the applicant refused to take out an attachment for the witness who was absent, although subpœnaed. Rodgers *v.* McLeary, 5 Ind. 236.

57. *California.*— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Georgia.— Boggess *v.* Lowery, 78 Ga. 353.

Kansas.— Cushenberry *v.* McMurray, 27 Kan. 328.

Kentucky.— McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Louisiana.— Moncheaux *v.* Mistrot, 22 La. Ann. 421.

Missouri.— Barker *v.* Pachin, 56 Mo. 241.

Nebraska.— Omaha *v.* Cane, 15 Nebr. 657, 20 N. W. 101.

New York.— Hooker *v.* Rogers, 6 Cow. 577.

Virginia.— Harman *v.* Howe, 27 Gratt. 676; Herrington *v.* Harkins, 1 Rob. 591.

West Virginia.— Buster *v.* Holland, 27 W. Va. 510.

See 10 Cent. Dig. tit. "Continuance," § 140.

Right of inference.— Where there has been a continuance for the absence of material witnesses, the court has a right to infer that an application for a second continuance for the absence of other witnesses is for delay, where there has been in the interim no attempt to secure the testimony of the first witnesses and no mention made of their materiality. King *v.* Pearce, 40 Mo. 222.

Statement of facts required.— Where from the circumstances of the case it appears that the application is for delay only, the court may require the party to state the facts he expects to prove by the absent witness, and if they be such as not to affect the result the motion should be overruled. Harman *v.* Howe, 27 Gratt. (Va.) 676; Riddle *v.* McGinnis, 22 W. Va. 253.

Under circumstances of suspicion, the court has discretionary power, in addition to the statutory causes, to require the applicant to negative any suspicious fact or circumstance disclosed on the face of the affidavit. Winter *v.* Bandel, 30 Ark. 362; Cushenberry *v.* McMurray, 27 Kan. 328.

58. See *supra*, IV, P, 2.

59. See *supra*, IV, O, 1.

60. *California.*— Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694.

Colorado.— Glenn *v.* Brush, 3 Colo. 26; Cody *v.* Butterfield, 1 Colo. 377; Thackaray *v.* Hanson, 1 Colo. 365.

District of Columbia.— Bradshaw *v.* Stott, 7 App. Cas. 276.

Georgia.— White *v.* Beasland, 42 Ga. 184; Stix *v.* Pump, 36 Ga. 526; McDougald *v.* Central Bank, 3 Ga. 185.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; Ilett *v.* Collins, 102 Ill. 402; Ault *v.* Rawson, 14 Ill. 484; Bailey *v.* Hardy, 12 Ill. 459; Lichliter *v.* Russell, 89 Ill. App. 62.

Indiana.— French *v.* Blanchard, 16 Ind. 143; Gordon *v.* Spencer, 2 Blackf. 286.

Indian Territory.— Missouri, etc., R. Co. *v.* Elliott, (1899) 51 S. W. 1067.

Iowa.— Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746; Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358; Olds *v.* Glaze, 7 Iowa 86.

Kansas.— Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Brown *v.* Johnson, 14 Kan. 377.

Kentucky.— McClurg *v.* Ingleheart, (1895) 33 S. W. 80; Slater *v.* Sherman, 5 Bush 206; Smith *v.* Snoddy, 2 A. K. Marsh. 382; Denny *v.* Booker, 2 Bibb 427; Rucker *v.* Howard, 2 Bibb 166; Singleton *v.* Carr, 1 Bibb 554; Simms *v.* Alcorn, 1 Bibb 348.

Louisiana.— Lex *v.* Southern Express Co., 23 La. Ann. 59; Raby *v.* Brown, 14 La. 247.

It should state with directness and certainty what the witness will prove,[61] and not mere conclusions or inferences[62] that might be drawn from the combined testimony desired.[63] And when it fails to state a fact necessary to make the testimony of the absent witness relevant and material, the presumption is that the fact was not so and the continuance will be denied.[64] The affidavit should state the facts the absent witness will prove just as they would be stated by the witness in a deposition.[65]

Massachusetts.— Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129.

Michigan.— McNaughton *v.* Evert, 116 Mich. 141, 74 N. W. 486.

Minnesota.—Mackubin *v.* Clarkson, 5 Minn. 247.

Nebraska.— Life Ins. Clearing Co. *v.* Altschuler, 53 Nebr. 481, 73 N. W. 942; Farmers' Bank *v.* Berchard, 32 Nebr. 785, 49 N. W. 762; Jameson *v.* Butler, 1 Nebr. 115.

New Mexico.— Dold *v.* Dold, 1 N. M. 397.

South Carolina.— Gibbes *v.* Mitchell, 2 Bay 351.

Tennessee.—Leiper *v.* Earthman, (Ch. App. 1897) 46 S. W. 321; Shaver *v.* Southern Oil Co., (Ch. App. 1897) 43 S. W. 736.

Texas.— Berry *v.* Texas, etc., R. Co., 72 Tex. 620, 10 S. W. 726; McMahan *v.* Busby, 29 Tex. 191; Titus *v.* Crittenden, 8 Tex. 139; Crawford *v.* Lozano, (Civ. App. 1898) 48 S. W. 538; Merchant *v.* Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763; Rubrecht *v.* Powers, 1 Tex. Civ. App. 282, 21 S. W. 318.

Utah.— McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574.

Washington.— Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169.

West Virginia.— Handley *v.* Chesapeake, etc., R. Co., 9 W. Va. 474.

Wisconsin.— Winslow *v.* Bradley, 15 Wis. 394.

United States.— U. S. *v.* Schoonmaker, 93 Fed. 724.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

Absence of papers.— The affidavit for a continuance on the ground of the absence of necessary papers should state the purport of such papers. Logan *v.* Farmers' Bank, 5 Harr. (Del.) 431; Hagerty *v.* Scott, 10 Tex. 525; Hyde *v.* Liverse, 12 Fed. Cas. No. 6,972, 1 Cranch C. C. 408.

Motion for attachment.— Where, a cause being called the last day of the term, defendant moves for attachments against his witnesses regularly summoned, but no return can be made until the following term, it is tantamount to a motion for a continuance; and he will be ruled to trial, unless he show what he expects to prove by the absent witnesses, as in ordinary cases of continuance. Raby *v.* Brown, 14 La. 247.

61. *District of Columbia.*— Bradshaw *v.* Stott, 7 App. Cas. 276.

Illinois.— Lichliter *v.* Russell, 89 Ill. App. 62.

Iowa.— Olds *v.* Glaze, 7 Iowa 86.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Kentucky.— Mitchell *v.* Bean, 13 Ky. L. Rep. 142.

Texas.— Crawford *v.* Lozano, (Civ. App. 1898) 48 S. W. 538.

Tennessee.—Leiper *v.* Earthman, (Ch. App. 1897) 46 S. W. 321; Shaver *v.* Southern Oil Co., (Ch. App. 1897) 43 S. W. 736.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

Contradiction of deposition.—A motion for a continuance, based upon the filing of a deposition, since the commencement of the term which the applicant expects to be able to contradict, must state the facts which the absent witness will testify to in contradiction to such deposition. Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358.

Failure of magistrate to return depositions. — If a complainant moves for a continuance because the magistrate has not returned depositions taken on his part, and the witnesses had been formerly examined by him, his affidavit should disclose what facts if any were deposed to, not contained in former depositions. Rucker *v.* Howard, 2 Bibb (Ky.) 166.

Proof of set-off.— Where a defendant applies for a postponement on the ground of the absence of a material witness, who is to prove a set-off, the court will require the defendant to specify what parts of his account he means to prove by the witness, that it may appear whether such items can legally be set off; and if he will not so specify the plaintiff may proceed with the cause. Gibbes *v.* Mitchell, 2 Bay (S. C.) 351.

Statement of amount.—In an action against a railway company for burning grass, an affidavit for continuance by defendant, on the ground of absent witnesses, stating that they would prove the value of the grass to have been much less than plaintiff alleges, but not stating how much less, is insufficient. Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440.

62. Deemer *v.* Falkenburg, 4 N. M. 57, 12 Pac. 717; Arnold *v.* Hockney, 51 Tex. 46. Thus an affidavit that states that the testimony "is material, proper, and competent," without setting out the particular facts, is insufficient. Bradshaw *v.* Stott, 7 App. Cas. (D. C.) 276. So an allegation that the defendant "would testify materially as stated in his answer" was held too indefinite. Crawford *v.* Lozano, (Tex. Civ. App. 1898) 48 S. W. 538.

63. Mitchell *v.* Bean, 13 Ky. L. Rep. 142.

64. Dold *v.* Dold, 1 N. M. 397.

65. Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Affidavit by attorney.— An affidavit of an

(B) *Probability of Production of Witness or Evidence.* In addition to a showing as to the nature and character of the desired evidence, the application must further show some probability of producing the absent witness or testimony should the continuance be granted.[66] It is not enough to show that the residence of the witness cannot be ascertained,[67] or that he has removed beyond the jurisdiction of the particular tribunal in which the relief is sought.[68] The court is

attorney as to the materiality of witnesses, in support of a motion for a commission to examine them, is sufficient, without stating "as advised by counsel." Beall *v.* Dey, 7 Wend. (N. Y.) 513.

Arkansas practice.—In an affidavit for continuance for absence of witnesses, it was held sufficient under the Arkansas practice to state that the moving party expects to prove by the witnesses the facts in his affidavit. Burriss *v.* Wise, 2 Ark. 33.

The reason for requiring the statements of facts in the affidavit is to give the court an opportunity to judge of the materiality of the evidence (Glenn *v.* Brush, 3 Colo. 26; Ault *v.* Rawson, 14 Ill. 484; Bailey *v.* Hardy, 12 Ill. 459; Slater *v.* Breese, 36 Mich. 77; and see *supra*, IV, S, 6) and to give the opposite party the opportunity of admitting the matters desired to be proved and to go to trial without further delay (Glenn *v.* Brush, 3 Colo. 26; Ault *v.* Rawson, 14 Ill. 484; Olds *v.* Glaze, 7 Iowa 86; Missouri, etc., R. Co. *v.* Elliott, (Indian Terr. 1899) 51 S. W. 1067. And see *infra*, IX).

66. *California.*— Harper *v.* Lamping, 33 Cal. 641.

Georgia.— Runnals *v.* Aycock, 78 Ga. 553, 3 S. E. 657.

Illinois.— Wilson *v.* King, 83 Ill. 232; Eames *v.* Hennessy, 22 Ill. 628; Mantonya *v.* Huerter, 35 Ill. App. 27.

Indiana.— Dunnington *v.* Syfers, 157 Ind. 458, 62 N. E. 29; Robinson *v.* Glass, 94 Ind. 211; Nixon *v.* Brown, 3 Blackf. 504.

Iowa.— Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45; Thompson *v.* Lord, 14 Iowa 591.

Kentucky.— Cope *v.* Deaton, 43 S. W. 190, 19 Ky. L. Rep. 1197.

Minnesota.—Lowenstein *v.* Greve, 50 Minn. 383, 52 N. W. 964.

Nebraska.— McClelland *v.* Scroggin, 48 Nebr. 141, 66 N. W. 1123; Home F. Ins. Co. *v.* Johnson, 43 Nebr. 71, 61 N. W. 84.

New York.— Brown *v.* Moran, 65 How. Pr. 349.

Texas.— Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740; Gulf, etc., R. Co. *v.* Burrows, (Civ. App. 1901) 66 S. W. 83; Doxey *v.* Westbrook, (Civ. App. 1901) 62 S. W. 787.

Washington.— Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

Definite promise of production.— Where an affidavit for a continuance showed that some of the defendant's witnesses resided in another state, but exactly where the applicant had been unable to learn, and that he expected, if a continuance were granted, to learn their residence and procure their testimony at the next term, it was held that it should have been granted. Knowlton *v.* Smith, 17 Ind. 508.

Probability of recovery from sickness.—On a second application for continuance for the illness of the same party, the affidavit of attending physician or other person familiar with the circumstances should be exhibited, showing a probability of the recovery of the party, so that his deposition may be taken, and the grounds for such probability. Wilson *v.* King, 83 Ill. 232.

Under N. Y. Consol. Act, §§ 1362, 1364, relating to adjournments in district courts, and permitting adjournments for more than eight days on defendant's giving a bond, it is not error to refuse any adjournment to procure the attendance of a sick witness, where the party asks for eleven days, and shows that a shorter adjournment would be useless, and does not offer to give an undertaking. Simon *v.* Sheridan, etc., Co., 21 Misc. (N. Y.) 489, 47 N. Y. Suppl. 647.

67. *California.*— Harper *v.* Lamping, 33 Cal. 641.

Florida.— Livingston *v.* Cooper, 22 Fla. 292.

Illinois.— Heitschmidt *v.* McAlpine, 59 Ill. App. 231.

Kansas.— Tucker *v.* Garner, 25 Kan. 454.

Minnesota.— Lowenstein *v.* Greve, 50 Minn. 383, 52 N. W. 964.

Texas.— Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

Transient person.— There is no error in refusing a continuance asked on the ground of the absence of a witness, where he is shown to be a transient person without business or other ties in the state, and where defendant and his attorney admit that they have no knowledge of his whereabouts and have no reason to believe his attendance could be secured at any future time. Carberry *v.* Worrell, 68 Miss. 573, 9 So. 290.

68. *Florida.*—Livingston *v.* Cooper, 22 Fla. 292.

Iowa.— Brandt *v.* McDowell, 52 Iowa 230, 2 N. W. 1100.

Kansas.— Tucker *v.* Garner, 25 Kan. 454.

Texas.— Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740.

Wisconsin.— Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768.

See 10 Cent. Dig. tit. "Continuance," § 130 *et seq.*

It is not error to refuse a continuance to

not bound to grant a continuance where it is altogether conjectural whether the absent witnesses are living, or if so where they reside, or when if at all their evidence can be procured.[69] There must be a direct allegation in the affidavit as to the probability of the future production of the witness or the evidence,[70] and it is the better practice to state at what time the evidence will be forthcoming,[71] which time should under ordinary circumstances be stated as the next term of court.[72]

(c) *Probability That Witness Will Testify as Alleged.* There must be some showing to the effect that the absent witness will testify as alleged,[73] but the

procure the attendance of a non-resident witness, where the court has no power to compel his attendance, especially when it appears that the witness is an employee of the party asking for continuance, and the court has granted one continuance to allow the party to procure his attendance. Philadelphia F. Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617.

Return before execution of commission.— Where an important witness is out of the country, and will not return until several terms have elapsed, but will return before a commission would be of service, the superior court of the city of New York will put off a cause for a reasonable time, although the delay may be for more than one term. Smith *v.* New York Ins. Co., 1 Hall (N. Y.) 223.

69. Lowenstein *v.* Greve, 50 Minn. 383, 52 N. W. 964. An affidavit for continuance which states that a witness was "late of this state, and now out of the state, and will in all probability be back," is insufficient to warrant a continuance of the cause. Freligh *v.* Ames, 31 Mo. 253.

70. *Arkansas.*—Burriss *v.* Wise, 2 Ark. 33.

Florida.— Harrell *v.* Durrance, 9 Fla. 490.

Illinois.— Splane *v.* Byrne, 9 Ill. App. 392.

Indiana.— Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Deming *v.* Patterson, 10 Ind. 251.

Kansas.— Bliss *v.* Carlson, 17 Kan. 325.

Kentucky.— Louisville, etc., R. Co. *v.* Rogers, 10 Ky. L. Rep. 726.

Louisiana.— An affidavit that a witness "has left the city for a few days" is equivalent to an allegation that he is expected to return after that period, and so is sufficient. Harrison *v.* Waymouth, 3 Rob. 340.

Missouri.— Freligh *v.* Ames, 31 Mo. 253.

Nebraska.—Rowland *v.* Shephard, 27 Nebr. 494, 43 N. W. 344.

Texas.— Franks *v.* Williams, 37 Tex. 24; Stachely *v.* Peirce, 28 Tex. 328; Byne *v.* Jackson, 25 Tex. 95; Hunter *v.* Waite, 11 Tex. 85.

See 10 Cent. Dig. tit. "Continuance," § 135.

71. Deming *v.* Patterson, 10 Ind. 251; Borron *v.* Mertens, 14 La. Ann. 306; Barker *v.* Patchin, 56 Mo. 241.

Reasonable time.— A party is not entitled to an adjournment on account of the absence of a witness, unless it is shown that the attendance of the witness can be procured within a reasonable time. Brown *v.* Moran, 65 How. Pr. (N. Y.) 349.

Time asked for.— An affidavit for continuance must show by the facts stated that there is a reasonable probability that the evidence of the absent witness can be procured by the time to which the continuance is asked. Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317.

Time of return of witness.— Where affidavits for a continuance on the ground of the absence of a material witness, a party interested, stated that he was suffering from nervous prostration and was advised to take a trip to Europe, and that he was not physically able before starting to stand a cross-examination; but such affidavits were vague and uncertain as to the length of time that he had been sick, and nothing was stated as to the time he would return, it was held that the continuance was properly refused. Mantonya *v.* Huerter, 35 Ill. App. 27.

72. *Arkansas.*— Burriss *v.* Wise, 2 Ark. 33.

Illinois.— Eames *v.* Hennessy, 22 Ill. 628; Splane *v.* Byrne, 9 Ill. App. 392.

Indiana.— Nixon *v.* Brown, 3 Blackf. 504.

Nebraska.— McCall *v.* Peter, 31 Nebr. 528, 48 N. W. 267; Johnson *v.* Mills, 31 Nebr. 524, 48 N. W. 266.

Texas.— Byne *v.* Jackson, 25 Tex. 95; Hunter *v.* Waite, 11 Tex. 85.

See 10 Cent. Dig. tit. "Continuance," § 135.

Indefinite statements.— Where the affidavit showed that the absent witness had been absent in a western territory over a year, that his exact whereabouts was unknown, and that numerous inquiries had failed to discover him, and, while it is stated that his testimony is expected at the next term, there are no facts alleged from which the court can see that there is any probability thereof, the continuance is properly refused. Bliss *v.* Carlson, 17 Kan. 325.

73. Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129; Macdonnell *v.* De los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792.

Doubt as to securing testimony.— There is no error in refusing a third continuance for the purpose of obtaining testimony which the witness relied upon cannot be compelled to give, and which he would not be likely to give voluntarily, because it would criminate himself, it appearing from the affidavit that such witness probably absconded from the state to avoid a subpœna in the action and is still absent. Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768.

Statements of third parties.— Under Mass. Super. Ct. Rule No. 34, providing that no motion for continuance for want of material testimony will be granted, unless supported by an affidavit stating the name of the witness whose testimony is wanted, and the testi-

showing thus required is nothing more than a probability which must be considered by the court in connection with the circumstances of the case as presented.[74]

(D) *Materiality of Evidence.* The affidavit must allege the materiality of the evidence expected to be proved.[75]

(E) *Applicant's Belief That Matters Intended to Be Shown Are True.* In some jurisdictions it is held that the applicant must state in his affidavit that the facts he expects to prove by the absent witness are true, and that an affidavit which does not contain an allegation to this effect is fatally defective.[76]

(F) *Absence of Other Witnesses or Evidence to the Same Facts.* There must be a further showing in the affidavit that there are no other witnesses or evidence by which the material facts in the case can be proved,[77] and there should be a direct allegation in the affidavit to that effect;[78] but it has been held in some cases

mony he is expected to give, with the grounds of such expectation, an affidavit of a party's attorney that he believed a certain witness if present would give certain material testimony, and that his belief was founded on the statement of a third person, to whom the absent witness had made his statement, is sufficient, without the affidavit of such third person, or the absence thereof being accounted for. Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129.

74. The right of a defendant to a continuance for the absence of a material witness is not impaired by the fact that plaintiff had talked to the witness, and that the witness told him that he did not know anything about the case. Waldrup *v.* Maxwell, 84 Ga. 113, 10 S. E. 597.

Application embracing more than one witness.— The fact that an application for a continuance to obtain the testimony of an absent witness, which is shown to be material, embraced another witness, by whom the applicant stated he expected to prove the same facts, which witness was present and testified on the trial, but who failed to testify to the facts expected, does not warrant the assumption that the facts could not be proved by the absent witness, and does not justify the refusal of the continuance. Jordan *v.* Jordan, 2 Tex. App. Civ. Cas. § 830.

75. Lomax *v.* Holbine, (Nebr. 1902) 90 N. W. 1112; Weston *v.* Proctor, 37 Misc. (N. Y.) 800, 76 N. Y. Suppl. 950. See also Hibbets *v.* Hibbets, 117 Iowa 177, 90 N. W. 613, holding that an affidavit in support of a motion for a continuance on the ground of sickness of the movant, stating merely that he was unable to attend the trial, but not showing that he intended to be a witness or that his presence was otherwise necessary, was insufficient to justify the court in granting a continuance.

76. Fausett *v.* Voss, 12 Ind. 525; Gaines *v.* White, 1 S. D. 424, 47 N. W. 524.

Affidavit held insufficient.— An affidavit in support of a motion for a continuance on the ground of the absence of a material witness, which stated that affiant would prove a certain fact "which is true," but did not state that affiant believed the facts to be true which the absent witness would prove, is defective. Helfrich Saw, etc., Mill Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795.

77. *Colorado.*— Mutzenburg *v.* McGowan, 10 Colo. App. 486, 51 Pac. 523.

Illinois.— Hodges *v.* Nash, 141 Ill. 391, 31 N. E. 151 [*affirming* 43 Ill. App. 638]; Jarvis *v.* Shacklock, 60 Ill. 378; McKichan *v.* McBean, 45 Ill. 228; Eames *v.* Hennessy, 22 Ill. 628.

Iowa.—Avery *v.* Wilson, 26 Iowa 573.

Louisiana.— Mills *v.* Fellows, 30 La. Ann. 824.

Virginia.— Barbour *v.* Melendy, 88 Va. 595, 14 S. E. 326.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Tompkins *v.* Burgess, 2 W. Va. 187.

See 10 Cent. Dig. tit. "Continuance," § 136.

Documentary evidence.— Where a party asks a continuance for the purpose of procuring certain papers for evidence, but does not show that the evidence therein contained cannot be procured some other way, he does not entitle himself to a continuance. Anderson *v.* Citizens' Nat. Bank, (Tex. Sup. 1887) 5 S. W. 503.

Evidence contained in record.— A continuance to procure the testimony of absent witnesses should be refused when there is record evidence of the facts thus sought to be proved. Reynolds *v.* Martin, 55 Ga. 628.

Evidence partly applicable.— An application for a continuance on the ground of the want of a material witness is properly refused where the applicant is unable to state that as to one part of the case the witness would be qualified to testify, and there was, independent of him, proof available as to the other part. Penoyer *v.* Phillips, 10 N. Y. St. 783.

Foreign witness.— In Ten Brocck *v.* Travelers' Ins. Co., 6 N. Y. St. 100, it was held no abuse of discretion to deny an adjournment of a cause on the ground of absence of a foreign witness, where the facts proposed to be proved by him can be abundantly established by other witnesses residing within the jurisdiction.

78. *California.*— Pope *v.* Dalton, 31 Cal. 218; Pierce *v.* Payne, 14 Cal. 419.

Illinois.— West Chicago Park Com'rs *v.* Barber, 62 Ill. App. 108.

that the mere fact that a party has other witnesses who can prove the same circumstances ought not to deprive him of a continuance where the absent witness might have the means of speaking more positively.[79]

(G) *Name and Residence of Absent Witness.* In some jurisdictions the names of the absent witnesses are required to be stated in the application, and this is always the better practice,[80] unless there be circumstances to show that the party, without any fault of his own, was unable to learn the names of such witnesses.[81] The affidavit should also state the residence of the witness,[82] either positively or by way of fair inference.[83]

(H) *Want of Consent of Applicant to Witness' Absence.* An affidavit for continuance on the ground of an absent witness need not state that the witness was not absent by the consent or procurement of the party applying for the continuance.[84]

(I) *Diligence in Attempting to Procure Evidence.* Every application for a continuance must, by express allegations, show that diligence has been used to procure the absent testimony[85] or some excuse for that want of diligence which

Iowa.— Thompson *v.* Lord, 14 Iowa 591; Thompson *v.* Abbott, 11 Iowa 193.

Missouri.— Leabo *v.* Goode, 67 Mo. 126.

New Mexico.— Kent *v.* Favor, 3 N. M. 218, 5 Pac. 470.

Texas.— Stinnett *v.* Rice, 36 Tex. 106.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

See 10 Cent. Dig. tit. "Continuance," § 136.

Expectation of proof.— It is not sufficient to state that he has no other witnesses by whom he expects to prove the same facts. Pope *v.* Dalton, 31 Cal. 218.

Witnesses in attendance.— A statement in an affidavit that there are no other witnesses in attendance by whom the applicant can prove the facts expected to be proved by the absent witness is not sufficient, as the continuance will not be granted unless there are no other witnesses either in attendance or elsewhere. Bartholow *v.* Campbell, 56 Mo. 117; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Witnesses in the state.— So an application which states that the applicant knows of no witness in the state by whom the material facts can be proved is insufficient, as it should show that he does know of any witness by whom such facts can be proved. Thompson *v.* Lord, 14 Iowa 591.

79. Hewlett *v.* Henderson, 9 Rob. (La.) 379; Harrison *v.* Waymouth, 3 Rob. (La.) 340. In Epsy *v.* State Bank, 5 Ind. 274, the defendant in a suit brought by a bank applied for a continuance, that he might obtain the testimony of an absent witness, not an officer of the bank, that part of the demand had been paid. It was held that it was not a sufficient objection to the application that if the payment had been made it would be known by the officers of the bank, and that they might be called.

80. *Illinois.*— Ilett *v.* Collins, 102 Ill. 402; Keith *v.* Knoche, 43 Ill. App. 161.

Kentucky.—McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913; Simmons *v.* Louisville, etc., R. Co., 18 S. W. 1024, 13 Ky. L. Rep. 941.

Louisiana.— Huff *v.* Freeman, 15 La. Ann. 240.

Massachusetts.— Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129.

Nebraska.— Life Ins. Clearing Co. *v.* Altschuler, 53 Nebr. 481, 73 N. W. 942.

New York.— Spangehl *v.* Spangehl, 39 N. Y. App. Div. 5, 57 N. Y. Suppl. 7.

Texas.— Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740; Parker *v.* McKelvain, 17 Tex. 157; Hunter *v.* Waite, 11 Tex. 85.

United States.— Smith *v.* Barker, 22 Fed. Cas. No. 13,012, 3 Day (Conn.) 280, Brunn. Col. Cas. 52.

See 10 Cent. Dig. tit. "Continuance," § 137.

81. Smith *v.* Barker, 22 Fed. Cas. No. 13,012, 3 Day (Conn.) 280, Brunn. Col. Cas. 52.

82. Ilett *v.* Collins, 102 Ill. 402; Parker *v.* McKelvaine, 17 Tex. 157; Hunter *v.* Waite, 11 Tex. 85. Where an affidavit for a continuance on the ground of the removal and absence of a material witness alleged that "affiant has made diligent inquiry to ascertain the place to which he has removed, by asking persons who were supposed to know, and by writing to witness at points where it was supposed he had gone," it was held that the affidavit was not sufficiently specific in stating names of places and persons, and that the motion for continuance was properly overruled. Ingalls *v.* Nobles, 14 Nebr. 272, 15 N. W. 351.

83. Lee *v.* Quirk, 20 Ill. 392, 395, where it is said: "This is indispensable, as connected with his identification, and diligence in obtaining his attendance."

84. Kellyville Coal Co. *v.* Hill, 94 Ill. App. 89.

85. *Arkansas.*— Burris *v.* Wise, 2 Ark. 33.

California.— Kern Valley Bank *v.* Chester, 55 Cal. 49; Jacks *v.* Buell, 47 Cal. 162; Leszinsky *v.* White, 45 Cal. 278.

Colorado.— Litchfield *v.* Daniels, 1 Colo. 268; Hart *v.* Greene, (App. 1901) 65 Pac. 344.

Florida.— Green *v.* King, 17 Fla. 452.

the law requires.[86] It is not enough to allege that diligence has been used, but the facts constituting such diligence must be set out in order that the court may judge of their sufficiency.[87] The application should show that the witness had

Illinois.— Anheuser-Busch Brewing Assoc. *v.* Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575 [*affirming* 29 Ill. App. 316]; Ilett *v.* Collins, 102 Ill. 402; Freeport *v.* Isbell, 93 Ill. 381; Meyers *v.* Andrews, 87 Ill. 433; Grundies *v.* Bliss, 86 Ill. 132; Hahn *v.* Huber, 83 Ill. 243; Walker *v.* Douglas, 70 Ill. 445; Freeman *v.* Tinsley, 50 Ill. 497; Eames *v.* Hennessy, 22 Ill. 628; Ault *v.* Rawson, 14 Ill. 484; Ide *v.* Gilbert, 62 Ill. App. 524; St. Louis, etc., R. Co. *v.* Olive, 40 Ill. App. 82; Johnson *v.* Glover, 19 Ill. App. 585; Splane *v.* Byrne, 9 Ill. App. 392.

Indiana.— Burkhart *v.* Merry, 88 Ind. 438; Chambers *v.* Butcher, 82 Ind. 508; Osborn *v.* Storms, 65 Ind. 321; Benson *v.* McFadden, 50 Ind. 431; Ward *v.* Colyhan, 30 Ind. 395; Mugg *v.* Graves, 22 Ind. 236; Pence *v.* Christman, 15 Ind. 257.

Iowa.— Hibbets *v.* Hibbets, 117 Iowa 177, 90 N. W. 613; Fiske *v.* Berryhill, 10 Iowa 203; Thurston *v.* Cavenor, 8 Iowa 155; Adams *v.* Peck, 4 Iowa 551; Widner *v.* Hunt, 4 Iowa 355; Brady *v.* Malone, 4 Iowa 146.

Kansas.— Struthers *v.* Fuller, 45 Kan. 735, 26 Pac. 471; Kilmer *v.* St. Louis, etc., R. Co., 37 Kan. 84, 14 Pac. 465; Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Kentucky.— Davis *v.* Gray, 3 Litt. 450; McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Louisiana.— Schneider *v.* Ætna L. Ins. Co., 32 La. Ann. 1049, 36 Am. Rep. 276; Vaiden *v.* Abney, 7 La. Ann. 575.

Minnesota.— Mackubin *v.* Clarkson, 5 Minn. 247; Washington County *v.* McCoy, 1 Minn. 100.

Missouri.— Cline *v.* Brainard, 28 Mo. 341; Gibson *v.* German-American Town Mut. Ins. Co., 85 Mo. App. 41.

New York.— Weston *v.* Proctor, 37 Misc. 800, 76 N. Y. Suppl. 950; Noye Mfg. Co. *v.* Raymond, 8 Misc. 353, 28 N. Y. Suppl. 693, 59 N. Y. St. 589.

Texas.— Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035 [*reversing* (Civ. App. 1895) 30 S. W. 686]; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 1118; Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, 9 S. W. 437; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599; Ft. Worth City Nat. Bank *v.* Stout, 61 Tex. 567; Green *v.* Dunman, 35 Tex. 175; Flournoy *v.* Marx, 33 Tex. 786; McMahan *v.* Busby, 29 Tex. 191; Baldessore *v.* Stephanes, 27 Tex. 455; Coody *v.* Walker, 20 Tex. 205; Williams *v.* Edwards, 15 Tex. 41; Johnson *v.* Evans, 15 Tex. 39; Mays *v.* Lewis, 4 Tex. 38; Texas Midland R. Co. *v.* Crowder, 25 Tex. Civ. App. 536, 64 S. W. 90; International, etc., R. Co. *v.* Fisher, (Civ. App. 1894) 28 S. W. 398; Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982; Gulf, etc., R. Co. *v.* Flake, 1 Tex. App. Civ. Cas. § 253; Pointer *v.* Flash, 2 Tex. Unrep. Cas. 742.

West Virginia.— Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.— Andrew *v.* Elderkin, 24 Wis. 531.

United States.— Hyde *v.* Liverse, 12 Fed. Cas. No. 6,972, 1 Cranch C. C. 408.

See 10 Cent. Dig. tit. "Continuance," § 133.

When a commission to take testimony has not been returned the affidavit of the fact must show the exercise of due diligence, to have the same executed and returned. McCarty *v.* McCarty, 19 La. 296; Rogers *v.* Davis, 18 La. 50; Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 228, 22 Am. Dec. 129; Silva *v.* Lafaye, 2 La. 198; Richardson *v.* Debuys, 4 Mart. N. S. 127.

86. Ilett *v.* Collins, 102 Ill. 402; Adams *v.* Peck, 4 Iowa 551; Widner *v.* Hunt, 4 Iowa 355. And see *supra*, IV, S, 13, o.

87. *Arkansas.*— Burriss *v.* Wise, 2 Ark. 33.

Illinois.— St. Louis, etc., R. Co. *v.* Olive, 40 Ill. App. 82.

Indiana.— Chambers *v.* Butcher, 82 Ind. 508; Pence *v.* Christman, 15 Ind. 257.

Iowa.— Thurston *v.* Cavenor, 8 Iowa 155; Brady *v.* Malone, 4 Iowa 146.

Kansas.— Struthers *v.* Fuller, 45 Kan. 735, 26 Pac. 471; Kilmer *v.* St. Louis, etc., Co., 37 Kan. 84, 14 Pac. 465; Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Minnesota.— Washington County *v.* McCoy, 1 Minn. 100.

New York.— Noye Mfg. Co. *v.* Raymond, 8 Misc. 353, 28 N. Y. Suppl. 693, 59 N. Y. St. 589.

Texas.— Flournoy *v.* Marx, 33 Tex. 786; McMahan *v.* Busby, 29 Tex. 191; Johnson *v.* Evans, 15 Tex. 39; Mays *v.* Lewis, 4 Tex. 39; Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Contra.— Higgs *v.* Heugh, 12 Fed. Cas. No. 6,472, 3 Cranch 142.

See 10 Cent. Dig. tit. "Continuance," § 133.

Discretion of court.— A failure by an applicant for a continuance for want of testimony to state, under the provisions of Tex. Rev. Stat. art. 1277, "that he has used due diligence to procure the same, stating such diligence," leaves the matter of continuance to the discretion of the court. St. Louis, etc., Co. *v.* Woolum, 84 Tex. 570, 19 S. W. 782.

Information and belief.— An affidavit for the continuance of a cause on the ground of the absence of a witness, in which the affiant speaks only from information and belief, and which does not show what steps have been taken to ascertain the whereabouts of such witness, is not sufficient. McKinley *v.* Shank, 24 Ind. 258.

When diligence began.—An affidavit in support of a motion for continuance does not make a sufficient showing as to diligence, in stating that the movant has made diligent efforts to ascertain the names of the witnesses, where it fails to show when the diligence began, or that he caused search to be

reasonable notice of the time of trial by the service of a subpœna,[88] and the date of such service should be given in order that the court may judge of the diligence employed.[89]

4. Amendment of Affidavits. The decisions respecting amendments of affidavits for continuances are not altogether harmonious. Some decisions hold that after the court has passed on an application for a continuance, the affidavit in support of the application cannot be amended;[90] in other decisions it is held that it is not error to refuse to permit such amendment,[91] and that the discretion of the court in refusing to permit an amendment is not subject to revision.[92] In one case it was held that it was discretionary with the court whether to permit an amendment by way of explanation, but that no new facts could be inserted.[93] Oral explanations of an affidavit should always be denied.[94]

5. Supplemental or Additional Affidavits. According to some decisions supplemental affidavits will in no event be received on a motion for continuance,[95] and others hold that the decision of the court in overruling an application for leave to file further and additional affidavits in support of a motion for continuance is not reviewable.[96] So some decisions hold that a second application based on the same state of facts is not permissible, since this would in effect allow an affidavit for a continuance to be amended.[97] Again it has been held that the refusal of such an application is proper; that it would be a dangerous practice to permit an application for a continuance to be repeated upon a new affidavit upon the same state of facts.[98]

made for a particular witness. In such case due diligence requires immediate action. Freeport *v.* Isbell, 93 Ill. 381.

88. Conner *v.* Sampson, 22 Tex. 20.

89. Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035 [*reversing* (Civ. App. 1895) 30 S. W. 686]; Brown *v.* Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599; Williams *v.* Edwards, 15 Tex. 41; Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. 736.

Date of subpœna.— In an application for continuance on the ground of absent witnesses, the date of the subpœna issued for him should be shown, so as to enable the appellate court to determine the correctness of the ruling, which depends on whether due diligence was shown in attempting to procure his attendance. Gulf, etc., Co. *v.* Flake, 1 Tex. App. Civ. Cas. § 253.

It is not sufficient to show that a subpœna was issued a day or two before the trial, unless it is also shown that the witness resides in the county or that the subpœna was served. Ellis *v.* Wiley, 17 Tex. 134.

90. Singleton *v.* Carr, 1 Bibb (Ky.) 554; Smally *v.* Anderson, 4 T. B. Mon. (Ky.) 367. See also Northwestern, etc., Aid Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98; Stockley *v.* Goodwin, 78 Ill. 127 (where the court said that the amendment of an affidavit for a continuance had never been permitted by any court of which it had knowledge).

91. Pence *v.* Christman, 15 Ind. 257; Widner *v.* Hunt, 4 Iowa 355.

The practice of suffering affidavits for continuance to be amended or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which may be productive of much evil, and which the court should permit with great caution. It is within the discretion of the trial court to refuse leave to amend an affidavit for continuance adjudged insufficient, or leave to file a new affidavit, unless for the purpose of presenting facts which have transpired or come to the knowledge of the party since the filing of the first. Widner *v.* Hunt, 4 Iowa 355.

92. Green *v.* Dunman, 35 Tex. 175.

93. Lucas *v.* Sevier, 1 Overt. (Tenn.) 105.

94. Singleton *v.* Carr, 1 Bibb (Ky.) 554; Smith *v.* Barker, 22 Fed. Cas. No. 13,012, 3 Day (Conn.) 312, Brunn. Col. Cas. 52.

95. Norwood *v.* Sutton, 18 Fed. Cas. No. 10,365, 1 Cranch C. C. 327; Union Bank *v.* Riggs, 24 Fed. Cas. No. 14,361, 2 Cranch C. C. 204.

96. McBain *v.* Enloe, 13 Ill. 76; Steward *v.* Miller, 17 Ill. App. 660.

97. Northwestern, etc., Aid Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98; Peru Coal Co. *v.* Merrick, 79 Ill. 112; Stockley *v.* Goodwin, 78 Ill. 127; Huff *v.* Freeman, 15 La. Ann. 240.

98. Garrett *v.* Garrett, 12 Ind. 407. See also Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236. In this latter case a second affidavit for a continuance at the same term for the same general reason: namely, the absence of witnesses — the first having been overruled — but held bad because it did not show a reasonable excuse for the failure to embrace all the reasons for the continuance in the first application.

"Affidavits filed subsequent to the ruling and trial can not be considered, for the question is, was the ruling right upon the affidavits presented to the court prior to the trial? Affidavits filed after the trial might, perhaps, be useful and influential upon a motion for a new trial or the like, but they certainly can not be given such a retrospective

VI. THE HEARING.

A. In General. Every application for a continuance should be heard by the court and determined according to its circumstances.[99] While it is the duty of the court to prevent unnecessary delay in the trial of causes, yet it should not prejudice the substantial rights of parties by forcing them to trial when they cannot reasonably be expected to do full and complete justice to their case.[1] It has been held not reversible error for the court to consult the convenience of jurors on an application for an adjournment for illness of counsel, where the court assumed the responsibility of deciding the motion.[2]

B. Discretion of Court. According to the great weight of authority, the granting or refusing of a motion for continuance is in the sound discretion of the court.[3] It is only in cases where there has been a very capricious exercise of

effect as to make an antecedent ruling erroneous." McBride *v.* Stradley, 103 Ind. 465, 467, 2 N. E. 358.

99. Roberts *v.* Moore, 27 Ga. 411.

Possible existence of facts.—Where a party makes out a good *prima facie* case for a continuance on account of the absence of a material witness, the court is not justified in refusing the continuance because it may imagine the possible existence of facts which if shown would have been sufficient in avoidance of the case made by the party moving. Beatty *v.* Sylvester, 3 Nev. 228.

1. *Georgia.*— Wilkes *v.* Phillips, 37 Ga. 588; Vanduzer *v.* McMillan, 37 Ga. 299; Hooper *v.* Memphis Branch R., etc., Co., 19 Ga. 85.

Kentucky.— Simms *v.* Alcorn, 1 Bibb 348.

New York.—Livingston *v.* Delafield, 1 Cai. 6.

Pennsylvania.— Bowen *v.* Douglass, 2 Dall. 44, 1 L. ed. 282.

South Carolina.— Farr *v.* McDowell, 1 Bay 31.

See 10 Cent. Dig. tit. "Continuance," § 142 *et seq.*

Diligence not positively determined.—When the applicant's diligence cannot be positively determined, the court should rather grant the continuance. Its allowance produces delay, but its denial may cause irreparable injury. Lee *v.* Andrews, 10 Mart. (La.) 682; Lecesne *v.* Cottin, 9 Mart. (La.) 454.

Frequency of terms.— In a probate court sitting monthly a continuance should be granted more readily than in a district court sitting semiannually. Kimball *v.* Dunn, 12 La. 445.

2. McCready *v.* Lindenborn, 165 N. Y. 630, 59 N. E. 1125 [*affirming* 37 N. Y. App. Div. 425, 56 N. Y. Suppl. 54].

3. *Alabama.*—Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Campbell *v.* White, 77 Ala. 397; Humes *v.* O'Bryan, 74 Ala. 64; Trammell *v.* Vane, 62 Ala. 301; Dudley *v.* Witter, 46 Ala. 664; *Ex p.* South, etc., Alabama R. Co., 44 Ala. 654; *Ex p.* Hunter, 39 Ala. 560; Planters', etc., Bank *v.* Walker, 7 Ala. 926; Planters', etc., Bank *v.* Walker, 5 Ala. 770; Givens *v.* Robbins, 5 Ala. 676; Evans *v.* Bolling, 5 Ala. 550.

Arkansas.— Supreme Lodge K. of P. *v.* Robbins, 70 Ark. 364, 67 S. W. 758; Watts *v.* Cohn, 40 Ark. 114; Winter *v.* Bandel, 30 Ark. 362; Ware *v.* Keeley, 22 Ark. 441; Stillwell *v.* Badgett, 22 Ark. 164; McDonald *v.* Smith, 21 Ark. 460; Hensley *v.* Tucker, 10 Ark. 527.

California.— Baumberger *v.* Arff, 96 Cal. 261, 31 Pac. 53; Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116; Kneebone *v.* Kneebone, 83 Cal. 645, 23 Pac. 1031; Griffin *v.* Polhemus, 20 Cal. 180 [*following* Musgrove *v.* Perkins, 9 Cal. 212]; Pilot Rock Creek Canal Co. *v.* Chapman, 11 Cal. 161; Frank *v.* Brady, 8 Cal. 47.

Colorado.— Michael *v.* Mills, 22 Colo. 439, 45 Pac. 429; Brown *v.* Nachtrieb, 6 Colo. 517; Hamill *v.* Hall, 4 Colo. App. 290, 35 Pac. 927.

Delaware.—Dulany *v.* Boston, 2 Harr. 350; Dickson *v.* Lewis, 2 Harr. 289.

Florida.— Livingston *v.* Cooper, 22 Fla. 292 [*following* McNealy *v.* Roulhac, 17 Fla. 198]; Ahren *v.* Willis, 6 Fla. 359.

Georgia.— Matthews *v.* Bates, 93 Ga. 317, 20 S. E. 320; Southern Bell Telephone Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757 [*following* Mitchell *v.* Southwestern R. Co., 75 Ga. 398]; Maynard *v.* Cleveland, 76 Ga. 52; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; Clay *v.* Barlow, 73 Ga. 787; Burge *v.* Hamilton, 72 Ga. 568; Campbell *v.* Campbell, 67 Ga. 423; Turner *v.* Tubersing, 67 Ga. 161; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Bowling *v.* Whatley, 53 Ga. 24; Hill *v.* Clark, 51 Ga. 122; Gavan *v.* Ellsworth, 45 Ga. 283; Roe *v.* Doe, 42 Ga. 403; Walker *v.* Mitchell, 41 Ga. 102; Long *v.* McDonald, 39 Ga. 186; Richardson *v.* Harvey, 37 Ga. 224; Lucas *v.* Carver, 32 Ga. 262.

Idaho.—Reynolds *v.* Corbus, (1901) 63 Pac. 884; Lillienthal *v.* Anderson, 1 Ida. 673.

Illinois.— Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634; Pennsylvania Co. *v.* Rudel, 100 Ill. 603; Lewis *v.* Lanphere, 79 Ill. 187; Farmer *v.* Farmer, 72 Ill. 32; Brooks *v.* McKinney, 5 Ill. 309; Packer *v.* Wetherell, 44 Ill. App. 95; Harris *v.* Rose, 26 Ill. App. 237; McNulta, etc., Benev., etc., Assoc. *v.* Prim, 19 Ill. App. 224.

power or a very flagrant case of injustice that the appellate court will inter-

Indiana.—Logansport *v.* Dykeman, 116 Ind. 15, 17 N. E. 587; Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906; Fisse *v.* Kalzentine, 93 Ind. 490 [*following* Deming *v.* Ferry, 8 Ind. 418]; Burkhart *v.* Merry, 88 Ind. 438; Whitehall *v.* Lane, 61 Ind. 93; Shurtz *v.* Woolsey, 18 Ind. 435; Vaublaricum *v.* Ward, 1 Blackf. 50; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427.

Iowa.— Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524; Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590; Voorhees *v.* Chicago, etc., R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. St. Rep. 823; Finnerty *v.* Coughlin, 53 Iowa 751, 5 N. W. 704; Williams *v.* Niagara F. Ins. Co., 50 Iowa 561; Walker *v.* Scofield, 39 Iowa 666; Harrison *v.* Charlton, 37 Iowa 134; Boone *v.* Mitchell, 33 Iowa 45; Snediker *v.* Poorhaugh, 29 Iowa 488; Greither *v.* Alexander, 15 Iowa 470; Cole *v.* Strafford, 12 Iowa 345; Childs *v.* Heaton, 11 Iowa 271; Gaylord *v.* Byers, 6 Iowa 557; Purington *v.* Frank, 2 Iowa 565.

Kansas.— Gurney *v.* Steffens, 56 Kan. 295, 43 Pac. 241; Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921; Chicago, etc., R. Co. *v.* Wilkinson, 42 Kan. 337, 22 Pac. 412; Westheimer *v.* Cooper, 40 Kan. 370, 19 Pac. 852; Harlow *v.* Warren, 38 Kan. 480, 17 Pac. 159; Parsons Water Co. *v.* Knapp, 33 Kan. 752, 7 Pac. 568; Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81; St. Louis, etc., Co. *v.* Ransom, 29 Kan. 298; Moon *v.* Helfer, 25 Kan. 139; Jaquith *v.* Davidson, 21 Kan. 341; Bliss *v.* Carlson, 17 Kan. 325; Payne *v.* Kansas City Nat. Bank, 16 Kan. 147; Swenson *v.* Aultman, 14 Kan. 273; Davis *v.* Wilson, 11 Kan. 74; Hottenstein *v.* Conrad, 9 Kan. 435; Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Missouri Pac. R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259; Atcheson, etc., R. Co. *v.* O'Melia, 1 Kan. App. 374, 41 Pac. 437; Paulucci *v.* Verity, 1 Kan. App. 121, 40 Pac. 927.

Kentucky.— McClurg *v.* Ingleheart, (1895) 33 S. W. 80; McCracken *v.* Church, 1 A. K. Marsh. 273; Lillard *v.* Whittaker, 3 Bibb 92.

Louisiana.—State *v.* Monceaux, 48 La. Ann. 100, 18 So. 896; Cameron *v.* Lane, 36 La. Ann. 716; Moncheux *v.* Mistrot, 22 La. Ann. 421; Rist *v.* Abbott, 19 La. Ann. 268; Cobb *v.* Franks, 6 La. Ann. 769; McCarty *v.* McCarty, 19 La. 296; Lizardi *v.* Arthur, 16 La. 577.

Maine.— Casco Nat. Bank *v.* Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319; Schwartz *v.* Drinkwater, 70 Me. 409.

Maryland.— Adams' Express Co. *v.* Trego, 35 Md. 47.

Massachusetts.—Pickering *v.* Reynolds, 111 Mass. 83; Barker *v.* Haskell, 9 Cush. 218.

Minnesota.— Adamek *v.* Piano Mfg. Co., 64 Minn. 304, 66 N. W. 981; West *v.* Hennessey, 63 Minn. 378, 65 N. W. 639; Lowenstein *v.* Greve, 50 Minn. 383, 52 N. W. 964.

Mississippi.— Soloman *v.* State, 71 Miss. 567, 14 So. 461; Franks *v.* Wanzer, 25 Miss. 121; Marshall *v.* Fulgham, 4 How. 216.

Missouri.— St. Louis, etc., Co. *v.* Halladay, 131 Mo. 440, 33 S. W. 49; Nolan *v.* Johns, 126 Mo. 159, 28 S. W. 492; Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860; Farmers', etc., Bank *v.* Williamson, 61 Mo. 259; Lackey *v.* Lubke, 36 Mo. 115; Owens *v.* Tinsley, 21 Mo. 423; Johnson *v.* Strader, 3 Mo. 359; Scogin *v.* Hudspeth, 3 Mo. 123; Riggs *v.* Fenton, 3 Mo. 28; Alt *v.* Grosclose, 61 Mo. App. 409; Keltenbaugh *v.* St. Louis, etc., Co., 34 Mo. App. 147; Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 629; Simpson *v.* Watson, 15 Mo. App. 425 [*overruled* on another point in Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052].

Montana.—Wormall *v.* Reims, 1 Mont. 627.

Nebraska.— Burris *v.* Court, 48 Nebr. 179, 66 N. W. 1131; Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; Kansas City, etc., R. Co. *v.* Conlee, 43 Nebr. 121, 61 N. W. 111; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Johnson *v.* Dinsmore, 11 Nebr. 391, 9 N. W. 558.

New Hampshire.— Folsom *v.* Folsom, 55 N. H. 78; Elliott *v.* Aiken, 45 N. H. 30; Riddle *v.* Gage, 37 N. H. 519, 75 Am. Dec. 151.

New Jersey.— Saxton *v.* Fuller, 20 N. J. L. 61; Ogden *v.* Gibbons, 5 N. J. L. 518; Smith *v.* Burnet, 17 N. J. Eq. 40.

New York.— People *v.* Northern R. Co., 53 Barb. 98; Jourdan *v.* Healey, 19 N. Y. Suppl. 240, 46 N. Y. St. 198, 22 N. Y. Civ. Proc. 157; Schaffer *v.* Schaffer, 5 N. Y. Suppl. 544, 24 N. Y. St. 645; Ten Broeck *v.* Traveler's Ins. Co., 6 N. Y. St. 100; Leggett *v.* Boyd, 3 Wend. 376.

North Carolina.— Banks *v.* Gay Mfg. Co., 108 N. C. 282, 12 S. E. 741; Stratford *v.* Stratford, 92 N. C. 297; Johnson *v.* Maxwell, 87 N. C. 18; McCurry *v.* McCurry, 82 N. C. 296; Austin *v.* Clarke, 70 N. C. 458; Foust *v.* Trice, 53 N. C. 490; Armstrong *v.* Wright, 8 N. C. 93.

Oklahoma.— McMahan *v.* Norick, (1902) 69 Pac. 1047.

Pennsylvania.— De Grote *v.* De Grote, 175 Pa. St. 50, 34 Atl. 312; Fritz *v.* Church, 3 Phila. 236, 15 Leg. Int. 341; McDermot *v.* Dearnley, 2 Walk. 386.

South Carolina.—Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605; Westfield *v.* Westfield, 19 S. C. 85; McDaniel *v.* Stokes, 19 S. C. 60; Symmes *v.* Symmes, 18 S. C. 601; Wardlaw *v.* Hammond, 9 Rich. 454; Cook *v.* Cottrell, 4 Strobh. 61; Mayrant *v.* Guigman, 3 Strobh. 112; Sheppard *v.* Lark, 2 Bailey 576; Hunter *v.* Glenn, 1 Bailey 542; McMahon *v.* Murphy, 1 Bailey 535; Lyles *v.* Robinson, 1 Bailey 25; Price *v.* Justrobe, Harp. 111; Farrand *v.* Bouchell, Harp. 83.

Tennessee.—Rexford *v.* Pulley, 4 Baxt. 364; Berger *v.* Harrison, 1 Overt. 483.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 18 S. W. 121; Texacana, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467; Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367; Burrows *v.* Brown, 59 Tex. 457; Hunt *v.* Makemson, 56 Tex. 9; Wiggins *v.* Fleishel, 50 Tex. 57;

vene.[4] In a number of jurisdictions, however, a limitation of the general doctrine is recognized.[5]

C. Counter-Affidavits and Other Evidence. Counter-affidavits cannot as a general rule be used in evidence in opposition to the original affidavit introduced in support of the motion;[6] but an exception, it has been held, obtains where a party has been granted repeated continuances, or his good faith is questionable.[7] So where, on motion for continuance because of an absent witness, the

Price *v.* Lauve, 49 Tex. 74; Peck *v.* Moody, 33 Tex. 84; McMahon *v.* Busby, 29 Tex. 191; Meuley *v.* Zeigler, 23 Tex. 88; Hipp *v.* Huchett, 4 Tex. 20; Ward *v.* Boon, Dall. 561; Fulton *v.* Craddock, Dall. 458; Gulf, etc., R. Co. *v.* Rowland, (Civ. App. 1896) 35 S. W. 31; Massie *v.* Meeks, (Civ. App. 1894) 28 S. W. 44; French *v.* Grosheck, 8 Tex. Civ. App. 19, 27 S. W. 43; Dempsey *v.* Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220; Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517.

Utah.— Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253; Almy *v.* Ness, 2 Utah 223.

Virginia.— Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504; Myers *v.* Trice, 86 Va. 835, 11 S. E. 428; Travelyan *v.* Lofft, 83 Va. 141, 13 S. E. 901; Carter *v.* Wharton, 82 Va. 264, 22 S. E. 504; Kiesee *v.* Borden Grange Bank, 77 Va. 129; Harman *v.* Howe, 27 Gratt. 676; Fiott *v.* Com., 12 Gratt. 564; Syme *v.* Montague, 4 Hen. & M. 180; Hook *v.* Nanny, 4 Hen. & M. 157 note.

Washington.— Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385; Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

West Virginia.— Marmet County *v.* Archibald, 37 W. Va. 778, 17 S. E. 299; Buster *v.* Holland, 27 W. Va. 510; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Davis *v.* Walker, 7 W. Va. 447.

Wisconsin.— Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695; Gear *v.* Shaw, 1 Pinn. 608.

Wyoming.— Kearney Stone Works *v.* McPherson, 5 Wyo. 178, 38 Pac. 920.

United States.—McFaul *v.* Ramsey, 20 How. 523, 15 L. ed. 1010; Thompson *v.* Shelden, 20 How. 194, 15 L. ed. 1001; Barrow *v.* Hill, 13 How. 54, 14 L. ed. 48; Simms *v.* Hundley, 13 How. 1, 12 L. ed. 319; Hunter *v.* Fairfax, 3 Dall. 305, 1 L. ed. 613; Woods *v.* Young, 4 Cranch 237, 2 L. ed. 607; Richmond R., etc., Co. *v.* Dick, 52 Fed. 379, 3 C. C. A. 149; Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, 1 Hempst. 265.

See 10 Cent. Dig. tit. "Continuance," § 17.

4. Watts *v.* Cohn, 40 Ark. 114. See also cases cited *supra*, note 3.

5. **In Illinois**, where the affidavit for continuance is in strict compliance with the statute, the court is bound to grant a continuance and can exercise no discretion in the matter. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; Wicker *v.* Boynton, 83 Ill. 545; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.

In Mississippi it has been held that a continuance of a cause under the statute regulating the practice in circuit courts to the term after the party defendant is brought into court is a matter of right which he may demand. The court has no discretion to refuse a continuance. Maury *v.* Commercial Bank, 5 Sm. & M. (Miss.) 41.

In Texas it has been repeatedly held when on a first or second application for a continuance, the affidavit is in strict compliance with the statute, the court has no discretion in the matter but must continue the cause. Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Cleveland *v.* Cole, 65 Tex. 402; Price *v.* Lauve, 49 Tex. 74; Chilson *v.* Reeves, 29 Tex. 275; McMahan *v.* Busby, 29 Tex. 191; Prewitt *v.* Everett, 10 Tex. 283; Smith *v.* Bates, (Civ. App. 1894) 27 S. W. 1044. Where the affidavit does not follow the statute, as when it does not show diligence, but alleges an excuse for not using it, or where some other equitable consideration not embraced in the terms of the statute is relied on, then the application is addressed to the sound discretion of the court, to be granted or not, according to the intrinsic merit of the application. Chilson *v.* Reeves, 29 Tex. 275 [*citing* Byne *v.* Jackson, 25 Tex. 95].

6. *Illinois.*— Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Wick *v.* Weber, 64 Ill. 167; Waarich *v.* Winter, 33 Ill. App. 36.

Indiana.— McBride *v.* Stradley, 103 Ind. 465, 2 N. E. 358; Eslinger *v.* East, 100 Ind. 434; Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236; Linville *v.* Golding, 11 Ind. 374.

Kentucky.—McClurg *v.* Ingleheart, 33 S. W. 80, 17 Ky. L. Rep. 913.

Louisiana.— Maher *v.* Pulley, 8 La. 89.

Nebraska.— Barton *v.* McKay, 36 Nebr. 632, 54 N. W. 968.

Wisconsin.— Davis, etc., Bldg., etc., Co. *v.* Riverside Butter, etc., Co., 84 Wis. 262, 54 N. W. 506.

United States.— Manning *v.* Jamesson, 16 Fed. Cas. No. 9,045, 1 Cranch C. C. 285.

See 10 Cent. Dig. tit. "Continuance," § 141.

Cannot deny materiality of evidence.— After an affidavit in support of a motion for the continuance of a cause on the ground of the absence of the material witness has been made, the opposite party may make a counter-affidavit stating any circumstances that render it impossible that the evidence of the witness can be obtained within a reasonable time, but such counter-affidavit should not deny the materiality of the evidence. Anonymous, 1 Fed. Cas. No. 434, 3 Day (Conn.) 308, Brunn. Col. Cas. 74.

7. Maher *v.* Pulley, 8 La. 89; Ogden *v.* Payne, 5 Cow. (N. Y.) 15; Bryce *v.* Jones, 38 Tex. 205 [*following* Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 660].

statements of the witness made in writing are admitted as his evidence, if present, it is competent to contradict them by an affidavit made by such witness at another time and place, when at the time of the hearing on the motion for continuance opposing counsel went to trial with the understanding that he could contradict the statement after stating that he would do so in that way.[8] Since the decision of the question of continuances is much within the discretion of the trial court, such court in passing upon the motion is not always confined entirely to the statements made in the affidavit;[9] it may, when occasion requires, insist upon other evidence in addition to the affidavit,[10] or inquire into the pleadings on file to see if a postponement is really in the interest of justice.[11] It may also take into consideration facts which are within its judicial knowledge concerning the condition of the country and the means of communication, in determining whether due diligence has been used in procuring absent testimony.[12] Although as above stated counter-affidavits and evidence cannot as a general rule be received, yet where such evidence has been received, it is not error that will constitute ground for a reversal, where independent of the evidence adduced the application should have been denied,[13] or where it appears that the court took no action upon it.[14]

VII. THE ORDER.

A. Entry. There is no absolute necessity that an order of continuance be entered in the cause;[15] a cause undisposed of will go to the succeeding term, although no formal order of continuance is entered;[16] and it has been held that

8. Hutmacher *v.* Charleston Consol. R., etc., Co., 63 S. C. 123, 40 S. E. 1029.

9. Black *v.* Appolonio, 1 Mont. 342.

Oral statements of counsel in opposition to a motion for continuance, if not objected to by the applicant for not being in the form of an affidavit, should be considered as evidence in determining the question of continuance. Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251.

10. Cushenberry *v.* McMurray, 27 Kan. 328.

Examination under oath.— A party seeking a continuance upon the ground of a material witness should state in his affidavit, fully and frankly, if he knows them, all the material facts which the witness will prove — as well those which are unfavorable as those which are in his favor; and if the court suspect that this has not been done the party should be examined under oath touching the matter. Dean *v.* Turner, 31 Md. 52. So the court may examine a party as to what he expects to prove by the absent witness. Harman *v.* Howe, 27 Gratt. (Va.) 676; Harris *v.* Harris, 2 Leigh (Va.) 584; Riddle *v.* McGinnis, 22 W. Va. 253.

11. Douglass *v.* Neil, 37 Tex. 528.

Depositions on file.— The court in considering a motion may hear depositions on file to enable him to determine the materiality of the absent evidence. Walt *v.* Walsh, 10 Heisk. (Tenn.) 314.

12. Black *v.* Appolonio, 1 Mont. 342; Park *v.* Larkin, 1 Overt. (Tenn.) 17. To a bill of exceptions to the refusal of a continuance on account of the absence of a witness, the judge appended a statement that witness was a merchant in business within six blocks of the court-house, and that his presence could have been had, if desired by the party, that it appeared on the trial that he could not have had any knowledge of the subject-matter at the time the cause of action arose, and that the motion for a new trial sets forth no facts that could have been proven by the witness. Under such circumstances it was held that this did not show any reason to deprive the party of the privilege of having him into court, nor that his attendance could have been procured at the trial, and the refusal of the continuance was erroneous. Corsicana *v.* Kerr, 75 Tex. 207, 12 S. W. 982.

13. Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Waarich *v.* Winter, 33 Ill. App. 36.

14. Wick *v.* Weber, 64 Ill. 167.

15. Horn *v.* Excelsior Springs Co., 52 Mo. App. 548; Johnston *v.* Ditty, 7 Yerg. (Tenn.) 85. And see State *v.* Moore, 57 Mo. App. 662.

Holding a cause under advisement beyond the term is a continuance without a formal order to that effect. Mayor *v.* Yocum, 15 Mo. App. 579.

The entry that referees are summoned for a particular day is a sufficient entry of the adjournment of the cause to that day, it appearing that the defendant had notice. Jeans *v.* Du Pont, 2 Harr. (Del.) 313.

16. The Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306; Horn *v.* Excelsior Springs Co., 52 Mo. App. 548; Johnston *v.* Ditty, 7 Yerg. (Tenn.) 85.

Effect of filing pleadings.— The fact that an affidavit for a continuance appears of record to have been filed does not, in the absence of an entry to that effect, show that the cause has been once continued on affidavit. Prewitt *v.* Everett, 10 Tex. 283. So an order that a motion for a continuance on the ground that an amended answer has been filed after service of the notice of trial be denied, and

a continuance relating back may be entered in a cause any time to effect the purpose of justice.[17]

B. Operation and Effect. The order of continuance is in effect a postponement of the cause until the next term,[18] unless there is some special matter in the order that gives it a particular significance.[19]

C. Setting Aside Order. A cause of action is considered *in fieri*, even though an order of continuance may have been entered during the term,[20] and such continuance may be subsequently set aside if the court is satisfied that no injustice will result to either of the parties.[21] An order of continuance, however, having been once granted, the court is not warranted in setting the same aside without strong reasons,[22] and notice should in all cases be served on the

declaring that the amended answer "is not properly a part of the record herein," does not have the effect of striking out such answer. Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

17. Sheppard *v.* Wilson, 6 How. (U. S.) 260, 12 L. ed. 430.

Entered nunc pro tunc.— Where a motion made, but not decided, was not continued to the next term, a continuance should be entered *nunc pro tunc*, but the opponent will not be required to take it up at that term. Hurd *v.* Williams, 12 Fed. Cas. No. 6,918, 4 McLean 239.

18. Innerarity *v.* Frowner, 2 Ala. 150; Butler *v.* McMillen, 13 Kan. 385; Sawyer *v.* Bryson, 10 Kan. 199; Messenger *v.* Broom, 1 Pinn. (Wis.) 630.

Pro forma ruling.— A ruling continuing a cause to another term for a final submission is only *pro forma*, and does not conclude any motion in the cause. Green *v.* Ronen, 62 Iowa 89, 17 N. W. 180.

Vacation of judgment.— When a motion is made to set aside a default and vacate a judgment at the term at which the judgment is rendered, and is continued until the next term, the court has power at such next term to vacate the judgment. Hibbard *v.* Mueller, 86 Ill. 256; Windett *v.* Hamilton, 52 Ill. 180.

19. Where a jury is impaneled and sworn, and an order is made continuing the cause a day in the term, the jury should be considered as discharged, and it is error to force a trial before that jury. Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429.

20. Saunders *v.* Coffin, 16 Ala. 421; Papin *v.* Buckingham, 33 Mo. 454. In Stephen Pl. p. 155, § 77, in treating of proceedings in an action, the learned author says: "Under the ancient law there were continuances, i. e., adjournments of the proceedings for certain purposes, from one day or one term to another; and in such cases there was an entry made on the record expressing the ground of the adjournment, and appointing the parties to reappear at the given day. In the intervals between such continuances and the day appointed, the parties were of course out of court, and consequently not in a situation to plead. But it sometimes happened that after a plea had been pleaded, and while the parties were out of court, in consequence of such a continuance, a new matter of defense arose, which did not exist, and which the defendant had consequently no opportunity to plead, before the last continuance. This new defense he was therefore entitled at the day given for his re-appearance to plead as a matter that had happened after the last continuance —(*puis darreign continuance — post ultimam continuationem*). In the same cases as occasioned a continuance in the ancient law, but in no other, a continuance still takes place. At the time, indeed, when the pleadings are filed and delivered, no record exists, and there is therefore no entry at that time made on record of the award of a continuance; but the parties are from the day when, by the ancient practice, a continuance would have been entered, supposed to be out of court, and the pleading is suspended till the day arrives to which, by the ancient practice, the continuance would extend. And that day the defendant is entitled, if any new matter of defense has arisen in the interval, to plead it according to the ancient plan, *puis darreign continuance.*"

21. Saunders *v.* Coffin, 16 Ala. 421; Amory *v.* Reilly, 9 Ind. 490.

Judgment by default.— After a case has been continued by the court upon an answer to the merits filed by leave, it is improper to set aside the order of continuance, strike out the answer, and enter a default judgment (Taff *v.* Westerman, 39 Mo. 413); so it is error to enter judgment by default in a case in which both parties have been in attendance with their witnesses, and after all litigated causes have been continued (Crouch *v.* Mullinix, 1 Heisk. (Tenn.) 478).

Sickness in family.— The setting aside of a continuance granted on account of sickness in the family of one of the counsel for one of the parties is not an abuse of discretion, where it appears that ample time was given such party to prepare for trial after the continuance was set aside, and that the counsel on whose account it was granted appeared and assisted at the trial of the case. Barner *v.* Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

22. Marsh *v.* Morse, 18 Mo. 477.

Consent of counsel.— Where a continuance is granted at the instance of one party, on an understanding by the court, from the statement of the counsel of such party, that the counsel of the opposite party consented thereto, it is not error to set aside the continuance on the motion of such opposite

adverse party.[23] A party may in effect, however, cancel an order of continuance by appearing and proceeding to trial during the term,[24] or acquiesce in its vacation by demurring and pleading the general issue after the order has been set aside.[25]

VIII. CONDITIONS IMPOSED ON GRANTING CONTINUANCE.

A. In General. The court may in its discretion, where the justice of the case so demands, impose terms or conditions upon the granting of a continuance.[26] Thus it may require that the applicant give security for carrying out the judgment or decree rendered,[27] that the adverse party be allowed to take depositions of a witness for which the court is without authority to issue a commission,[28] that the death of the applicant (whose health is in a precarious condition) before the term to which the cause is continued shall not abate the suit,[29] that the applicant give bail in the action,[30] that the applicant confess judgment for a sum admitted to be due,[31] that the opposite party be allowed to take depositions without making a preliminary affidavit,[32] that a deposition may be read, although informally taken,[33] or that a rule be granted to try the cause at the next term or the applicant suffer a *non prosequitur*.[34]

B. Payment of Costs.[35] It is a usual condition imposed upon the applicant that he shall pay costs where a continuance is granted in his favor.[36] In many

party, on denial by his counsel that he consented thereto, etc.; and this, although the latter counsel was present when the court was induced to grant such a continuance, in the absence of any showing that he heard the statement and made no objection to it. Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

Mistake.— A court may set aside a continuance entered by mistake at any time during the term of entry. Ralston *v.* Lothain, 18 Ind. 303.

23. *Illinois.*— Mattoon *v.* Hinkley, 33 Ill. 208; McKee *v.* Ludwig, 30 Ill. 28; Newell *v.* Clodfelter, 3 Ill. App. 259.

Kansas.— Gray *v.* Ulrich, 8 Kan. 112.

Kentucky.—Tunstall *v.* Barbour, Hard. 560.

Louisiana.— Ogden *v.* Wilson, 18 La. Ann. 596; Mooney *v.* Hooper, 3 La. 444.

Missouri.— Marsh *v.* Morse, 18 Mo. 477.

See 10 Cent. Dig. tit. "Continuance," § 149.

24. Wilson *v.* Coles, 2 Blackf. (Ind.) 402.

25. Gridley *v.* Capen, 72 Ill. 11.

26. *Alabama.*— Dudley *v.* Witter, 51 Ala. 456; Gowen *v.* Jones, 20 Ala. 128.

Mississippi.— Hamilton *v.* Cooper, Walk. 542, 12 Am. Dec. 588.

Montana.— State *v.* Second Judicial Ct., 10 Mont. 456, 26 Pac. 182.

New Hampshire.— Woodbury *v.* Swan, 59 N. H. 515; Norton *v.* Hazelton, 45 N. H. 240.

New York.— Irroy *v.* Nathan, 4 E. D. Smith 68; Ames *v.* Webber, 10 Wend. 575.

North Carolina.— Walker *v.* Greentree, 12 N. C. 367.

Oklahoma.—See McMahan *v.* Norick, (1902) 69 Pac. 1047.

Pennsylvania.— Todd *v.* Thompson, 2 Dall. 105, 1 L. ed. 309.

South Carolina.— Stanley *v.* Miers, 1 Brev. 24.

Tennessee.— McFarlane *v.* Moore, 1 Overt. 32, 3 Am. Dec. 752.

Vermont.— Collins *v.* Richardson, 66 Vt. 89, 28 Atl. 877.

England.— Campbell *v.* Read, 4 Jur. N. S. 1111.

See 10 Cent. Dig. tit. "Continuance," § 143.

Suspicious circumstances.— When circumstances exist which give rise to suspect that a party insists on the presence of his witness at the trial for the sole purpose of delay the court may impose terms on him. Larrat *v.* Carlier, 1 Mart. (La.) 144.

27. Dudley *v.* Witter, 51 Ala. 456; Campbell *v.* Read, 4 Jur. N. S. 1111.

28. McFarlane *v.* Moore, 1 Overt. (Tenn.) 32, 3 Am. Dec. 752.

29. Ames *v.* Webber, 10 Wend. (N. Y.) 575.

30. Stanley *v.* Miers, 1 Brev. (S. C.) 24.

31. Gowen *v.* Jones, 20 Ala. 128.

32. Humes *v.* O'Bryan, 74 Ala. 64.

33. Hamilton *v.* Cooper, Walk. (Miss.) 542, 12 Am. Dec. 588. And see Den *v.* Greentree, 12 N. C. 367.

34. Todd *v.* Thompson, 2 Dall. (Pa.) 105, 1 L. ed. 309. But such rule will not preclude plaintiff from showing reasonable cause for delay in obtaining the presence of a material witness at the next term. Schlosser *v.* Lesher, 1 Dall. (Pa.) 251, 1 L. ed. 123.

35. For costs of continuance see, generally, COSTS.

36. *Alabama.*—Alexander *v.* Moore, 111 Ala. 410, 20 So. 339; Maund *v.* Loeb, 87 Ala. 374, 6 So. 376; Rhea *v.* Tucker, 56 Ala. 450.

California.— Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932.

Florida.— Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

Illinois.— Collins *v.* Tuttle, 24 Ill. 623.

Indiana.— State *v.* Dugan, 1 Ind. 475.

Kentucky.— Morrison *v.* Beckham, 96 Ky. 72, 27 S. W. 868, 16 Ky. L. Rep. 294.

Minnesota.— Fay *v.* Davidson, 13 Minn. 298.

Montana.— State *v.* Second Judicial Dist. Ct., 10 Mont. 456, 26 Pac. 182.

Nebraska.— Coombs *v.* Brenklander, 29

jurisdictions the matter of imposing costs as a condition of granting a continuance is by special statutory provision made discretionary with the court.[37] The court has no power to make a direct order for the payment of costs, but can only impose their payment as a condition of granting the application.[38]

C. Effect of Conditions and Non-Compliance Therewith. By accepting a continuance, the party accepts the terms or conditions imposed by the court on granting the continuance;[39] and this is so, although the continuance is in fact

Nebr. 586, 45 N. W. 929; Smith *v.* Silvis, 8 Nebr. 164.

New York.— Crim *v.* Drain, 64 N. Y. App. Div. 581, 72 N. Y. Suppl. 298; Lawson *v.* Hill, 66 Hun 288, 20 N. Y. Suppl. 904; Kennedy *v.* Wood, 54 Hun 14, 7 N. Y. Suppl. 90, 26 N. Y. St. 34, 17 N. Y. Civ. Proc. 375; Gamble *v.* Taylor, 43 How. Pr. 375; Noxon *v.* Bentley, 6 How. Pr. 418; Bagley *v.* Ostrom, 5 Hill 516; Morell *v.* Gould, 5 Hill 553; Booth *v.* Whitby, 5 Hill 446; Hall *v.* Dwinell, 10 Wend. 628; Kirby *v.* Sisson, 1 Wend. 83; Jackson *v.* Pell, 19 Johns. 270; Jackson *v.* Larroway, 2 Johns. Cas. 114.

North Carolina.— Park *v.* Cochran, 2 N. C. 178; Tyce *v.* Ledford, 2 N. C. 25.

South Carolina.— Pulliam *v.* Bartee, 3 Brev. 146.

Washington.— Tacoma Nat. Bank *v.* Peet, 9 Wash. 222, 37 Pac. 426.

Wisconsin.— Hawkins *v.* Northwestern Union R. Co., 34 Wis. 302; Knox *v.* Arnold, 1 Wis. 70.

United States.— Patton *v.* Blackwell, 18 Fed. Cas. No. 10,831, 2 Overt. (Tenn.) 114, Brunn. Col. Cas. 125.

See 10 Cent. Dig. tit. "Continuance," § 144.

Jury summoned by adverse party.— A defendant who puts off a cause on affidavit is not held to pay the costs of striking a jury that has been summoned on a rule of the plaintiff. Kennedy *v.* Nixon, 6 N. J. L. 159.

Quasi-criminal action.— A suit to recover a penalty for violation of a city ordinance, being quasi-criminal in its nature, it is error for the trial court to require payment of costs as the terms of granting a continuance in such suit. Boscobel *v.* Bugbee, 41 Wis. 59.

37. *California.*— Eltzroth *v.* Ryan, 91 Cal. 584, 27 Pac. 932.

Florida.— Williamson *v.* Dickenson, 28 Fla. 90, 9 So. 847.

Illinois.— Collins *v.* Tuttle, 24 Ill. 623.

Montana.— State *v.* Second Judicial Dist. Ct., 10 Mont. 456, 26 Pac. 182.

Nebraska.— Smith *v.* Silvis, 8 Nebr. 164.

New York.— Lawson *v.* Hill, 66 Hun 288, 20 N. Y. Suppl. 904; Kennedy *v.* Wood, 54 Hun 14, 7 N. Y. Suppl. 90, 17 N. Y. Civ. Proc. 375.

Washington.— Tacoma Nat. Bank *v.* Peet, 9 Wash. 222, 37 Pac. 426.

See 10 Cent. Dig. tit. "Continuance," § 144.

Under the English practice it seems to be the rule that the applicant should offer to pay the costs of the adjournment. Waller *v.* Joy, 4 D. & L. 338, 16 L. J. Exch. 17, 16 M. & W. 60; Ward *v.* Ducker, 5 M. & G. 377, 6 Scott N. R. 45, 44 E. C. L. 203. So in Lydall *v.* Martinson, 5 Ch. D. 780, 37 L. T. Rep. N. S. 69, 25 Wkly. Rep. 866, it was held that where the hearing of an action was adjourned in order to allow parties to be added, the applicant must pay all the costs incurred by the action, and not merely a fixed sum for costs of the day.

38. Bagley *v.* Ostrom, 5 Hill (N. Y.) 516.

Election of payment.— If an action is continued on terms and the order is that plaintiff pay the sum fixed on as terms or be nonsuited or defaulted at the next term, the party may elect to pay the terms imposed or submit to the nonsuit or default. Murray *v.* Emmons, 26 N. H. 523.

Presumption as to costs.— Under Wash. Code Proc. § 832, empowering the court to enforce, as a condition for granting a continuance, the payment of ten dollars to the adverse party, besides witness fees, it was held that when the court requires the payment of twenty-five dollars as such condition no presumption obtains that the excess over ten dollars was made up of witness' fees, in the face of a request of the applicant to the adverse party to show the costs incurred, and there being an entire absence of any showing in the record as to what the costs were. Tacoma Nat. Bank *v.* Peet, 9 Wash. 222, 37 Pac. 426.

39. Humes *v.* O'Bryan, 74 Ala. 64; Rhea *v.* Tucker, 56 Ala. 450; Dunlap *v.* Horton, 49 Ala. 412; Waller *v.* Sultzbacher, 38 Ala. 318; Brown *v.* Warren, 17 Nev. 417, 30 Pac. 1078; Spangehl *v.* Spangehl, 39 N. Y. App. Div. 5, 57 N. Y. Suppl. 7; Booth *v.* Whitby, 5 Hill (N. Y.) 446.

Rule applied.— Thus a party applying for a continuance by accepting the same accepts conditions imposed by the order that payment within a certain time shall be a condition precedent to his further defense of the suit (Rhea *v.* Tucker, 56 Ala. 450) or that his pleading or answer be stricken from the file and judgment given his adversary (Waller *v.* Sultzbacher, 38 Ala. 318; Brown *v.* Warren, 17 Nev. 417, 30 Pac. 1078; Booth *v.* Whitby, 5 Hill (N. Y.) 446). *Compare* Dunlap *v.* Horton, 49 Ala. 412, holding that when a continuance is granted on the application of the defendant, on condition that if the costs are not paid within a certain time judgment shall go against him, his acceptance of the terms makes a valid agreement of record, but that the court is not bound to enforce it and cannot impose such terms at the trial without the defendant's consent.

If a continuance is granted "on payment of costs" the opposite party may insist on having the trial proceed on failure to pay the

unnecessary,[40] or although some of the costs imposed as a condition of the continuance are improper.[41]

IX. ADMISSIONS TO PREVENT CONTINUANCE.

A. In General. Where the adverse party will admit the evidence or facts for the production of which the continuance is asked a postponement of the cause will ordinarily be denied by the court;[42] and where injustice is likely to

costs, or he may waive this right and either compel payment by precept or include them in his general bill in case he is ultimately successful in the action. Gamble *v.* Taylor, 43 How. Pr. (N. Y.) 375. If the order imposes payment of costs within a specified time, on granting a continuance, without providing that the cause shall be stricken from the docket on non-compliance with the order, failure to pay the costs within the time limited will not authorize the court to strike the cause from the docket. *Ex p.* Abrams, 48 Ala. 151. If the court have imposed payment of costs as a condition of granting a continuance, but have not required immediate payment, the party upon whom the condition was imposed has a right to appear and defend at the trial, notwithstanding his failure to make payment. Tacoma Nat. Bank *v.* Peet, 9 Wash. 222, 37 Pac. 426.

40. Robinson *v.* Chicago, etc., R. Co., 73 Iowa 506, 35 N. W. 602.

41. Abbott *v.* Johnson, 47 Wis. 239, 2 N. W. 332. See also Smith *v.* Grant, 11 N. Y. Civ. Proc. 354.

42. *Alabama.*—Pool *v.* Devers, 30 Ala. 672.

Arkansas.— Hibbard *v.* Kirby, 38 Ark. 102.

California.— Boggs *v.* Merced Min. Co., 14 Cal. 279.

Colorado.— Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Delaware.— Dickson *v.* Lewis, 2 Harr. 289.

Florida.— Green *v.* King, 17 Fla. 452.

Georgia.— Kitchens *v.* Hutchins, 44 Ga. 620; Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50; Baldwin *v.* Walden, 30 Ga. 829.

Illinois.— Montgomery County *v.* Robinson, 85 Ill. 174; Graff *v.* Brown, 85 Ill. 89; Utley *v.* Burns, 70 Ill. 162; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 338; Vickers *v.* Hill, 2 Ill. 307; Aurora *v.* Scott, 82 Ill. App. 616; Beal *v.* Pratt, 67 Ill. App. 483; Keith *v.* Knoche, 43 Ill. App. 161; Chicago, etc., R. Co. *v.* Goyette, 32 Ill. App. 574 [*affirmed* in 133 Ill. 21, 24 N. E. 549].

Indiana.— Pate *v.* Tait, 72 Ind. 450; Whitehall *v.* Lane, 61 Ind. 93; Dawson *v.* Hemphill, 50 Ind. 422; Nave *v.* Horton, 9 Ind. 563.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; State *v.* Geddis, 42 Iowa 264; Strong *v.* Hart, 7 Iowa 484.

Kansas.— Sanford *v.* Gates, 38 Kan. 405, 16 Pac. 807; Rice *v.* Hodge, 26 Kan. 164.

Kentucky.— Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Hughes *v.* Waring, Litt. Sel. Cas. 402; Hutton *v.* Augusta First Nat. Bank, 45 S. W. 668, 20 Ky. L. Rep. 225; Louisville, etc., R. Co. *v.* Hoskins, 15 Ky. L. Rep. 238.

Louisiana.— Cole *v.* La Chambre, 31 La. Ann. 41; Pruyn *v.* Gibbens, 24 La. Ann. 231; Powell *v.* Hopson, 14 La. Ann. 666; Faulk *v.* Hough, 14 La. Ann. 659.

Maryland.— Bryan *v.* Coursey, 3 Md. 61.

Minnesota.— Conrad *v.* Dobmeier, 64 Minn. 284, 67 N. W. 5.

Mississippi.— Brent *v.* Heard, 40 Miss. 370.

Missouri.— Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854; Wilson *v.* Purl, 133 Mo. 367, 34 S. W. 884; Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 11 S. W. 991; Murphy *v.* Murphy, 31 Mo. 322; Ely, etc., Dry Goods Co. *v.* McLaughlin, 78 Mo. App. 578; Woolwine *v.* Bick, 39 Mo. App. 495; Richey *v.* Branson, 33 Mo. App. 418.

Nebraska.— Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796.

Nevada.— O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.

Oregon.— Lew *v.* Lucas, 37 Oreg. 208, 61 Pac. 344.

South Carolina.— Farrand *v.* Bouchell, Harp. 83.

Tennessee.— Hammonds *v.* Kemer, 3 Hayw. 145.

Texas.— Page *v.* Arnim, 29 Tex. 53; Fisk *v.* Miller, 13 Tex. 224; Maughmer *v.* Behring, 19 Tex. Civ. App. 299, 46 S. W. 917.

United States.— Kerr-Murray Mfg. Co. *v.* Hess, 98 Fed. 56, 38 C. C. A. 647.

See 10 Cent. Dig. tit. "Continuance," § 113.

Affidavit read as deposition.— A second continuance for the absence of a witness is properly refused where the affidavit of what the witness would testify to is read as his deposition. Louisville, etc., R. Co. *v.* Hoskins, 15 Ky. L. Rep. 238. So in Gaines *v.* Wilson, (Va. 1896) 24 S. E. 828, it was held that where on the hearing the affidavit of the applicant and a witness that he wished to introduce were allowed in evidence, the continuance was properly denied.

Evidence given at former trial.— In Conrad *v.* Dobmeier, 64 Minn. 284, 67 N. W. 5, it was held no error to refuse a continuance for defendant's enforced absence from a second trial of the cause, where defendant's attorneys had tried the cause before, and plaintiff's attorneys agreed to let defendant's evidence given at the former trial be read and considered as actually given.

Illness of material witness.— The affidavit of defendant that he is sick and unable to attend court as a witness on the day of trial is not good cause for a continuance of the case, if it is admitted by the opposite party

result from delay, the court may require a party to disclose what he expects to prove, in order that the other party may admit it if he so desires.[43] Provisions for making admissions to prevent the continuance of a cause are usually made by statute [44] or rule of court.[45] Some of these statutes are mandatory in their terms and prohibit a continuance where the facts are admitted,[46] while others make it discretionary with the court whether or not a continuance shall be refused.[47]

B. Sufficiency of Admissions. The character of admissions necessary to be made in order to prevent a continuance varies in the different jurisdictions, because of the difference in the wording of the statutes regulating the subject.[48] In some jurisdictions an admission that the witness if present would testify as alleged is sufficient;[49] while in others the material facts must be admitted as true without reserve, it not being enough for the adverse party to admit that the witness if present would swear to the facts to be proved.[50] The terms of the

that he would as a witness if present swear to what he had set forth in his affidavit. Pruyn *v.* Gibbens, 24 La. Ann. 231. See also Kitchens *v.* Hutchins, 44 Ga. 620. And this rule holds good although the applicant alleges in his affidavit that, being the witness, it was necessary for him to be present for the purpose of conferring with his counsel and assisting in the trial of the cause. Pate *v.* Taite, 72 Ind. 450.

43. Dickson *v.* Lewis, 2 Harr. (Del.) 289; McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574.

44. *Georgia.*—Kitchens *v.* Hutchins, 44 Ga. 620; Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50.

Illinois.— State *v.* Eisenmeyer, 94 Ill. 96; Montgomery County *v.* Robinson, 85 Ill. 174; Graff *v.* Brown, 85 Ill. 89; Utley *v.* Burns, 70 Ill. 162; Aurora *v.* Scott, 82 Ill. App. 616; Keith *v.* Knoche, 43 Ill. App. 161.

Indiana.— Dawson *v.* Hemphill, 50 Ind. 422; Nave *v.* Horton, 9 Ind. 563.

Iowa.— State *v.* Geddis, 42 Iowa 264.

Kansas.— Sanford *v.* Gates, 38 Kan. 405, 16 Pac. 807; Rice *v.* Hodge, 26 Kan. 164.

Kentucky.— Hutton *v.* Augusta First Nat. Bank, 45 S. W. 668, 20 Ky. L. Rep. 225.

Louisiana.— Pruyn *v.* Gibbens, 24 La. Ann. 231; Faulk *v.* Hough, 14 La. Ann. 659; Larrat *v.* Carlier, 1 Mart. 144.

Maryland.— Bryan *v.* Coursey, 3 Md. 61.

Mississippi.— Brent *v.* Heard, 40 Miss. 370.

Missouri.— Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854; Wilson *v.* Purl, 133 Mo. 367, 34 S. W. 884; Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 11 S. W. 991; Murphy *v.* Murphy, 31 Mo. 322; Woolwine *v.* Bick, 39 Mo. App. 495; Richey *v.* Branson, 33 Mo. App. 418.

Nevada.— O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.

Oregon.— Lew *v.* Lucas, 37 Oreg. 208, 61 Pac. 344.

Utah.— McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574.

See 10 Cent. Dig. tit. "Continuance," § 113.

45. U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 553.

46. Montgomery County *v.* Robinson, 85 Ill. 174.

47. O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

48. Murphy *v.* Murphy, 31 Mo. 322.

49. In Larrat *v.* Carlier, 1 Mart. (La.) 144, it was stated that when a party prays for a continuance on account of the absence of witness, the adverse party may require him to disclose what facts he intends to prove by such witness; and if such party admit those facts the trial shall proceed.

The **Illinois statute** declares the effect of admitting in evidence by the opposite party an affidavit for a continuance on account of the absence of testimony, as follows: "The party admitting such affidavits shall be held to admit only, that if the absent witness was present, he would swear to the fact or facts which the affidavit states he will swear to, and such fact or facts shall have no greater force or effect than if such absent witness was present and swore to the same in open court, leaving it to the party admitting such affidavit to controvert the statements contained therein, the same as if such witness was present and examined in open court." Utley *v.* Burns, 70 Ill. 162.

Under the Indiana statute it is sufficient to admit that a party or witness would testify to the facts stated in the application, and consent that it may be used in evidence at the trial. Pate *v.* Tait, 72 Ind. 450. See also Dawson *v.* Hemphill, 50 Ind. 422.

50. *Georgia.*— Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50.

Kentucky.— Smith *v.* Creason, 5 Dana 298, 30 Am. Dec. 688.

Mississippi.— Brent *v.* Heard, 40 Miss. 370.

Missouri.— Murphy *v.* Murphy, 31 Mo. 322.

Texas.— Maughmer *v.* Bering, 19 Tex. Civ. App. 299, 46 S. W. 917.

United States.— See Kerr-Murray Mfg. Co. *v.* Hess, 98 Fed. 56, 38 C. C. A. 647.

See 10 Cent. Dig. tit. "Continuance," § 114.

Admission in writing.— To avoid the continuance of a case for the purpose of procuring testimony upon a proper showing made therefor, under the Ga. Code, § 3472, the opposite party must admit in writing the facts expected to be proved, and agree that he does not contest the truth thereof. Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50.

admission must substantially comply with the provisions of the statute itself,[51] and the admission must be broad enough to cover the evidence to obtain which the continuance is asked.[52]

C. Effect of Admissions. Where a party admits the facts as stated in the affidavit to be true he will be precluded from contesting them when the affidavit is read in evidence,[53] and although his adversary fails to object to evidence contradictory thereof, he does not lose the benefit of the admission.[54] But where the admission is only that the witness if present would testify as alleged, there is no admission that such facts are absolutely true[55] or that the witness is competent and

Admission not changing results.— Where the evidence of an absent witness, for whose production a continuance is applied for, if admitted as true could not change the result, it is harmless error to refuse a continuance upon the admission only by the opposing party that the witness would have testified to the facts stated in the application. Maughmer *v.* Bering, 19 Tex. Civ. App. 299, 46 S. W. 917.

Admission withdrawn.— An agreement intended to be used as an admission in the absence of a witness may if in evidence be withdrawn by the court, without allowing any continuance, where the witness is present, and the opportunity is offered to prove the facts recited in the agreement by the witness. Robbins *v.* Ginnochio, (Tex. Civ. App. 1898) 45 S. W. 34.

Reason of rule.— The right of a party to bring his witnesses before the jury is a legal right, which may be of essential advantage to him, especially in the establishment of controverted facts, of which he ought not to be deprived. If therefore entitled to a continuance in such a case, he ought not to be deprived of it by any admission short of the admission of the fact intended to be proved by his absent witnesses. Smith *v.* Creason, 5 Dana (Ky.) 298, 30 Am. Dec. 688. See also Murphy *v.* Murphy, 31 Mo. 322.

51. Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50; Dawson *v.* Hemphill, 50 Ind. 422; Nave *v.* Horton, 9 Ind. 563; Murphy *v.* Murphy, 31 Mo. 322.

52. Peek *v.* Lovett, 41 Cal. 521.

Intimate knowledge of witness.— It is error to refuse a defendant a continuance on the ground of the absence of a material witness, although the plaintiff admits that the witness would testify to all the facts set forth in the affidavit for continuance, where the affidavit shows that the witness had an intimate knowledge of the transactions between the parties giving rise to the action, and carried on all correspondence between them, and that her presence is important for a just and fair trial of the case. Hopkinson *v.* Jones, 28 Ill. App. 409.

53. Klugman *v.* Gammell, 43 Ga. 581; Cheney *v.* Smith, 42 Ga. 50; Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 388; Bryan *v.* Coursey, 3 Md. 61; Brent *v.* Heard, 40 Miss. 370.

Admission limited in time.— Mo. Rev. Stat. (1889), § 2127, provided that if the opposite party will admit what an absent witness would swear to as set out in an affidavit, the cause shall not be continued, but the party moving therefor shall read such affidavit as evidence of the absent witness. On defendant's application for a continuance, plaintiff admitted the testimony of an absent witness as set forth in defendant's affidavit, and afterward the court for other reasons continued the case on its own motion for one month and four days. Under such circumstances it was held that it was error, after the expiration of the continuance, to allow defendant to read such affidavit to the jury over plaintiff's objection, since plaintiff's admission under such circumstances does not stand for all time, but ceases when the emergency ceases. Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

Allegations must correspond with issues.— If the testimony be material, and the court determines that the party has shown sufficient ground for a continuance, the other side may elect to continue the cause or go to trial, conceding as true what his adversary says his witness if present would prove. But although the party against whom such proof is offered cannot deny its truth, yet it must be within the issues, for the statute does not dispense with the rule that the *allegata et probata* must correspond. Bryan *v.* Coursey, 3 Md. 61.

54. The court should in such case instruct the jury that they should take the facts as true and not consider the contradictory evidence. Galveston, etc., R. Co. *v.* Lynes, (Tex. Civ. App. 1901) 65 S. W. 1119.

Previous admission of contradictory evidence.— Where defendant filed an affidavit for a continuance, showing the absence of a physician whom it had summoned as a witness, and that if present he would testify that he had examined plaintiff and found him to be sound and well, and plaintiff to prevent a continuance agreed to secure the presence of the absent witness when defendant should be ready to examine him, it was error, upon plaintiff's failure, although without his fault, to secure the attendance of the absent witness, to go on with the trial, although plaintiff then admitted the truth of the statements of the affidavit for a continuance and that he was sound and well at the time of the alleged examination, as plaintiff had already introduced testimony to show the severity and permanence of his injuries, the effect of which testimony could not be removed. Louisville, etc., Co. *v.* Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673.

55. Montgomery, etc., Plank-Road Co. *v.* Webb, 27 Ala. 618, an admission only that if witness were in court "he would swear," etc.

credible.[56] And although, where it is admitted that the witness would testify as stated in the affidavit, the testimony must be deemed as actually before the court,[57] such admission does not make incompetent evidence admissible.[58] The true test is, Could the witness if present be permitted to testify to the facts? If not they should be excluded from the jury, thus putting the affidavit on an equality with the testimony of the witness.[59] It is the duty of the court to exclude from the jury such evidence as may be improper for their consideration,[60] and it may instruct the jury as to those matters in which an instruction would ordinarily be given.[61]

X. WAIVER OF RIGHT TO CONTINUANCE.

Where a party appears and goes to trial without asking a continuance it is a

Mo. Rev. Stat. § 3596, recites: "If the affidavit does not contain a sufficient statement of facts, as herein required, the court shall overrule the same; but if, upon the contrary, the court shall find the affidavit sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would swear to the facts set out in the affidavit, in which event the cause shall not be continued, but the party moving therefor shall read as the evidence of such witness the facts stated in such affidavit, and the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue or on trial." Richey *v.* Branson, 33 Mo. App. 418.

56. Montgomery, etc., Plank-Road Co. *v.* Webb, 27 Ala. 618.

Credibility of witness may be attacked in the same manner as that of a deposition — by impeaching the veracity of the witness. U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533.

Inconsistent declarations.— In Pool *v.* Devers, 30 Ala. 672, to prevent a continuance of a case, the defendant admitted that an absent witness if present would prove a certain material fact. The defendant proposed to prove that the witness had made declarations inconsistent with proof which it was admitted he would make if present. The court refused to permit the proposed evidence to go to the jury. It was held that the admission of the evidence would have violated the rule that a witness cannot be discredited by proof of counter declarations, unless the witness was previously asked whether he did not make such declarations at a specified time and place. That if the defendant was placed in a situation which deprived him of all opportunity to resort to that mode of discrediting the witness, it was the result of his own act in making the admission for the purpose of procuring the trial, and that he should have taken the result of a deprivation of such testimony into account, when determining whether to make the admission or submit to a continuance.

57. Boggs *v.* Merced Min. Co., 14 Cal. 279; State *v.* Eisenmeyer, 94 Ill. 96; Utley *v.* Burns, 70 Ill. 162; Woolwine *v.* Bick, 39 Mo. App. 495.

58. State *v.* Eisenmeyer, 94 Ill. 96; Aurora *v.* Scott, 82 Ill. App. 616; Woolwine *v.* Bick, 39 Mo. App. 495. The admission made by the plaintiff is not required by the statute to be of the competency or relevancy of the statements, but only that if the witness was present he would so testify, and does not preclude any legal objection which might be made if the witness himself were present. See Iowa Code, § 2751. State *v.* Geddis, 42 Iowa 264. In this case the parts excluded are matters of opinion and other matters which the witness would not be competent to testify to if present.

Not evidence of conclusions.— The affidavit admitted in evidence is proof of the facts stated only, and not of the conclusion alleged therein. Eagle Mfg. Co. *v.* Jennings, 29 Kan. 657, 44 Am. Rep. 668. See also Wilson *v.* Purl, 133 Mo. 367, 34 S. W. 884.

Statement of information and belief.— In Richey *v.* Branson, 33 Mo. App. 418, it was held that statements made on information and belief of affiant had no evidentiary value and could not be considered in determining the sufficiency of the evidence to take the case to the jury.

59. State *v.* Eisenmeyer, 94 Ill. 96; State *v.* Geddis, 42 Iowa 264.

60. Chicago, etc., R. Co. *v.* Clark, 70 Ill. 276; Nave *v.* Horton, 9 Ind. 563; Strong *v.* Hart, 7 Iowa 484.

61. Nave *v.* Horton, 9 Ind. 563; Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 11 S. W. 991.

Erroneous instructions.— Where, to avoid a continuance on account of an absent witness, the adverse party admits that such witness would testify as set forth in the application for the continuance, it is error for the court to tell the jury in effect to be wary of his testimony in view of the means used to get it before them, since it is entitled to the same credit and the same probative force as his deposition would have, had it been taken in the regular statutory method. Ely, etc., Dry-Goods Co. *v.* McLaughlin, 78 Mo. App. 578. In Utley *v.* Burns, 70 Ill. 162, it was held error, after an affidavit for a continuance on account of the absence of a witness had been admitted in evidence, to instruct the jury that they should attach no more weight "to the statements than would be attached to the statements of a witness who does not disclose his means of knowledge, and who is not subject to cross-examination."

waiver of his right thereto.[62] So also a party may waive his rights as to a continuance by withdrawing his pleadings or defense,[63] or by subsequently filing pleadings in the cause.[64]

XI. SECOND OR FURTHER CONTINUANCES.

A. Right to Such Continuances. While there is no fixed rule as to the length of time a case may be kept on the docket, or the number of continuances that should be granted in a particular case,[65] yet as a general rule second and

62. Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122. See also Reed *v.* Wangler, 46 Mo. 508.

Absence of leading counsel.— Although, under the Louisiana statute of 1856, the absence of leading counsel is a peremptory cause for continuance, a failure to except to the overruling of a motion for a continuance on such ground is a waiver of the right. Wooldridge *v.* Rickert, 33 La. Ann. 234.

Admissions in affidavit.— Where a continuance was refused on defendant's agreeing to admit matters set out in a writing not identical with the affidavit, it was held no error, because, under Mo. Rev. Stat. § 3596, the plaintiff was entitled to read the statements in the affidavit to the jury as an admission, and not having offered to do so had waived the point. Ambs *v.* Hill, 10 Mo. App. 108.

Cause not triable at term.—If a party goes to trial without objection after a motion for continuance has been overruled, the judgment will not be reversed, although the cause was not triable at that term, and the motion for continuance was unnecessary. Watson *v.* Walsh, 10 Mo. 454.

Renewal of application.—Where on the day of trial the sheriff had not made his return as to a subpœna issued for a witness on behalf of the defendant, and a motion for continuance on this ground was overruled and the case continued until the following day, when the sheriff made his return that the witness could not be found, it was held that in the absence of any renewal of the application for continuance after the return of the sheriff it was not error to proceed to trial. State *v.* Turner, 26 La. Ann. 390.

63. Arnold *v.* Trundle, 7 J. J. Marsh. (Ky.) 115; Owings *v.* Beall, 1 Litt. (Ky.) 257. *Compare* Wright *v.* Basye, 6 Blackf. (Ind.) 419, where it was held that the defendant's objection to the refusal of a continuance to which he was entitled was not waived by a subsequent withdrawal of his plea.

An abandonment of a particular defense, for which the testimony of an absent witness was wanted, is a waiver of an exception taken to a refusal to grant a continuance asked on the ground of such absence. Crawford *v.* Redway, 62 Ind. 573.

Compliance with order of court.— A defendant does not waive an error of the court in refusing him a continuance by complying with the order of the court requiring him to answer immediately. Meredith *v.* Lackey, 14 Ind. 529.

64. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557.

By demurring to an additional paragraph counting on a cause of action accrued since service of the summons the defendant waives his right to a continuance. Farrington *v.* Hawkins, 24 Ind. 253.

By withdrawing his answer and demurring to the petition and electing to stand on his demurrer after the overruling thereof, a defendant waives error in overruling his previous application for continuance on account of the absence of witnesses. Day *v.* Mooney, 3 Okla. 608, 41 Pac. 142.

65. Wood *v.* McGuire, 21 Ga. 576; Bowen *v.* Douglass, 2 Dall. (Pa.) 44, 1 L. ed. 282; Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, Wall. Sr. 1.

Necessity for defendant's presence and inability to attend from sickness.—Where a case was set for trial on June 19, but owing to an accident to defendant was postponed until September 13, when defendant's attorney made affidavit showing the necessity of defendant's presence, and his physician made affidavit that he was not in a condition to be present or to have his deposition taken, but would probably be able to attend to his affairs by October 15, it was error to refuse a further continuance. Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976.

No fixed length of time.— The fact that a case has been four years in court is no reason for a refusal of a further continuance, provided proper grounds are shown for it, as where it is asked for to obtain newly discovered evidence, and where the party applying is not chargeable with the delay. Hooper *v.* Memphis Branch R., etc., Co., 19 Ga. 85. See also Welsh *v.* Savery, 4 Iowa 241. So in Thompson *v.* Lewis, 2 C. L. R. 707, it was held that the court would further postpone a trial for the absence of a witness beyond the seas, where there was reasonable probability of his return, although the case had already been postponed more than a year.

Peremptory rule for trial.— A stipulation or peremptory rule for trial will never be enforced so strictly as to work injustice. If any unforeseen accident or casualty intervenes which puts it out of the power of the party or his witnesses to attend the court will, notwithstanding such rule, postpone a trial. Livingston *v.* Delafield, 1 Cai. (N. Y.) 6; Bowen *v.* Douglass, 2 Dall. (Pa.) 44, 1 L. ed. 282; Farr *v.* McDowell, 1 Bay (S. C.) 31; Hammond *v.* Haws, 11 Fed. Cas. No. 6,002, Wall. Sr. 1. See also Wilkes *v.* Phillips, 37 Ga. 588.

Where the continuances of the party have been exhausted it is at the discretion of the court whether it will grant a further continuance at its own instance, having a due

further continuances are not favored by the courts and will usually be denied,[66] unless the applicant can show that he has used all reasonable effort to effect the results upon which the grounds of continuance are based.[67]

B. Allegations of Affidavit. Upon a second or subsequent application for a continuance the allegations of the affidavit must be more precise as to the grounds

regard to the proper administration of justice. Wood *v.* McGuire, 21 Ga. 576.

66. *Alabama.*—Lewis *v.* Wood, 42 Ala. 502.

Arkansas.— Burriss *v.* Wise, 2 Ark. 33.

California.— Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557; Levy *v.* Baldwin, (1885) 7 Pac. 683.

Georgia.— Mitchell *v.* Mitchell, 40 Ga. 11.

Illinois.— Northwestern, etc., Aid Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98; Stockley *v.* Goodwin, 78 Ill. 127; Slade *v.* McClure, 76 Ill. 319.

Indiana.— Breedlove *v.* Bundy, 96 Ind. 319.

Kentucky.— Davis *v.* Gray, 3 Litt. 450.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

New York.— Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251.

Texas.— Hipp *v.* Ingram, 3 Tex. 17; Bond *v.* National Exch. Bank, (Civ. App. 1899) 53 S. W. 71.

Virginia.— Payne *v.* Zell, 98 Va. 294, 36 S. E. 379; Brooks *v.* Calloway, 12 Leigh 466; Milstead *v.* Redman, 3 Munf. 219.

West Virginia.— Wilson *v.* Kochnlein, 1 W. Va. 145.

See 10 Cent. Dig. tit. "Continuance," § 147.

Continuances are counted as first, second, or subsequent applications from the filing of the suit, not from the reversal of a case on appeal or error. McMichael *v.* Truehart, 48 Tex. 216. So where two continuances have been granted the same party, if a mistrial intervene, his application for another continuance is treated as an application for a third continuance. Stewart *v.* Austin, 1 Overt. (Tenn.) 186.

Second application at same term.— A second application to continue a cause, based on the same facts as the first application, cannot be made at the same term. Northwestern, etc., Aid Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98; Stockley *v.* Goodwin, 78 Ill. 127. See also Huff *v.* Freeman, 15 La. Ann. 240, where the second application was made at the same trial.

The discretion of the judge in granting or refusing a continuance is to be exercised more rigidly after long delays or several continuances granted than upon the first application. Wilson *v.* Kochnlein, 1 W. Va. 145.

67. *Georgia.*— Hooper *v.* Memphis Branch R., etc., Co., 19 Ga. 85.

Illinois.— Shook *v.* Thomas, 21 Ill. 87.

Iowa.— Rosecranes *v.* Iowa, etc., Tel. Co., 65 Iowa 444, 21 N. W. 769.

Louisiana.—Turnbull *v.* Barrow, 9 La. Ann. 135; Gay *v.* Kendig, 2 Rob. 472.

Missouri.— Moore *v.* McCullough, 6 Mo. 444.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

South Carolina.— Farr *v.* McDowell, 1 Bay 31.

Texas.— Ruhrecht *v.* Powers, 1 Tex. Civ. App. 282, 21 S. W. 318; Gulf, etc., R. Co. *v.* Sebastian, 3 Tex. App. Civ. Cas. § 393.

Virginia.— Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

See 10 Cent. Dig. tit. "Continuance," § 147.

Attachment after subpœna.— A party should, on a second application, be required to show something more than a mere service of a subpœna; he should avail himself of other legal means to compel the attendance of the witness. If within the reach of the process of the court, so as to be availing, the party should apply to the court for an attachment to compel his attendance so soon as he has failed to attend under the subpœna. Shook *v.* Thomas, 21 Ill. 87.

Transitory witness.—In Breedlove *v.* Bundy, 96 Ind. 319, it was held that where there was not a sufficient showing of diligence in attempting to procure the testimony of an absent witness, and it appeared that he was transitory, going from one point to another in another state, so as to appear that there was no likelihood that this testimony could be procured if a continuance were granted, the refusal of an application for a second continuance was not an abuse of discretion. And so it was held in the case of an absconding partner who had carried off the partnership books. Slade *v.* McClure, 76 Ill. 319.

Virginia and West Virginia practice.— With reference to the continuances of cases by the circuit court, it may be regarded as settled law in Virginia and West Virginia that where a party has obtained one or more continuances at prior terms of the court, and the court in the exercise of its discretion refuses to again continue his case, even when he has brought himself apparently within the general rule, which ordinarily entitles a party to a continuance, the appellate court will not reverse such case because of the refusal of the circuit court to grant such continuance, unless the party complaining makes out a very strong case, and the appellate court sees that the party has suffered from an abuse by the circuit court of its legal discretion. Some appellate courts have gone further than ours and have held that they could not review the exercise of such discretion by the inferior court, whose opportunities of exercising its discretion in such case must greatly exceed that of the appellate court. It has, however, been determined that the exercise of such discretion is reviewable; but under such circumstances the leaning of the court will be strong to support the action of the circuit court. Logie *v.* Black, 24 W. Va. 1.

urged in favor of the relief,[68] and the diligence employed by the applicant.[69] Even where the continuance is asked on a different state of facts, the statements in the affidavit are required to be more specific than upon an original application,[70] and it is better in all cases to follow the words of the statute itself.[71]

XII. REVIEW OF ORDER GRANTING OR REFUSING CONTINUANCE.

A. Power to Review. In some jurisdictions it has been held that the discretion of the court in granting or refusing a continuance is not the subject of review.[72] In a great majority of jurisdictions, however, the rule is otherwise and the discretion of the trial court held subject to review by the appellate court,[73]

68. Ogden *v.* Gibbons, 5 N. J. L. 518; Arnold *v.* Hockney, 51 Tex. 46; Coleman *v.* Beardsley, (Tex. Sup. 1891) 16 S. W. 1011.

Absence of witness.— When a second application is made for the continuance of a cause on account of the absence of a material witness, the affidavit must state the facts the absent witness is expected to prove more specifically than they had already been set out in a pleading in the action. State *v.* Bennett, 31 Mo. 462.

Designation as to number.— It is not required that the application should state specifically that it is a first or second one. It is sufficient if the bill of exceptions to the ruling of the court thereon shows that it is a first or second one. Arnold *v.* Hockney, 51 Tex. 46; Barth *v.* Jester, 3 Tex. App. Civ. Cas. § 223.

Special affidavit.—If there has already been a postponement of the trial at the instance of the party soliciting a second adjournment, or any other circumstances raising a supposition that his application is merely for delay, then he must present a special affidavit. Brooklyn Oil Works *v.* Brown, 38 How. Pr. (N. Y.) 451.

69. In Shook *v.* Thomas, 21 Ill. 87, 89, the court said: "On a first application a less degree of diligence would satisfy the court, than on a second or third application. The fact that a party applies for the continuance of a cause a second time on account of the absence of the same witness, might create the suspicion that the party was not sufficiently anxious for his attendance to make the necessary effort to procure it, and would require evidence of greater diligence than if it were a first application, and so would it continue to require greater diligence on each successive application." See also Ogden *v.* Gibbons, 5 N. J. L. 518.

70. On the third trial of a cause wherein plaintiff has had a continuance by stipulation, a motion for the further continuance, to amend his complaint and obtain his evidence, is properly denied where the affidavit neither shows the amendments desired nor alleges want of evidence to support the amended complaint. Schultz *v.* McLean, 109 Cal. 437, 42 Pac. 557.

71. The application for a second continuance because a material witness was absent should state that no other witness is in attendance by whom the defendant could prove the same facts, or, in the words of the statute, "that the testimony cannot be obtained from any other source." Champion *v.* Angier, 16 Tex. 93.

Grounds complying with the law.— If one application for a continuance has been correctly overruled, but on a subsequent day a second application is made upon grounds substantially different from the first, and which complies substantially and fully with the law, a continuance should be granted thereon. Welsh *v.* Savery, 4 Iowa 241.

72. Planters', etc., Bank *v.* Willis, 5 Ala. 770; Givens *v.* Robbins, 5 Ala. 676; Lingenfelter *v.* Williams, (Pa. 1897) 9 Atl. 653; Woods *v.* Young, 4 Cranch (U. S.) 237, 2 L. ed. 607. In Evans *v.* Bolling, 5 Ala. 550, it was decided that the refusal to continue an action could not be reviewed on error in chancery any more than at law. See also Planters', etc., Bank *v.* Willis, 5 Ala. 770, 779, where it was said: "Though the court may exercise its discretion unwisely, it is not competent for an appellate tribune to revise the matter so as to administer more complete justice." And see, generally, APPEAL AND ERROR.

In Massachusetts the right of review is recognized but only to a very limited extent. It is held that a ruling on a decision granting or refusing a continuance is not subject to exception (Kittredge *v.* Russell, 114 Mass. 67; Pickering *v.* Reynolds, 111 Mass. 83; Monk *v.* Beal, 2 Allen, 585; Reynard *v.* Brecknell, 4 Pick. 302), and that the court can grant the party a remedy only upon a petition for a review (Reynard *v.* Brecknell, 4 Pick. 302).

In Pennsylvania while the supreme court does not ordinarily regard a continuance or a refusal to continue the trial of a cause in the common pleas as reviewable it will review a refusal to continue which subjects parties to a trial without witnesses, and which is in violation of a written rule of court. Schrimpton *v.* Bertolet, 155 Pa. St. 638, 32 Wkly. Notes Cas. 429, 26 Atl. 776.

73. *Arkansas.*— McDonald *v.* Smith, 21 Ark. 460; Hensley *v.* Tucker, 10 Ark. 527.

California.— Jeffe *v.* Lilienthal, 101 Cal. 175, 35 Pac. 636.

District of Columbia.— Strong *v.* District of Columbia, 3 MacArthur 499.

Florida.— Ahren *v.* Willis, 6 Fla. 359.

Georgia.— Central R., etc., Co. *v.* Jackson, 94 Ga. 640, 21 S. E. 845; Mathews *v.* Willoughby, 85 Ga. 289, 11 S. E. 620; Lucas *v.* Tarver, 32 Ga. 262; McDougald *v.* Central Bank, 3 Ga. 185.

either upon a bill of exceptions[74] or an appeal from the judgment in the action.[75]

B. Basis of Review. While this is true, the appellate court acts with some hesitancy in disturbing the ruling of the trial court. If the latter has exercised a reasonable discretion, its decision will not be disturbed.[76] It is only in cases where there has been an obvious abuse of discretion that the reviewing court will reverse the ruling of the trial court.[77]

Illinois.— Wicker *v.* Boynton, 83 Ill. 545; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Vickers *v.* Hill, 2 Ill. 307.

Indiana.— Vanblaricum *v.* Ward, 1 Blackf. 50.

Iowa.— Rice *v.* Melendy, 36 Iowa 166.

Louisiana.—Neyland *v.* Neyland, 8 La. Ann. 467; Hewlett *v.* Henderson, 9 Rob. 379; Richardson *v.* Nolan, 7 Mart. N. S. 103.

Mississippi.— Franks *v.* Wanzer, 25 Miss. 121.

Missouri.— Darne *v.* Broadwater, 9 Mo. 19; Tunstall *v.* Hamilton, 8 Mo. 500; J. H. Rottman Distilling Co. *v.* Van Frank, 88 Mo. App. 50; Alt *v.* Grosclose, 61 Mo. App. 409; Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 628; Blanchard *v.* Hunt, 18 Mo. App. 284; Hanel *v.* Freund, 17 Mo. App. 618.

Nebraska.— Johnson *v.* Dinsmore, 11 Nebr. 391, 9 N. W. 558.

New York.— Howard *v.* Freeman, 7 Rob. 25; Pulver *v.* Hiserodt, 3 How. Pr. 49.

Tennessee.— Fowlks *v.* Long, 4 Humphr. 511.

Texas.— Peck *v.* Moody, 33 Tex. 84; Hensley *v.* Lytle, 5 Tex. 497, 55 Am. Dec. 741; Dillingham *v.* Chapman, (Civ. App. 1895) 30 S. W. 677 [*following* Dillingham *v.* Ellis, 86 Tex. 447, 25 S. W. 618].

Virginia.— McAlexander *v.* Hairston, 10 Leigh 486; Anthony *v.* Lawhorne, 1 Leigh 1.

Washington.— Robertson *v.* Woolley, 6 Wash. 156, 32 Pac. 1060.

West Virginia.—Manufacturers', etc., Bank *v.* Mathews, 3 W. Va. 26.

Wisconsin.— Davis, etc., Mfg. Co. *v.* Riverside Butter, etc., Co., 84 Wis. 262, 54 N. W. 506; Hanson *v.* Michelson, 19 Wis. 498.

And see, generally, APPEAL AND ERROR.

By statute.— Exceptions and assignment of error for overruling motions for a continuance have been expressly provided for by statute in some states. Ahren *v.* Willis, 6 Fla. 359; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Vickers *v.* Hill, 2 Ill. 307. See also Howard *v.* Freeman, 7 Rob. (N. Y.) 25.

74. Robinson *v.* Glass, 94 Ind. 211; Arnold *v.* Hockney, 51 Tex. 46; McMahan *v.* Busby, 29 Tex. 191; Dangerfield *v.* Paschal, 20 Tex. 536; Campion *v.* Angier, 16 Tex. 93; Gaines *v.* Wilson, (Va. 1896) 24 S. E. 828.

75. Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251 [*following* Gregg *v.* Howe, 37 N. Y. Super. Ct. 420]; Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

76. *California.*— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116; Griffin *v.* Polhemus, 20 Cal. 180; Musgrove *v.* Perkins, 9 Cal. 211.

Florida.— Livingston *v.* Cooper, 22 Fla. 292.

Iowa.— Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590.

Nebraska.— Corbett *v.* National Bank of Commerce, 44 Nebr. 230, 62 N. W. 445.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

Oklahoma.— McMahan *v.* Norick, (1902) 69 Pac. 1047.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Texas.— J. S. Mayfield Lumber Co. *v.* Carver, (Civ. App. 1901) 66 S. W. 216.

Virginia.— Gaines *v.* Wilson, (1896) 24 S. E. 828.

From the nature of the case, the court trying the cause, witnessing all the proceedings, and being from personal observation familiar with all the attendant circumstances, has the best opportunity of forming a correct opinion upon any matter presented, which involves the exercise of this power.

California.— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116; Griffin *v.* Polhemus, 20 Cal. 180; Musgrove *v.* Perkins, 9 Cal. 211.

Florida.— Livingston *v.* Cooper, 22 Fla. 292.

Iowa.— Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590.

Louisiana.— Hewlett *v.* Henderson, 9 Rob. 379; Lizardi *v.* Arthur, 16 La. 577. *Compare* Vaiden *v.* Abney, 7 La. Ann. 575, where ruling was correct on one of two grounds.

Nebraska.— Corbett *v.* National Bank of Commerce, 44 Nebr. 230, 62 N. W. 445.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

New York.— Tribune Assoc. *v.* Smith, 40 N. Y. Super. Ct. 251, where there was a conflict of evidence.

Oregon.— Young *v.* Patton, 9 Oreg. 195.

Pennsylvania.— Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Virginia.— Gaines *v.* Wilson, (1896) 24 S. E. 828.

See also *supra*, VI, B.

77. *Alabama.*— Campbell *v.* White, 77 Ala. 397; Humes *v.* O'Bryan, 74 Ala. 64; Givens *v.* Robbins, 5 Ala. 676.

Arkansas.— Winter *v.* Bandel, 30 Ark. 362; Ware *v.* Kelly, 22 Ark. 441.

California.— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Griffin *v.* Polhemus, 20 Cal. 180; Haight *v.* Green, 19 Cal. 113; Musgrove *v.* Perkins, 9 Cal. 211.

C. Presumptions and Burden of Proof. In all cases the ruling of the lower court will be presumed to have been in accordance with the merits and justice of the case,[78] unless the party complaining shows unequivocally that the

Florida.— Livingston *v.* Cooper, 22 Fla. 292 [*following* McNealy *v.* State, 17 Fla. 198].

Georgia.— Southern Bell Tel., etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; Maynard *v.* Cleveland, 76 Ga. 52; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; Clay *v.* Barlow, 73 Ga. 787; Burge *v.* Hamilton, 72 Ga. 568; Turner *v.* Tubersing, 67 Ga. 161; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187; Ross *v.* Head, 51 Ga. 605; Walker *v.* Mitchell, 41 Ga. 102.

Idaho.— Lillienthal *v.* Anderson, 1 Ida. 673.

Illinois.— Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634; Northwestern Benev., etc., Aid Assoc. *v.* Primm, 124 Ill. 100, 16 N. E. 98 [*affirming* 19 Ill. App. 224]; Pennsylvania Co. *v.* Rudel, 100 Ill. 603; Vickars *v.* Hill, 2 Ill. 307; Packer *v.* Wetherell, 44 Ill. App. 95; Harris *v.* Rose, 26 Ill. App. 237.

Indiana.— Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906; Fisse *v.* Katzentine, 93 Ind. 490; Pate *v.* Tait, 72 Ind. 450; Whitehall *v.* Lane, 61 Ind. 93; Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427.

Iowa.— Borland *v.* Chicago, etc., R. Co., 78 Iowa 94, 42 N. W. 590; Boone *v.* Mitchell, 33 Iowa 45; Snediker *v.* Poorbaugh, 29 Iowa 488; Avery *v.* Wilson, 26 Iowa 573; Childs *v.* Heaton, 11 Iowa 271.

Kansas.— Gurney *v.* Steffens, 56 Kan. 295, 43 Pac. 241; Beard *v.* Mackey, 51 Kan. 131, 32 Pac. 921; Westheimer *v.* Cooper, 40 Kan. 370, 19 Pac. 852; Parsons Water Co. *v.* Knapp, 33 Kan. 752, 7 Pac. 568; Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81; St. Louis, etc., R. Co. *v.* Ransom, 29 Kan. 298; Moon *v.* Helfer, 25 Kan. 139; Jaquith *v.* Davidson, 21 Kan. 341; Bliss *v.* Carlson, 17 Kan. 325; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147; Swenson *v.* Aultman, 14 Kan. 273; Davis *v.* Wilson, 11 Kan. 74; Hottenstein *v.* Conrad, 9 Kan. 435; Christian Churches Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Missouri, etc., R. Co. *v.* Haynes, 1 Kan. App. 586, 42 Pac. 259; Atchison, etc., R. Co. *v.* O'Melia, 1 Kan. App. 374, 41 Pac. 437; Paulucci *v.* Verity, 1 Kan. App. 121, 40 Pac. 927.

Kentucky.— McCracken *v.* Church, 1 A. K. Marsh. 273.

Louisiana.— Johnston *v.* Dean, 48 La. Ann. 100, 18 So. 902; Cameron *v.* Lane, 36 La. Ann. 716; Cobb *v.* Franks, 6 La. Ann. 769; Biernacki *v.* Mexia, 18 La. 86; Lizardi *v.* Arthur, 16 La. 577.

Maine.— Schwartz *v.* Drinkwater, 70 Me. 409.

Massachusetts.—Barker *v.* Haskell, 9 Cush. 218.

Minnesota.—Ademek *v.* Piano Mfg. Co., 64 Minn. 304, 66 N. W. 981.

Mississippi.— Solomon *v.* State, 71 Miss. 567, 14 So. 461; Franks *v.* Wanzer, 25 Miss. 121.

Missouri.— St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 49; Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860; Owens *v.* Tinsley, 21 Mo. 423; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147; Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 629.

Nebraska.— Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; Kansas City, etc., R. Co. *v.* Conlee, 43 Nebr. 121, 61 N. W. 111.

New Hampshire.—Riddle *v.* Gage, 37 N. H. 519, 75 Am. Dec. 151.

New York.— People *v.* Northern R. Co., 53 Barb. 98; Ten Broeck *v.* Traveler's Ins. Co., 6 N. Y. St. 100; Leggett *v.* Boyd, 3 Wend. 376.

North Carolina.— Banks *v.* Gay Mfg. Co., 108 N. C. 282, 12 S. E. 741; Stratford *v.* Stratford, 92 N. C. 297.

South Carolina.— Westfield *v.* Westfield, 19 S. C. 85; Sheppard *v.* Lark, 2 Bailey 576; Ordinary *v.* Robinson, 1 Bailey 25; Farrand *v.* Bouchell, Harp. 83; Mayrant *v.* Guignard, 3 Strobh. Eq. 112.

South Dakota.— Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Tennessee.— Rexford *v.* Pulley, 4 Baxt. 364.

Texas.— Texas, etc., R. Co. *v.* Hall, 83 Tex. 675, 19 S. W. 121; Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467; Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367; Burrow *v.* Brown, 59 Tex. 457; Hunt *v.* Makemson, 56 Tex. 9; McMahan *v.* Busby, 29 Tex. 191; Gulf, etc., R. Co. *v.* Rowland, (Civ. App. 1896) 35 S. W. 31; French *v.* Groesbeck, 8 Tex. Civ. App. 19, 27 S. W. 43; Dempsey *v.* Taylor, 4 Tex. Civ. App. 126, 23 S. W. 220.

Utah.— Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

Virginia.— Gaines *v.* Wilson, (1896) 24 S. E. 828; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504; Carter *v.* Wharton, 82 Va. 264; Keesee *v.* Border Grange Bank, 77 Va. 129; Harman *v.* Howe, 27 Gratt. 676.

West Virginia.— Buster *v.* Holland, 27 W. Va. 510; Wilson *v.* Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Davis *v.* Walker, 7 W. Va. 447.

And see, generally, APPEAL AND ERROR.

78. *Indiana.*— Pate *v.* Tait, 72 Ind. 450 [*cited* in Fisse *v.* Katzentine, 93 Ind. 490].

Iowa.— Woolheather *v.* Risley, 38 Iowa 486; Finch *v.* Billings, 22 Iowa 228.

Oregon.— Young *v.* Patton, 9 Oreg. 195.

Texas.— McMahan *v.* Busby, 29 Tex. 191.

Virginia.— Gaines *v.* Wilson, (1896) 24 S. E. 828.

And see, generally, APPEAL AND ERROR.

Presumption not conclusive.— The judge before whom it is made has, in the manner and appearance and acts of the applicant, means of a correct decision with which the court at bar cannot be furnished. His determination of the question therefore affords strong presumption of correctness, but it is not conclusive. If a clear case of mistake on his part be made out, and we perceive that injustice has been done, the evil will be

court has been guilty of an abuse of discretionary powers, and that his rights have been injuriously affected by such abuse.[79]

remedied by a new trial. But the inquiry always is, Has injustice been done? has the party been injured? If he has not, no good reason can be given why he should receive the favor of trying his cause over again. Ogden *v.* Gibbons, 5 N. J. L. 518.

79. *Arkansas.*— McDonald *v.* Smith, 21 Ark. 460; Hensley *v.* Tucker, 10 Ark. 527.

Georgia.— Maynard *v.* Cleveland, 76 Ga. 52.

Indiana.— Gordon *v.* Spencer, 2 Blackf. 286.

Iowa.— Connor *v.* Griffin, 27 Iowa 248; Widner *v.* Hunt, 4 Iowa 355.

Louisiana.— Hewlett *v.* Henderson, 9 Rob. 379.

Nebraska.— Singer Mfg. Co. *v.* McAllister, 22 Nebr. 359, 35 N. W. 181; Johns *v.* Dinsmore, 11 Nebr. 391, 9 N. W. 558; Jameson *v.* Butler, 1 Nebr. 115.

Nevada.— Choate *v.* Bullion Min. Co., 1 Nev. 73.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

New York.— Obart *v.* Simmons Soap Co., 13 N. Y. Civ. Proc. 227.

Oregon.— Young *v.* Patton, 9 Oreg. 195.

Texas.— Stanley *v.* Epperson, 45 Tex. 644; Peck *v.* Moody, 33 Tex. 84; Hipp *v.* Bissell, 3 Tex. 18.

Virginia.— Gaines *v.* Wilson, (1896) 24 S. E. 828; Myers *v.* Trice, 86 Va. 835, 11 S. E. 428.

Erroneous idea of law.— In Maynard *v.* Cleveland, 76 Ga. 52, 56, the court said: "This court has repeatedly held that continuances are in the discretion of the court, and that, when refused, unless there is an abuse of discretion, this court will not interfere. But where it plainly appears that the court below acted on an erroneous notion of the law, and that without that error, the showing would have been satisfactory, and that in consequence of the refusal of the continuance the party has suffered a serious disadvantage, we hold that a tribunal for the correction of errors of law has distinct ground for reviewing the decision."

CONTINUANCES IN CRIMINAL CASES

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CROSS-REFERENCES

For Matters Relating to:

Continuance:

Affecting Bail, see BAIL.

In Bastardy Proceeding, see BASTARDS.

In Civil Cases, see CONTINUANCES IN CIVIL CASES.

In Court Martial Proceeding, see ARMY AND NAVY.

In Justice's Court, see JUSTICES OF THE PEACE.

General Matters Relating to Criminal Law and Criminal Proceedings, see CRIMINAL LAW.

I. DEFINITION.

A continuance is the adjournment of a cause from one day to another of the same term or to a subsequent term.[1]

II. POWER AND NECESSITY OF GRANTING.

A. Power to Grant. Where the court conceives it to be necessary for the more perfect attainment of justice it has the power, upon the application either of the state or of the accused, to continue a case;[2] and the fact that the offense is a capital one creates no exception.[3] So too the court may in certain instances continue a criminal cause of its own motion.[4]

B. Necessity of Granting — 1. RULE STATED. A party charged with a crime has no natural or inalienable right to a continuance, and in the absence of a statute

1. Bouvier L. Dict. And see CONTINUANCES IN CIVIL CASES, *ante* p. 75.

"The term originated when all the proceedings in a cause were conducted orally and in presence of the court, and were entered upon record as they transpired. As the proceedings generally occupied more days than one, the court used to adjourn them from time to time; if these adjournments, which were called continuances, were not made, the suit was at an end, since there was no period at which either party had a right again to call the court's attention to it; and if the continuance, though made, were not entered on the record, the suit was equally at an end, since the record was the only evidence the court would admit of the fact of the continuance. Subsequently, when a cause was put down in the list of causes to be tried at a certain time, and, from some cause or other, it was not then tried, but was adjourned, a minute of such adjournment was entered on the record, which was technically termed entering a continuance, because such entry signified that the cause was not yet finished, but continued pending." Abbott L. Dict.

Must be for time certain.— A continuance, within the lawful meaning of this term, must be for a definite and certain time. Com. *v.* Maloney, 145 Mass. 205, 13 N. E. 482. See also State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008.

Distinguished from postponement.— It is conceived that, properly speaking, the word "postponement" is preferable when the purpose is to obtain a continuance to another day during the term at which the case is fixed rather than to a future term. See State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008. So too a postponement to another day in the same term cannot be considered as a "continuance" within the meaning of a statute providing for the averment of different facts upon an application for a second continuance than on the first. State *v.* Maguire, 69 Mo. 197. But as in the almost universal phraseology of the courts these terms are used interchangeably, and a postponement to another day during the same term is spoken of in many cases as a continuance, no distinction is made in the use of the two terms in this article.

2. *Iowa.*— State *v.* Rorabacher, 19 Iowa 154; State *v.* Arnold, 12 Iowa 479.

Louisiana.— State *v.* Brooks, 30 La. Ann. 335, holding that the state upon a proper showing is entitled to a continuance to each of jointly indicted defendants, although one of the accused is ready for and demands trial.

Nevada.— State *v.* Lawry, 4 Nev. 161.

New Jersey.— State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

New York.— McFall *v.* People, 18 Hun 382, holding that a juror might be withdrawn at the request of the accused, and the case continued if the court conceived that justice would be more nearly attained thereby.

North Carolina.— State *v.* Weaver, 35 N. C. 203, holding that the court had power in misdemeanor cases to withdraw a juror and continue a case without the consent of the accused when in its discretion it deemed it necessary to the ends of justice.

See 14 Cent. Dig. tit. "Criminal Law," § 1306.

3. U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

4. *Ex p.* Larkin, 11 Nev. 90, holding that the court might continue a criminal case

is not entitled to the same as a mere matter of right or law.[5] At common law such applications were addressed to the sound discretion of the court, and its decision thereon could not be assigned as error;[6] and while now the practice acts in perhaps all American jurisdictions authorize the review of such decisions by the appellate tribunals, the rule is well established that the trial court still acts within its own discretion in granting or refusing an application for a continuance in a criminal case, whether it be on behalf of the accused or of the state; which ruling will not be disturbed in the absence of a clear abuse of discretion.[7]

2. Application of Rule. The discretion which a trial court exercises must be judicial and not arbitrary;[8] it is the guardian of the rights of the accused as well

where a great public calamity had befallen the city, or where a condition of affairs exists that is notorious, and about which from its very nature it is apparent there could be no conflict of opinion, as it would be idle ceremony to require an affidavit setting forth the existence of such fact in order to authorize the court to act.

5. *Iowa.*— State *v.* McComb, 18 Iowa 43, holding that under neither the code nor the statutes of that state was a defendant entitled to a continuance as a matter of law merely on the ground that it was the first term of court after his arrest.

Kansas.— See State *v.* Stredder, 3 Kan. App. 631, 44 Pac. 34.

Massachusetts.— Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386.

New York.— People *v.* Horton, 4 Park. Crim. 222.

South Carolina.— State *v.* Smith, 8 Rich. 460; State *v.* Dayley, 2 Nott & M. 121.

Texas.—Wooldridge *v.* State, 13 Tex. App. 443, 44 Am. Rep. 708.

Washington.— See Thompson *v.* Territory, 1 Wash. Terr. 547.

See 14 Cent. Dig. tit. "Criminal Law," § 1309.

6. People *v.* Diaz, 6 Cal. 248; Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239.

7. *Alabama.*— Walker *v.* State, 91 Ala. 76, 9 So. 87; De Arman *v.* State, 77 Ala. 10; Starr *v.* State, 25 Ala. 49; Lindsay *v.* State, 15 Ala. 43.

Colorado.— Solander *v.* People, 2 Colo. 48.

Florida.— Ballard *v.* State, 31 Fla. 266, 12 So. 865; Hicks *v.* State, 25 Fla. 535, 6 So. 441.

Georgia.— Williams *v.* State, 69 Ga. 11; Long *v.* State, 38 Ga. 491; Revel *v.* State, 26 Ga. 275.

Illinois.— Holmes *v.* Smith, 10 Ill. 478; Baxter *v.* People, 8 Ill. 368.

Indiana.— Morris *v.* State, 104 Ind. 457, 4 N. E. 148; Detro *v.* State, 4 Ind. 200.

Iowa.— State *v.* Reid, 20 Iowa 413.

Louisiana.— State *v.* Charles, 108 La. 230, 32 So. 354; State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802; State *v.* Green, 43 La. Ann. 402, 9 So. 42; State *v.* George, 37 La. Ann. 786 (where it is said that the repetition of this rule becomes wearisome); State *v.* Kane, 36 La. Ann. 153; State *v.* King, 31 La. Ann. 179; State *v.* Johnson, 26 La. Ann. 543.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

Mississippi.— McDaniel *v.* State, 8 S. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588; State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Wilson, 85 Mo. 134; State *v.* Kring, 74 Mo. 612; State *v.* Ward, 74 Mo. 253; State *v.* Lange, 59 Mo. 418; State *v.* Sayers, 58 Mo. 585; Green *v.* State, 13 Mo. 382.

Montana.— Territory *v.* Perkins, 2 Mont. 467.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

Nevada.— State *v.* Rosemurgey, 9 Nev. 308.

New Hampshire.— State *v.* Pike, 20 N. H. 344.

New Mexico.— Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357.

New York.—People *v.* Colt, 3 Hill 432; People *v.* Horton, 4 Park. Crim. 222; Com. *v.* Carson, 1 Wheel. Crim. 487.

North Carolina.— State *v.* Pankey, 104 N. C. 840, 10 S. E. 315; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364.

Ohio.— Holt *v.* State, 11 Ohio St. 691.

Oregon.— State *v.* Howe, 27 Oreg. 138, 44 Pac. 672.

South Carolina.— State *v.* Lucker, 40 S. C. 549, 18 S. E. 797; State *v.* Way, 38 S. C. 333, 17 S. E. 39; State *v.* Dodson, 16 S. C. 453; State *v.* Thomas, 8 Rich. 295; State *v.* Patterson, 1 McCord 177.

Tennessee.— Brown *v.* State, 85 Tenn. 439, 2 S. W. 895; State *v.* Rigsby, 6 Lea 554; Garber *v.* State, 4 Coldw. 161.

Texas.— Howard *v.* State, 8 Tex. App. 53; Krebs *v.* State, 8 Tex. App. 1; Reynolds *v.* State, 7 Tex. App. 516; Jackson *v.* State, 4 Tex. App. 292; Nichols *v.* State, 3 Tex. App. 546.

Virginia.— Smith *v.* Com., 2 Va. Cas. 6.

Washington.— Thompson *v.* Territory, 1 Wash. Terr. 547.

United States.— Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343; Isaacs *v.* U. S., 159 U. S. 487, 16 S. Ct. 51, 40 L. ed. 229.

See 14 Cent. Dig. tit. "Criminal Law," § 1311.

8. State *v.* Poe, 8 Lea (Tenn.) 647; Irvine *v.* State, 20 Tex. App. 12; Harris *v.* State, 18 Tex. App. 287.

It is not repugnant to a bill of rights which gives an accused the right of compulsory process for his witnesses to give trial judges discretionary power to refuse continuances. Lillard *v.* State, 17 Tex. App. 114.

as of those of the people at large,[9] and should not unduly force him to trial,[10] but when exercised with a reasonable degree of judicial acumen and fairness it is one which the higher courts are loth to review or disturb;[11] and the mere fact that the case was disposed of with unusual despatch is not an ear-mark of error.[12] The presiding judge must be, to a certain extent, free to secure a speedy and expeditious trial when such speed is not inconsistent with its fairness;[13] and the business before the court, the number of witnesses, and venire of men in attendance are all to be considered,[14] as well as the shifts, devices, and false pretenses to which defendants often resort to escape or delay justice.[15] And while it is not necessary, to constitute abuse, that the court acts wickedly or with intentional unfairness,[16] it is essential that it be shown to have committed a clear or palpable error, without the correction of which manifest injustice will be done;[17] and since the court trying the cause is from personal observation familiar with all the attendant circumstances, and has the best opportunity of forming a correct opinion upon the case presented, the presumption will be in favor of its action;[18] and in no case will the exercise of this discretion be reviewed where it manifestly appears that justice has been done without sacrificing the rights of the defendant.[19]

3. Limitation of Rule — a. In General. The rule that the court may exercise its discretion in granting continuances is, however, in some jurisdictions, subject to certain limitations prescribed by statutes;[20] these provisions are inclined to

9. People *v.* Horton, 4 Park. Crim. (N. Y.) 222, holding, however, that it cannot for light causes jeopard the rights or interests of the public; and that where the court is informed by the indictment that evidence sufficient, in the opinion of the grand jury, to warrant a conviction of the prisoner has been adduced before it, and where the district attorney moves the cause for trial, the presumption is that that evidence is ready to be laid before the petit jury, and a criminal court cannot without good cause grant a delay which may lead to a dispersion of the witnesses and the loss of material testimony.

10. Robinson *v.* Com., 68 S. W. 1099, 24 Ky. L. Rep. 564.

11. Long *v.* State, 38 Ga. 491, 504 (where it is said: "It is only when the discretion of the Circuit Judge is abused — is unwise — that this Court interposes to control it"); State *v.* Pike, 20 N. H. 344; Garber *v.* State, 4 Coldw. (Tenn.) 161 (where it is said that it would require a very strong case of abuse of this discretion to authorize this court to interfere).

12. Hubbard *v.* State, (Nebr. 1902) 91 N. W. 869, 870, where the court say: "Criminal justice is supposed to be leaden-heeled, but we have never understood that the leaden heel was indispensable. Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination — delay for delay's sake — should not be tolerated."

13. Allen *v.* State, 10 Ga. 85; Haas *v.* State, 13 Ohio Cir. Ct. 418.

14. Green *v.* State, 13 Mo. 382.

15. State *v.* Rigsby, 6 Lea (Tenn.) 554, where the proof was in relation to an alibi.

16. Long *v.* State, 38 Ga. 491.

17. Long *v.* State, 38 Ga. 491; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93.

18. *Florida.*— Gladden *v.* State, 12 Fla. 562.

Georgia.— Allen *v.* State, 10 Ga. 85.

Indiana.— Detro *v.* State, 4 Ind. 200.

Louisiana.— State *v.* Spooner, 41 La. Ann. 780, 6 So. 879.

Missouri.— State *v.* Cochran, 147 Mo. 504, 49 S. W. 558.

Texas.— Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630.

The opinion that the trial court might, in view of all the facts shown, very consistently have granted the continuance will not of itself be sufficient to authorize a reversal. State *v.* Reid, 20 Iowa 413; State *v.* Rorabacher, 19 Iowa 154.

19. Brown *v.* State, 85 Tenn. 439, 2 S. W. 895.

20. For judicial construction of old statutory provisions concerning the granting of continuances see State *v.* Moran, 7 Iowa 236; Com. *v.* Viers, 2 Duv. (Ky.) 377, holding that the object of the statute allowing as grounds of continuances the absence of the defendant as a volunteer in the army of Kentucky, or of the United States, being not to grant immunity to crime but to simply postpone investigation of all prosecutions where the defendant should engage in the service of his country, such statutes applied as well to those indicted before as after its passage.

The statutes with regard to continuances in civil cases in some jurisdictions do not apply to criminal cases (State *v.* Flemons, 6 Ind. 279); while in other states the causes for continuances in the two kinds of cases are the same (Territory *v.* Perkins, 2 Mont. 467). But where such statutes do not govern it has been held that it is reasonable to consult them in the absence of special provisions in the criminal code, in establishing rules, as the court must, in relation to procedure in criminal cases. Miller *v.* State, 42 Ind. 544.

liberality in favor of the accused,[21] and should, at least when life is involved, receive a liberal interpretation.[22] And where the statutes are fully complied with, and no facts discrediting the affidavit for continuance are shown, the court has no discretion in the matter but must grant the same.[23]

b. In Case of Joint Defendants. A continuance granted on the application of one joint defendant operates as a continuance to all of them, when no severance has been granted;[24] but after severance the fact that a continuance is granted to one does not entitle the other to the same as a matter of right;[25] nor on the other hand does it preclude him from demanding a trial if he so desires.[26] So too it may be said that a statute providing that where two or more persons are indicted, either jointly or severally, for an offense growing out of the same transaction, either co-defendant may, for the purpose of defensive testimony, by making the prescribed affidavit, have his co-defendant first tried, does not contemplate that if such co-defendant is convicted and appeals, the other shall be entitled to a continuance as a matter of right until the appeal is determined.[27] Such severance may be demanded at any time before an announcement of ready for trial on the merits,[28] and where the affidavit for severance has been made the state cannot defeat its operation and effect by continuing the case of the co-defendant whose testimony is desired by the affiant.[29]

III. GROUNDS.

A. In General. The more usual and prominent grounds generally alleged as cause for a continuance may be separately distinguished and profitably commented upon,[30] as they are often specifically enumerated by statute or have become established, by the courts having long exercised their discretion upon a certain state of facts in a uniform manner;[31] but no universal enumeration of such grounds is possible, as the sufficiency of a cause for a continuance is necessarily dependent upon, and often intricately interwoven with many facts and circumstances peculiar to the case in question. Perhaps the usual and most cogent

"First term," as used in a statute authorizing a continuance at the first term on the affidavit of the accused, to the effect that popular prejudice precludes him from a safe trial, means the term at which the prosecuting officer demands the arraignment of the prisoner, and not necessarily the first term after the indictment. John *v.* State, 1 Head (Tenn.) 49.

21. Copenhaven *v.* State, 14 Ga. 22.

22. John *v.* State, 1 Head (Tenn.) 49.

23. Hurt *v.* State, 26 Ind. 106; State *v.* Butler, 42 La. Ann. 405, 7 So. 669; Shackelford *v.* State, 43 Tex. 138; Dinkens *v.* State, 42 Tex. 250; Jenkins *v.* State, 30 Tex. 444; Stephenson *v.* State, 5 Tex. App. 79; Sansbury *v.* State, 4 Tex. App. 99; Brown *v.* State, 3 Tex. App. 294; Peeler *v.* State, 2 Tex. App. 455; Perkins *v.* State, 1 Tex. App. 114. But see Aiken *v.* State, 10 Tex. App. 610, where, by a later statute, it was held that even where the application is in conformity to the requirements of the statute its truth and merits are addressed to the sound discretion of the trial court. And indeed this latter view seems to be the one taken by the Georgia court in the interepretation of the statutes of that state. See Malone *v.* State, 49 Ga. 210.

24. Thompson *v.* State, 9 Tex. App. 301; Krebs *v.* State, 3 Tex. App. 348.

25. White *v.* State, 31 Ind. 262.

26. Winkle *v.* State, 20 Ga. 666.

27. Krebs *v.* State, 8 Tex. App. 1; Myers *v.* State, 7 Tex. App. 640; Slawson *v.* State, 7 Tex. App. 63.

28. Dodson *v.* State, 32 Tex. Crim. 529, 24 S. W. 899, holding that the overruling of a motion for a continuance was not such an announcement.

29. Forcey *v.* State, 29 Tex. App. 408, 16 S. W. 261.

30. See *infra*, III, B.

31. See State *v.* Pike, 20 N. H. 344.

The rules as to granting continuances are often said to be substantially the same in both civil and criminal causes (Ballard *v.* State, 31 Fla. 266, 12 So. 865; Gladden *v.* State, 12 Fla. 562; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630), although partly by virtue of the statute and partly from judicial decisions, differences in practice in the respective states have arisen (State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008); it being generally agreed, however, that, because of the superior temptation to delay arising in criminal cases, the matter presented for a continuance is to be scanned more closely (Ballard *v.* State, 31 Fla. 266, 12 So. 865; Gladden *v.* State, 12 Fla. 562; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630). And it is said that the affidavit for continuance of a person indicted for felony cannot be given the same explicit credence as that of a party to a civil action. State *v.* Horton, 4 Park. Crim. (N. Y.) 222.

consideration is whether or not an injury will be done the applicant by a refusal;[32] although circumstances working a hardship on defendant are not sufficient grounds if beyond the control of the court.[33] It is not a sufficient ground to allege that the ministerial and other officers of the court actually and *de facto* acting as such have no legal right to their respective offices.[34] And while there may be peculiar circumstances sufficient to warrant a court in delaying the trial of a criminal prosecution for a reasonable time on account of the pendency of a civil suit involving the same question,[35] the mere existence of such suit is not of itself sufficient ground;[36] and it has been held that the criminal action should not be continued unless the party is to be used as a witness for the state.[37] But where defendant has been convicted of a certain offense and an appeal has been taken, a trial against him, under the same statute, upon the same state of facts, and upon

32. See, generally, the following cases:
Arkansas.— Jackson *v.* State, 54 Ark. 243, 15 S. W. 607.
California.— People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.
Colorado.— Holland *v.* People, (1902) 69 Pac. 519.
Iowa.— State *v.* Rorabacher, 19 Iowa 154.
Texas.— Morse *v.* State, (Crim. 1898) 47 S. W. 989.
Virginia.— Early *v.* Com., 86 Va. 921, 11 S. E. 795.

That defendant was in attendance as a juror for a week previous to the calling of his case is not ground for a continuance, where it is not shown that by reason of such service he is less prepared to go to trial than he would otherwise have been. Johnson *v.* State, 83 Ga. 553, 10 S. E. 207.

The fact that an order rescinding certain procedure has not been entered upon the record of the court does not entitle the defendant to a continuance, where it is not claimed that he was surprised by the order not having been entered of record or that he is not at the time ready for trial. State *v.* Gillick, 10 Iowa 98.

The misspelling of the names of witnesses in indorsing them on an information does not entitle defendant to a continuance, where his affidavit does not distinctly allege that he was surprised by the introduction of their testimony. State *v.* Everitt, 14 Wash. 574, 45 Pac. 150.

Where a stenographer is in court and it is clear that his attendance should have been compelled by a subpœna had he not been present and that he could be compelled under oath to develop from his notes any testimony taken on preliminary examination, a failure to file a transcript of the evidence contained in such notes is not a good ground for a continuance, as it is plain that no injury results therefrom. Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

33. State *v.* Ford, 37 La. Ann. 443, holding that while the arrest and indictment of important witnesses for the defendant because of testimony given by them on his former trial might work a hardship upon him, it was a matter beyond the control of the court, and not sufficient ground. But see State *v.* Harris, 22 Wash. 57, 60 Pac. 58, where it is held that a continuance should be granted until a material witness whose conviction for perjury which was pending on appeal was determined.

The private and personal convenience of the defendant and his counsel is not a sufficient consideration to authorize a continuance. People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. 506, 6 N. Y. Crim. 392. See also Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342.

34. To permit a party to urge this as a ground would give him the right to commence with a kind of a collateral quo warranto as to the judge, and continue thus down through the official roster of the court. State *v.* O'Grady, 31 La. Ann. 378.

The mere fact that a defendant has turned state's evidence does not, as a matter of right, entitle him to a continuance. Runnels *v.* State, 28 Ark. 121; Com. *v.* Dabney, 1 Rob. (Va.) 696, 40 Am. Dec. 717.

35. Taylor *v.* Com., 29 Gratt. (Va.) 780. See also Com. *v.* Bliss, 1 Mass. 32.

36. Com. *v.* Hurd, 177 Pa. St. 481, 35 Atl. 682· Taylor *v.* Com., 29 Gratt. (Va.) 780.

That a special plea in abatement has been overruled is no ground for a continuance. Carter *v.* State, 75 Ga. 747.

Unwarranted belief and supposition of defendant.— Where the only grounds stated in an affidavit for a continuance is that the defendant was informed by someone, just whom it does not appear, that the case would not be tried at that term, and that the district attorney had no intention of calling it for trial that term, and that the witnesses for the state were not present until the day before the affidavits were made, a continuance is properly refused. State *v.* Smith, 60 Iowa 755, 15 N. W. 593.

37. Com. *v.* Elliott, 2 Mass. 372.

The fact that difficult and important legal questions will likely arise on the trial will not ordinarily justify the postponement to a time when, by the practice of the court, if a division of opinion should occur between the trial judges, the point or points could be certified to the supreme court; such manner being the only authorized mode of sending questions of law arising on the trial of criminal cases to the upper court for revision. U. S. *v.* Fullerton, 25 Fed. Cas. No. 15,175, 6 Blatchf. 275.

the ground of the case already pending in the appellate court, and involving the same questions, should be continued until the determination of the former case in the appellate court;[38] although the mere fact that accused has been convicted of another offense and is at the time awaiting sentence is not ground for a continuance on a charge of an entirely different offense.[39] Nor would the fact that an accused who is put on trial for murder has been at that term convicted of another murder be such cogent reason for a continuance that a refusal would be reversible error.[40]

B. Special or Particular Grounds — 1. Absence of Counsel — a. In General. A request for continuance on the ground of the absence of a certain counsel is not looked upon by the courts with favor,[41] especially where such counsel is attending to professional duties in another court, or in some other manner would retard the operation of the court by his personal convenience or business.[42] And generally speaking a continuance will not be granted on this ground where defendant is ably represented by other counsel, and it does not appear that his rights have been jeopardized or injury done him by the absence of certain counsel;[43] or where, defendant's counsel being engaged in the trial of another

38. White *v.* Com., 79 Va. 611.

39. State *v.* Robertson, 48 La. Ann. 1026, 20 So. 167.

The fact that there are cross indictments between the prosecutor and prisoner, the prosecutor having been acquitted on a previous day, is not ground for a continuance. Galloway *v.* State, 25 Ga. 596.

40. Jones *v.* State, 61 Ark. 88, 32 S. W. 81.

That a prisoner desires to find certain persons to join with him in an affidavit to change the venue does not as a right entitle him to a postponement or continuance. Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302.

The fact that a witness whose name was indorsed on the information was returned as a juror is not ground for granting the accused a continuance, as continuances are not to be granted merely because of the acquaintance of a juror with the prosecution. People *v.* Williams, 118 Mich. 692, 77 N. W. 248.

Where the judge of another district presided at a trial pursuant to a call made by the presiding judge of the district in which the trial was held, it is not ground for a continuance that the certificate of record does not affirmatively set forth that the presiding judge was disqualified or disabled, or that in his opinion the proper despatch of public business required the calling in of another judge. Com. *v.* Scouton, 20 Pa. Super. Ct. 503. See also Payne *v.* State, 60 Ala. 80.

Where there is an objection to the formation or personnel of the jury which could have been properly raised by a challenge, such objection cannot be availed of by a motion for a continuance. Humphries *v.* State, 100 Ga. 260, 28 S. E. 25; State *v.* Hoozer, 26 La. Ann. 599; Bateman *v.* State, (Tex. Crim. 1898) 44 S. W. 290.

41. Poppell *v.* State, 71 Ga. 276; Long *v.* State, 38 Ga. 491; Wright *v.* State, 18 Ga. 283; Allen *v.* State, 10 Ga. 85.

42. *California.*— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Colorado.— Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

Georgia.— See Johnson *v.* State, 108 Ga. 771, 33 S. E. 641.

Illinois.— Feinberg *v.* People, 174 Ill. 609, 51 N. E. 798.

Michigan.— People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

New York.— People *v.* McGuinness, 60 Hun 584, 15 N. Y. Suppl. 230, 39 N. Y. St. 533.

Texas.— Mixon *v.* State, 36 Tex. Crim. 66, 35 S. W. 394.

Wyoming.— Van Horn *v.* State, 5 Wyo. 501, 40 Pac. 964.

See 14 Cent. Dig. tit. "Criminal Law," § 1320.

43. *California.*— People *v.* Durrant, 119 Cal. 201, 51 Pac. 185.

Florida.— Newberry *v.* State, 26 Fla. 334, 8 So. 445.

Georgia.— Smith *v.* State, 78 Ga. 71; Giles *v.* State, 66 Ga. 344; Allen *v.* State, 10 Ga. 85; Bulloch *v.* State, 10 Ga. 46.

Illinois.— Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48.

Iowa.— State *v.* Ostrander, 18 Iowa 435, holding that it is not ground for a continuance where time enough is given to employ another attorney to enable him to prepare the case for trial.

Kansas.— State *v.* Sullivan, 43 Kan. 563, 23 Pac. 645.

Kentucky.— Hatfield *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1461; Stevens *v.* Com., 6 S. W. 456, 9 Ky. L. Rep. 742; Brown *v.* Com., 7 Ky. L. Rep. 451.

Missouri.— State *v.* Parker, 106 Mo. 217, 17 S. W. 180.

Texas.— Moore *v.* State, (Crim. 1902) 70 S. W. 89; Roberts *v.* State, (Crim. 1899) 51 S. W. 383; Barton *v.* State, 34 Tex. Crim. 613, 31 S. W. 671; Weaver *v.* State, 34 Tex. Crim. 282, 30 S. W. 220; Stockholm *v.* State, 24 Tex. App. 598, 7 S. W. 338; Walker *v.* State, 13 Tex. App. 618.

West Virginia.— See State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328.

See 14 Cent. Dig. tit. "Criminal Law," § 1320.

cause, the court offers to assign him counsel, which offer he declined.[44] Where, however, the higher court conceives that the ends of justice require the presence at the trial of a particular counsel, and he is unexpectedly absent through no fault of the accused, it will be held reversible error on the part of the trial court to refuse a continuance.[45]

b. By Reason of Illness. A request for continuance on the ground that the absence of the counsel is due to his sickness is of course received with more favor than when such absence is due to his personal business transactions; and where defendant has been unable or has not had sufficient time to provide other counsel, a continuance should be granted.[46] Such sickness must, however, be *bona fide* and sufficient to incapacitate him from conveniently appearing and making an able defense;[47] nor is it error to refuse a continuance because of the sickness of a certain counsel, where defendant has sufficient array of other counsel, or where other able counsel are appointed to defend him, and no injury to defendant's rights are shown.[48]

2. Absence of Evidence — a. Of Witnesses — (i) *In General.* It has been said that the rule governing the granting of a continuance on the ground of absence of witnesses is the same in both civil and criminal cases;[49] under this rule the court is invested with a certain amount of discretion which, when the facts and circumstances on which it acts are not certified to the appellate court, will be presumed to be properly exercised.[50] If the absent witnesses can be procured by a short postponement of the trial, and this mode is adopted, a continuance cannot be claimed;[51] nor is it error to refuse a continuance where defendant refuses to avail himself of an offer of postponement sufficient to enable him to procure their attendance;[52] nor where the court is convinced that their absence is due to the procurement and connivance of defendant,[53] or that the continuance is not requested in good faith.[54] Certain concurring facts have, however, from a very early date, been considered by the courts as guiding stars to the proper exercise of this discretion,[55] which, either by virtue of judicial precedent or stat-

This rule applies to an attorney in fact as well as an attorney at law. Allen *v.* State, 10 Ga. 85.

44. State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160.

45. *Georgia.*— Delk *v.* State, 100 Ga. 61, 27 S. E. 152.

Kentucky.— Cornelius *v.* Com., 64 S. W. 412, 23 Ky. L. Rep. 771; Leslie *v.* Com., 42 S. W. 1095, 19 Ky. L. Rep. 1201; Bates *v.* Com., 16 S. W. 528, 13 Ky. L. Rep. 132.

Louisiana.— State *v.* Ferris, 16 La. Ann. 424.

Minnesota.— See State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

Texas.— Scott *v.* State, (Crim. 1902) 68 S. W. 171.

See 14 Cent. Dig. tit. "Criminal Law," § 1320.

46. People *v.* Logan, 4 Cal. 188; Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80; Allen *v.* State, 10 Ga. 85; People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79; Daugherty *v.* State, 33 Tex. Crim. 173, 26 S. W. 60.

47. Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Murmutt *v.* State, (Tex. Crim. 1902) 67 S. W. 508. See also Hanye *v.* State, 99 Ga. 212, 25 S. E. 307; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

48. Marshall *v.* State, 94 Ga. 589, 20 S. E. 432; State *v.* Ostrander, 18 Iowa 435; State *v.* Bailey, 94 Mo. 311, 7 S. W. 425; Calhoun *v.* State, (Tex. Crim. 1901) 63 S. W. 322; Johnson *v.* State, 41 Tex. Crim. 9, 51 S. W. 911, 54 S. W. 598; Self *v.* State, 39 Tex. Crim. 455, 47 S. W. 26; Webb *v.* State, (Tex. Crim. 1897) 40 S. W. 989; Alexander *v.* State, 4 Tex. App. 261.

49. People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

50. State *v.* Finn, 31 La. Ann. 408; People *v.* Foote, 93 Mich. 38, 52 N. W. 1036; Com. *v.* Carson, 3 Phila. (Pa.) 219, 15 Leg. Int. (Pa.) 325.

51. Betts *v.* State, 66 Ga. 508; Reese *v.* State, 7 Ga. 373; Salisbury *v.* Com., 3 Ky. L. Rep. 211, holding that section 189 of the criminal code did not preclude the court from so proceeding. See also State *v.* Lewis, 41 La. Ann. 590, 6 So. 536; State *v.* Gamble, 108 Mo. 500, 18 S. W. 1111.

52. Smith *v.* State, 78 Ga. 71; McRae *v.* State, 52 Ga. 290; May *v.* State, 25 Tex. App. 114, 7 S. W. 588; Ferguson's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196.

53. State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846; Ogles *v.* Com., 11 S. W. 816, 11 Ky. L. Rep. 289; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

54. Freeman *v.* State, 78 Ga. 663, 3 S. E. 700; State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846; Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

55. In Rex *v.* D'Eon, 1 W. Bl. 510, Lord Mansfield held that to put off a trial

ute,[56] should be followed. Hence where it is shown that the evidence of the absent witness is material and admissible;[57] that the testimony, in view of the established facts, is not probably untrue;[58] that their attendance can probably be procured at another term;[59] that the facts expected to be proved cannot be obtained from other disinterested witnesses;[60] and that the defendant has exercised proper diligence to procure their attendance,[61] a denial of a continuance under such circumstances would operate unfairly to a defendant, would deprive him of a fair and impartial trial, and would therefore constitute reversible error.[62]

(II) *Right to Personal Attendance.* A defendant in a criminal action should not be compelled to invoke a statutory method of procuring evidence from absent witnesses, but is entitled to their personal attendance if it can be

because of the absence of a witness it must appear (1) that the witness was really material and appears to the court to be so; (2) that the party who pleads has been guilty of no neglect; (3) that the witness must be had at the time to which the trial is deferred. This case was followed in Rex *v.* Jones, 8 East 31, 9 Rev. Rep. 368, and has been cited and approved, as the clear and proper enunciation of the law, by modern courts. See State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. 506, 6 N. Y. Crim. 393; People *v.* Vermilyea, 7 Cow. (N. Y.) 369; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630.

56. For in some jurisdictions it is expressly provided by statute that where the proof which the accused expects to make by absent witnesses is material and cannot be satisfactorily made by other witnesses, and he has used due diligence to procure their presence, a continuance must be granted unless the state will admit the truth of such evidence. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; Robinson *v.* Com., 68 S. W. 1099, 24 Ky. L. Rep. 564; Territory *v.* Kinney, 3 N. M. 656, 9 Pac. 599.

For admissions to prevent continuances see *infra*, III, B, 2, c.

57. See *infra*, III, B, 2, a, (III), (A), (1), (a).

58. Cline *v.* State, (Tex. Crim. 1902) 68 S. W. 679; *infra*, III, B, 2, a. (III) (A), (2).

59. See *infra*, III, B, 2, a, (III), (D).

60. Compton *v.* State, 108 Ga. 747, 32 S. E. 843; *infra*, III, B, 2, a, (III), (C).

61. See *infra*, III, D.

62. *Arkansas.*— Statham *v.* State, 42 Ark. 273.

California.— People *v.* Lee, (1885) 8 Pac. 685; People *v.* McCrory, 41 Cal. 458.

Florida.— Shiver *v.* State, 41 Fla. 630, 27 So. 36.

Georgia.—Andrews *v.* State, 84 Ga. 82, 10 S. E. 503; Barnard *v.* State, 73 Ga. 803; Witworth *v.* State, 30 Ga. 10; Copenhaven *v.* State, 14 Ga. 22.

Illinois.— Sutton *v.* People, 119 Ill. 250, 10 N. E. 376.

Indiana.— Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118; Jenks *v.* State, 39 Ind. 1; Spence *v.* State, 8 Blackf. 281.

Iowa.— State *v.* Painter, 40 Iowa 298.

Kentucky.— Strange *v.* Com., 55 S. W. 204, 21 Ky. L. Rep. 1333; Hunt *v.* Com., 24 S. W. 623, 15 Ky. L. Rep. 591; Wells *v.* Com., 13 S. W. 915, 12 Ky. L. Rep. 111; Embry *v.* Com., 12 S. W. 383, 11 Ky. L. Rep. 515; Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005; Salisbury *v.* Com., 3 Ky. L. Rep. 211.

Louisiana.— State *v.* Bolds, 37 La. Ann. 312; State *v.* Moultrie, 33 La. Ann. 1146.

Massachusetts.— Com. *v.* Carter, 11 Pick. 277.

Mississippi.— Hattox *v.* State, 80 Miss. 186, 31 So. 579; Havens *v.* State, 75 Miss. 488, 23 So. 181; Hill *v.* State, 72 Miss. 527, 17 So. 375.

Missouri.— State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; State *v.* Farrow, 74 Mo. 531.

Nebraska.— Newman *v.* State, 22 Nebr. 355, 35 N. W. 194.

Oklahoma.— Lawson *v.* Territory, 8 Okla. 1, 56 Pac. 698.

Texas.— Jemison *v.* State, (Crim. 1902) 66 S. W. 842; Cortez *v.* State, (Crim. 1902) 66 S. W. 453; Whitney *v.* State, (Crim. 1900) 59 S. W. 895; Bennett *v.* State, (Crim. 1898) 48 S. W. 61; Hull *v.* State, (Crim. 1898) 47 S. W. 472; Clark *v.* State, 39 Tex. Crim. 179, 45 S. W. 576, 73 Am. St. Rep. 918; Dawson *v.* State, 38 Tex. Crim. 9, 40 S. W. 731; Massey *v.* State, (Crim. 1897) 40 S. W. 726; Williams *v.* State, (Crim. 1896) 37 S. W. 325; Edmonson *v.* State, (Crim. 1896) 36 S. W. 270; Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791; Richards *v.* State, 34 Tex. Crim. 277, 30 S. W. 229; Walker *v.* State, 32 Tex. Crim. 175, 22 S. W. 685; Givens *v.* State, (Crim. 1893) 21 S. W. 44; Moreno *v.* State, (Crim. 1893) 21 S. W. 924; Harrington *v.* State, 31 Tex. Crim. 577, 21 S. W. 356; Arrington *v.* State, (Crim. 1893) 20 S. W. 927; Hyden *v.* State, 31 Tex. Crim. 401, 20 S. W. 764; Ferguson *v.* State, 31 Tex. Crim. 93, 19 S. W. 901; McConnell *v.* State, (App. 1892) 18 S. W. 645; Clark *v.* State, 30 Tex. App. 377, 17 S. W. 933; Ainsworth *v.* State, 29 Tex. App. 599, 16 S. W. 652; English *v.* State, (App. 1891) 16 S. W. 306; Pitts *v.* State, (App. 1890) 14 S. W. 1014; Gregg *v.* State, (App. 1889) 12 S. W. 732; Sweet *v.* State, 28 Tex. App. 223, 12 S. W. 590; Donahoe *v.* State, 28 Tex. App. 12, 11 S. W. 677; Brooks *v.* State, 26 Tex. App. 87, 9 S. W. 355; Eads *v.* State, 26 Tex. App. 69, 9 S. W. 68; Fowler *v.* State, 25 Tex. App. 27, 7 S. W. 340; Mayfield *v.* State, 23 Tex. App. 645, 5 S. W. 161; Frazier *v.* State, 22 Tex. App. 120, 2 S. W. 637; Tucker

obtained without unreasonable delay.[63] So too he has a right to put them on the stand in the order he conceives most advantageous to his defense, and need not vary this order because a witness, for some providential cause, would be absent at the time he desired to introduce his testimony.[64]

(III) *ESSENTIAL REQUISITES OF GROUND* — (A) *Elements of Testimony* — (1) RELEVANT, MATERIAL, AND RESPONSIVE — (a) RULE STATED. It is not reversible error to refuse to grant a continuance on account of the absence of witnesses, where the testimony sought to be adduced does not appear to the court to be important, or as materially affecting the guilt or innocence of the accused,[65] where it is too vague[66] or remote[67] to affect the verdict, where it is objectionable as a mere conclusion,[68] where it is not responsive to the material issues presented,[69] where it is not inconsistent with the theory on which the defendant's guilt is sought to be established,[70] as well as where the witness is incompetent,[71] or where for any reason the testimony sought to be introduced, from the nature of the case involved and the other testimony submitted, is by the general rules of evidence, irrelevant, immaterial, or for other reasons inadmissible or unimportant.[72]

v. State, 21 Tex. App. 699, 2 S. W. 893; Schindler *v.* State, 15 Tex. App. 394; Garcia *v.* State, 15 Tex. App. 120; McCracken *v.* State, 6 Tex. App. 507.

England.— Reg. *v.* Lawrence, 4 F. & F. 901. See 14 Cent. Dig. tit. "Criminal Law," § 1321.

63. People *v.* Dodge, 28 Cal. 445; Hooker *v.* Rogers, 6 Cow. (N. Y.) 577. To the same effect see Scott *v.* State, 80 Miss. 197, 31 So. 710.

The policy of the law is not merely considerations affecting the defendant only, but also every consideration affecting the ends of public justice, irrespective of individual interest. This is manifest from the fact that the deposition of such witnesses are allowed to be read in evidence only upon further evidence at the trial that their personal attendance cannot be obtained. It is to the interest of the people as well as the defendant that the defendant's witnesses should be made to give their testimony in the presence of the jury, as much weight may be added to or taken from such testimony by the personal appearance, hearing, and manner of the witnesses while under examination. If these add to the weight of his testimony the defendant ought not to be deprived of such effect except upon the grounds of necessity; and if they detract therefrom, such effect should be secured to the people in order that the ends of public justice may be subserved. People *v.* Dodge, 28 Cal. 445.

64. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721.

65. Perteet *v.* People, 70 Ill. 171; State *v.* Baptiste, 26 La. Ann. 134; Crumpton *v.* U. S., 138 U. S. 361, 11 S. Ct. 355, 34 L. ed. 958.

66. Highsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919; Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

67. Goldsmith *v.* State, 32 Tex. Crim. 112, 22 S. W. 405; Brumley *v.* State, (Tex. App. 1889) 11 S. W. 831.

68. Dailey *v.* State, (Tex. Crim. 1902) 55 S. W. 821.

69. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; State *v.* Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; Hamilton *v.* State, (Tex. Crim. 1900) 58 S. W. 93; Harris *v.* State, (Tex. Crim. 1900) 57 S. W. 833; Rios *v.* State, (Tex. Crim. 1898) 48 S. W. 505; Harris *v.* State, 40 Tex. Crim. 8, 48 S. W. 502; Garrett *v.* State, 37 Tex. Crim. 198, 38 S. W. 1017, 39 S. W. 108; Koller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44; Slade *v.* State, 29 Tex. App. 381, 16 S. W. 253; Fisher *v.* State, 4 Tex. App. 181.

70. Adams *v.* People, 109 Ill. 444, 50 Am. Rep. 617; Jones *v.* State, 11 Ind. 357; Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; McMullen *v.* State, (Tex. Crim. 1900) 59 S. W. 891; Hargrove *v.* State, (Tex. Crim. 1899) 51 S. W. 1124; Johnson *v.* State, (Tex. Crim. 1899) 50 S. W. 1018; Garza *v.* State, (Tex. Crim. 1899) 49 S. W. 103; Houston *v.* State, (Tex. Crim. 1898) 47 S. W. 468; Von Senden *v.* State, (Tex. Crim. 1898) 45 S. W. 725; Greenwood *v.* State, (Tex. Crim. 1898) 44 S. W. 177; Sisk *v.* State, (Tex. Crim. 1897) 42 S. W. 985; Henry *v.* State, 38 Tex. Crim. 306, 42 S. W. 559; Toms *v.* State, (Tex. Crim. 1897) 40 S. W. 491; Taylor *v.* State, (Tex. Crim. 1897) 40 S. W. 274; Jackson *v.* State, 31 Tex. Crim. 342, 20 S. W. 921; Higginbotham *v.* State, (Tex. Crim. 1892) 20 S. W. 360; Tweedle *v.* State, 29 Tex. App. 586, 16 S. W. 544.

71. Young *v.* State, (Tex. Crim. 1901) 60 S. W. 767.

72. *California.*— People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

Georgia.— Delk *v.* State, 99 Ga. 667, 26 S. E. 752; Parker *v.* State, 81 Ga. 332, 6 S. E. 600; Heath *v.* State, 68 Ga. 287; Brady *v.* State, 48 Ga. 311; Revel *v.* State, 26 Ga. 275; Dacy *v.* State, 17 Ga. 439.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Moody *v.* People, 20 Ill. 315.

Indiana.— Beavers *v.* State, 58 Ind. 530; Gross *v.* State, 2 Ind. 135.

Iowa.— State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* Falconer, 70 Iowa 416, 30 N. W. 655.

(b) APPLICATION OF RULE — aa. *Contradictory Testimony* — (aa) Of Witness' Previous Statements. It is not error to refuse to grant a continuance to secure an absent witness where the material facts to which it is claimed he will testify are contradictory to such witness' previous affidavits;[73] where such material facts would be contradictory of the witness' previous testimony as given on a preliminary examination;[74] where affidavits of such witnesses, procured and filed by the state, directly contradict the alleged facts to which it is claimed the witness will swear;[75] or where affidavits are presented that the witness had made former statements contradictory of the evidence to which it is alleged he will testify.[76] On the other hand it has been held that a continuance to procure such witness ought not to be denied merely because such witness had, while not under oath, made statements inconsistent with the facts which it is alleged he would testify to.[77]

Kentucky.— Nelson *v.* Com., 94 Ky. 594, 23 S. W. 348, 15 Ky. L. Rep. 255; Lisle *v.* Com., 6 Ky. L. Rep. 229.

Louisiana.— State *v.* Cook, 52 La. Ann. 114, 26 So. 751.

Mississippi.— Washington *v.* State, (1901) 29 So. 77.

Missouri.—State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38.

New York.— People *v.* Petersen, 60 N. Y. App. Div. 118, 69 N. Y. Suppl. 941.

Oregon.— State *v.* Huffman, 39 Oreg. 48, 63 Pac. 1.

South Carolina.— State *v.* Smith, 56 S. C. 378, 34 S. E. 657.

Texas.— Boone *v.* State, 31 Tex. 557; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Moore *v.* State, (Crim. 1902) 70 S. W. 89; Kindred *v.* State, (Crim. 1902) 68 S. W. 796; Calhoun *v.* State, (Crim. 1901) 63 S. W. 322; Brice *v.* State, (Crim. 1901) 61 S. W. 121; Hamilton *v.* State, 41 Tex. Crim. 599, 58 S. W. 93; Gentry *v.* State, (Crim. 1900) 56 S. W. 68; Maddox *v.* State, (Crim. 1900) 55 S. W. 833; Wade *v.* State, (Crim. 1899) 54 S. W. 582; Dancy *v.* State, 41 Tex. Crim. 293, 53 S. W. 635, 886; Highsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919; Isham *v.* State, (Crim. 1899) 49 S. W. 581; McGrew *v.* State, (Crim. 1899) 49 S. W. 226; Gregory *v.* State, (Crim. 1898) 48 S. W. 577; Johnican *v.* State, (Crim. 1898) 48 S. W. 181; Little *v.* State, 39 Tex. Crim. 654, 47 S. W. 984; Brooks *v.* State, 39 Tex. Crim. 622, 47 S. W. 640; Turner *v.* State, (Crim. 1898) 46 S. W. 830; Kugadt *v.* State, 38 Tex. Crim. 681, 44 S. W. 989; Pilot *v.* State, 38 Tex. Crim. 515, 43 S. W. 112, 1024; McIntyre *v.* State, (Crim. 1897) 43 S. W. 104; Steel *v.* State, (Crim. 1897) 43 S. W. 101; Harmanson *v.* State, (Crim. 1897) 42 S. W. 995; Taylor *v.* State, (Crim. 1897) 42 S. W. 285; Funtches *v.* State, (Crim. 1897) 41 S. W. 603; Keller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44; Clark *v.* State, (Crim. 1896) 36 S. W. 273; Green *v.* State, 36 Tex. Crim. 109, 35 S. W. 971; Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534; Williams *v.* State, 34 Tex. Crim. 327, 30 S. W. 669; Gallagher *v.* State, 34 Tex. Crim. 306, 30 S. W. 557; Millirons *v.* State, 34 Tex. Crim. 12, 28 S. W. 685; Childs *v.* State, (Crim. 1893) 22 S. W. 1039; Stayton *v.* State, 32 Tex. Crim. 33, 22 S. W. 38; Knowles *v.* State, 31 Tex. Crim. 383, 20 S. W. 829; Fleming *v.* State, (App. 1890) 15 S. W. 175; Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242; Browning *v.* State, 26 Tex. App. 432, 9 S. W. 770; Brooks *v.* State, 26 Tex. App. 184, 9 S. W. 562; Parker *v.* State, 24 Tex. App. 61, 5 S. W. 653; Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215; Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640; Krebs *v.* State, 8 Tex. App. 1; Fernandez *v.* State, 4 Tex. App. 419.

Virginia.— Andrews *v.* Com., 100 Va. 801, 40 S. E. 935.

Washington.— State *v.* Harras, 22 Wash. 57, 60 Pac. 58.

Wyoming.— McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,342.

See 14 Cent. Dig. tit. "Criminal Law," § 1323.

Affecting admissibility of dying declarations.— Evidence tending to show that other evidence which is offered as dying declarations is inadmissible as such is material, and it is error to refuse a continuance to allow a party to procure such testimony. Wyatt *v.* Com., 1 S. W. 196, 8 Ky. L. Rep. 55.

Where an absent witness' testimony on a former hearing was such that accused would probably not have introduced him had he been present, and it was not suggested that he would testify differently, it was not error to refuse a continuance because of his absence. Williams *v.* State, 40 Tex. Crim. 565, 51 S. W. 224.

73. State *v.* White, 152 Mo. 159, 53 S. W. 895; O'Toole *v.* State, 40 Tex. Crim. 578, 51 S. W. 244.

74. State *v.* Timberlake, 50 La. Ann. 308, 23 So. 276.

75. Reese *v.* State, 7 Ga. 373; State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38; State *v.* Bishop, 98 N. C. 773, 4 S. E. 357; Wilkins *v.* State, 35 Tex. Crim. 525, 34 S. W. 627; Vaden *v.* State, (Tex. Crim. 1894) 25 S. W. 777.

76. Turner *v.* State, (Tex. Crim. 1901) 68 S. W. 511, holding that this was especially true where diligence had not been exercised to secure the attendance of a witness who was beyond the state.

77. Cunneen *v.* State, 95 Ga. 330, 22 S. E. 538; Pyburn *v.* State, 84 Ga. 193, 10 S. E.

(bb) Of Defendant's Previous Statements. It is not error to refuse a continuance requested on behalf of defendant to procure an absent witness whose testimony would be contradictory of the testimony or declarations of defendant.[78]

bb. *Cumulative Evidence* — (aa) Rule Stated. Generally speaking it is not error to refuse a continuance when the evidence sought to be introduced by the absent witnesses is merely cumulative;[79] and especially is this true where such evidence does not conflict with the state's theory of the guilt of the accused,[80] and where the continuance is asked for the second time.[81] This is not, however, an absolute criterion by which the court should be governed, and where the evidence is important and material it may in some instances be error to refuse a continuance notwithstanding the fact that it is cumulative,[82] especially where no prior continuance has been requested.[83]

(bb) Rule Does Not Apply to Corroborative Testimony. The rule that a continuance will not be granted for the purpose of procuring cumulative evidence does not apply to the procurement of evidence merely corroborative of defendant's testimony, as such evidence is clearly material, and its absence is likely to work an injury to his rights.[84]

cc. *Evidence of Alibi.* Testimony tending to show that defendant was, at the time of the commission of the offense, at another place, and could not possibly have

733. To a similar effect see Kennedy *v.* State, 101 Ga. 559, 28 S. E. 979.

78. Washington *v.* State, (Miss. 1901) 29 So. 77; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242.

79. *Arkansas.*— Maxey *v.* State, 66 Ark. 523, 52 S. W. 2; Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

Illinois.— Dacey *v.* People, 116 Ill. 555, 6 N. E. 165.

Kentucky.— Toliver *v.* Com., 104 Ky. 760, 47 S. W. 1082, 20 Ky. L. Rep. 906; Young *v.* Com., 96 Ky. 573, 29 S. W. 439, 16 Ky. L. Rep. 496; Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341; Hall *v.* Com., 94 Ky. 322, 22 S. W. 333, 15 Ky. L. Rep. 102; Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Hatfield *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1461; Howard *v.* Com., 26 S. W. 1, 15 Ky. L. Rep. 873; Nelson *v.* Com., 23 S. W. 350, 15 Ky. L. Rep. 255; Simmons *v.* Com., 18 S. W. 534, 13 Ky. L. Rep. 839; Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612; Trahune *v.* Com., 17 S. W. 186, 13 Ky. L. Rep. 343; Henderson *v.* Com., 15 S. W. 782, 12 Ky. L. Rep. 908; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215; Mitchell *v.* Com., (1886) 1 S. W. 9.

Louisiana.— State *v.* Primeaux, 39 La. Ann. 673, 2 So. 423.

Mississippi.— Wells *v.* State, (1895) 18 So. 117.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

New York.— Eighmy *v.* People, 79 N. Y. 546.

Tennessee.— State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65.

Texas.— Grimsinger *v.* State, (Crim. 1901) 69 S. W. 583; Martin *v.* State, (Crim. 1901) 61 S. W. 486; Gann *v.* State, (Crim. 1900) 59 S. W. 896; Hamilton *v.* State, (Crim. 1900) 58 S. W. 93; Wilkerson *v.* State, (Crim. 1899) 57 S. W. 956; Speights *v.* State, 41 Tex. Crim. 323, 54 S. W. 595; Shackleford *v.* State, (Crim. 1899) 53 S. W. 884; Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385; Henderson *v.* State, (Crim. 1897) 39 S. W. 116; Bonners *v.* State, (Crim. 1896) 35 S. W. 650; Evans *v.* State, (Crim. 1895) 31 S. W. 648; Steel *v.* State, (Crim. 1895) 30 S. W. 1064; Gonzalez *v.* State, 30 Tex. App. 203, 16 S. W. 978; Frizzell *v.* State, 30 Tex. App. 42, 16 S. W. 751; Roberts *v.* State, (App. 1891) 16 S. W. 255; Kilgore *v.* State, (App. 1889) 11 S. W. 830; Peace *v.* State, 27 Tex. App. 83, 10 S. W. 761; Parker *v.* State, 24 Tex. App. 61, 5 S. W. 653; Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180; Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Graves *v.* State, 9 Tex. App. 559.

Washington.— State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

Wyoming.—McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710.

See 14 Cent. Dig. tit. "Criminal Law," § 1328.

80. Bryant *v.* State, (Tex. Crim. 1898) 47 S. W. 373; Pruitt *v.* State, 30 Tex. App. 156, 16 S. W. 773.

81. Brittain *v.* State, (Tex. Crim. 1897) 40 S. W. 297.

82. Ninnon *v.* State, 17 Tex. App. 650; Harris *v.* State, 15 Tex. App. 411 (where it was held that defendant should have been granted a continuance to produce a witness who would testify to facts which his relatives had testified to); McDow *v.* State, 10 Tex. App. 98.

83. Porter *v.* State, (Tex. Crim. 1895) 32 S. W. 692; Hyden *v.* State, 31 Tex. Crim. 401, 20 S. W. 764; Burnly *v.* State, (Tex. App. 1890) 14 S. W. 1008; Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589.

84. People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218 (holding that the fact that defendant knew the facts proposed to be proven as well as the witness on account of whose absence a continuance was asked was

been at the place of the crime, is material; and a refusal to continue the case to procure such testimony is reversible error if it does not appear that such testimony is untrue, and the defense of an alibi could not be successfully established without such testimony, due diligence being shown;[85] and this is especially true where the evidence on the part of the state is circumstantial.[86] The fact that defendant has made affidavit of an intent to produce certain witnesses to establish the defense of an alibi, and whom, when produced, he does not place upon the stand, does not preclude him from demanding a continuance to obtain witnesses who will unquestionably prove for him an alibi.[87] Nor will the fact that the evidence sought to be offered in proof of the defense of an alibi is cumulative justify the court in refusing a continuance to procure it.[88] The evidence sought to be introduced must, however, account for the presence of the defendant at the time of the actual commission of the offense;[89] and if there is still a sufficient time left unaccounted for to have enabled defendant to commit the crime a refusal to continue is not error.[90] So too the court has a right to look at the other facts clearly shown in the case, and judge whether or not there is a likelihood or possibility of the truthfulness of the evidence of an alibi, even if presented.[91] Although it has been said that where the affidavit of a witness for defendant states absolutely that he will testify to facts establishing the defense of an alibi, to assume the prerogative of saying that such testimony is not probably true would not only usurp the functions of the jury, but would announce in addition that the absent witness had probably committed perjury.[92]

dd. *Evidence of Accused's Character.* Evidence as to the character of the accused is usually held by the courts not to be of such materiality as to constitute error in a refusal to grant a continuance for the purpose of procuring testimony of such character.[93]

ee. *Evidence of Incapacity to Commit.* Where defendant is charged with an offense involving an intent, and it appears that he will be able to produce witnesses show-

not sufficient ground for refusing such continuance); Holt *v.* Com., 13 S. W. 71, 11 Ky. L. Rep. 773; Fossett *v.* State, 41 Tex. Crim. 400, 55 S. W. 497; Phipps *v.* State, 34 Tex. Crim. 560, 31 S. W. 397; Burnly *v.* State, (Tex. App. 1890) 14 S. W. 1008; Maines *v.* State, 26 Tex. App. 14, 9 S. W. 51.

85. *Georgia.*— Allen *v.* State, 112 Ga. 752, 38 S. E. 79; Reid *v.* State, 23 Ga. 190.

Indiana.— Binns *v.* State, 38 Ind. 277.

Kentucky.— Petty *v.* Com., 15 S. W. 1059, 12 Ky. L. Rep. 919.

Missouri.— State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429; State *v.* Maddox, 117 Mo. 667, 23 S. W. 771.

Texas.— Smith *v.* State, (Crim. 1902) 68 S. W. 267; Baines *v.* State, (Crim. 1901) 61 S. W. 119; Murphy *v.* State, (Crim. 1899) 51 S. W. 940; Dawson *v.* State, 34 Tex. Crim. 263, 30 S. W. 224; Taylor *v.* State, 27 Tex. App. 44, 11 S. W. 35.

86. Long *v.* State, 39 Tex. Crim. 461, 537, 46 S. W. 821; Curtis *v.* State, (Tex. Crim. 1897) 40 S. W. 265; Horn *v.* State, 30 Tex. App. 541, 17 S. W. 1094.

87. Blake *v.* State, 38 Tex. Crim. 377, 43 S. W. 107.

88. This arises from the fact that the greater number of witnesses to such a fact, the stronger would be the probability of the defendant's innocence. Pinckord *v.* State, 13 Tex. App. 468. See State *v.* Hillstock, 45 La. Ann. 298, 12 So. 352, holding that it was not error to refuse a continuance because of the absence of two witnesses, where the defendant summoned twenty-four witnesses to prove an alibi for him.

89. Cline *v.* State, 34 Tex. Crim. 415, 31 S. W. 175; Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408, holding that where the evidence for the prosecution showed that the crime was committed before the date alleged in the indictment, it was not error to refuse a continuance to procure witnesses who would testify to an alibi for the defendant on the date alleged.

90. Beavers *v.* State, 58 Ind. 530; State *v.* Murphy, 9 N. D. 175, 82 N. W. 738; Farris *v.* State, (Tex. Crim. 1902) 69 S. W. 140; Parsley *v.* State, (Tex. Crim. 1901) 64 S. W. 257; Leslie *v.* State, (Tex. Crim. 1898) 47 S. W. 367.

91. Ross *v.* State, (Tex. Crim. 1900) 58 S. W. 105; Jones *v.* State, 31 Tex. Crim. 177, 20 S. W. 354.

92. Baines *v.* State, (Tex. Crim. 1901) 61 S. W. 119.

93. Ballard *v.* State, 31 Fla. 266, 12 So. 865; McNealy *v.* State, 17 Fla. 198; Steele *v.* People, 45 Ill. 152 (holding that this was especially true when accused had no other defense); State *v.* Klinger, 43 Mo. 127; Jackson *v.* State, (Tex. Crim. 1901) 62 S. W. 914; Shaw *v.* State, 39 Tex. Crim. 161, 45 S. W. 597; Wright *v.* State, 37 Tex. Crim. 627, 40 S. W. 491; Parks *v.* State, 35 Tex. Crim. 378, 33 S. W. 872. But see State *v.* Nash, 7 Iowa 347.

ing him to be of such unsound mind as to be incapable of committing such an offense, a continuance should be granted.[94] The materiality of such evidence must, however, clearly appear by the application, and where there is no claim of mental aberration or lasting or temporary insanity at the time of the commission of the offense, or that the plea of insanity will be introduced, a refusal to continue is not error;[95] nor will a continuance be granted where it is admitted that defendant can clearly distinguish between right and wrong.[96]

ff. *Evidence of Self-Defense.* Where due diligence has been shown to procure absent witnesses it is error to refuse a continuance to procure witnesses whose testimony concerning alleged threats or actions of the injured or deceased party would be material to a defendant who seeks to defend on the ground of self-defense.[97] The motion for continuance to procure testimony of this character must, however, show the relevancy and materiality of the same;[98] hence if there is not the slightest pretense of self-defense legitimately raised by the facts,[99] as where for instance the defense is accidental homicide,[1] or the threats are not of sufficiently grave a nature[2] or have not been communicated to defendant[3] or it appears that even though threats were made, accused had no fear of deceased,[4] it will not be error to refuse a continuance. So too in some jurisdictions it is necessary that defendant show that the deceased party manifested some intention to execute his threats at the time of the homicide.[5]

gg. *Hearsay Evidence.* In the application of this rule it is held that a continuance should not be granted to procure witnesses whose evidence would be objectionable as hearsay.[6]

hh. *Impeaching Testimony.* Where due diligence has been shown to procure the attendance of impeaching witnesses, and the evidence sought to be impeached by them is material, a refusal to grant a continuance to procure their attendance is

94. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; Claxon *v.* Com., 30 S. W. 998, 17 Ky. L. Rep. 284; Reg. *v.* Langhurst, 10 Cox C. C. 353, 4 F. & F. 969. See also Murphy *v.* Com., 92 Ky. 485, 18 S. W. 163, 13 Ky. L. Rep. 695.

95. *Louisiana.*— State *v.* Manceaux, 42 La. Ann. 1164, 8 So. 297.

Missouri.— State *v.* Mitchell, 98 Mo. 657, 12 S. W. 379.

Montana.— See Territory *v.* Roberts, 9 Mont. 12, 22 Pac. 132.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Texas.— Fisher *v.* State, 30 Tex. App. 502, 18 S. W. 90; Sherar *v.* State, 30 Tex. App. 349, 17 S. W. 621.

See 14 Cent. Dig. tit. "Criminal Law," § 1325.

96. State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

97. *Arkansas.*— Cannon *v.* State, 60 Ark. 564, 31 S. W. 150, 32 S. W. 128.

Illinois.— Corbin *v.* People, 131 Ill. 615, 23 N. E. 613.

Indiana.— Lofton *v.* State, 14 Ind. 1.

Kentucky.— Bowlin *v.* Com., 94 Ky. 391, 22 S. W. 543, 15 Ky. L. Rep. 149; Vogt *v.* Com., 92 Ky. 68, 17 S. W. 213, 13 Ky. L. Rep. 376; Gambrel *v.* Com., 63 S. W. 272, 23 Ky. L. Rep. 502; Costigan *v.* Com., 12 S. W. 629, 11 Ky. L. Rep. 617; Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005.

Texas.— Duffy *v.* State, (Crim. 1902) 67 S. W. 418; Cogdell *v.* State, (Crim. 1901) 63 S. W. 645; Fant *v.* State, (Crim. 1900) 57 S. W. 819; Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607; Rucker *v.* State, (Crim. 1897) 40 S. W. 991; Koller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44; Gilcrease *v.* State, 33 Tex. Crim. 619, 28 S. W. 531; Tankersley *v.* State, 31 Tex. Crim. 595, 21 S. W. 767; Self *v.* State, 28 Tex. App. 398, 13 S. W. 602; Stevens *v.* State, 27 Tex. App. 461, 11 S. W. 459.

See 14 Cent. Dig. tit. "Criminal Law," § 1324.

98. Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054; Thompson *v.* State, 26 Ark. 323; State *v.* Cochran, 147 Mo. 504, 49 S. W. 558; McKinney *v.* State, (Tex. Crim. 1895) 30 S. W. 786.

99. Melton *v.* State, 24 Tex. App. 47, 5 S. W. 652.

1. Brittain *v.* State, (Tex. Crim. 1897) 40 S. W. 297.

2. Halbert *v.* State, 31 Tex. 357; Dow *v.* State, 31 Tex. Crim. 278, 20 S. W. 583.

3. Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

4. Stapleton *v.* Com., (Ky. 1887) 3 S. W. 793.

5. Kitts *v.* State, 70 Ark. 521, 69 S. W. 545; Ellis *v.* State, 30 Tex. App. 601, 18 S. W. 139; Brooks *v.* State, 24 Tex. App. 274, 5 S. W. 852; Carter *v.* State, 8 Tex. App. 372.

6. State *v.* Hollier, 49 La. Ann. 371, 21 So. 633; State *v.* Perkins, 40 La. Ann. 210, 3 So. 647; Taylor *v.* State, 11 Lea (Tenn.) 708; Moore *v.* State, (Tex. Crim. 1896) 33 S. W. 980; Aiken *v.* State, 10 Tex. App. 610; U. S. *v.* Toms, 28 Fed. Cas. No. 16,532, 1 Cranch C. C. 607.

error;[7] but generally speaking evidence for which a continuance will be granted must directly touch the issue of guilt or innocence of the accused; and a continuance will not ordinarily be granted merely to secure the attendance of impeaching witnesses;[8] and especially is this true where it is not certain that the witness sought to be impeached will testify at the trial.[9]

ii. *Negative Testimony.* It is not error to refuse a continuance to obtain the testimony of a witness which is of a negative character, and states conclusions of law rather than of fact.[10]

(2) PROBABILITY OF TRUTH. While it is not the province of the court to usurp the province of the jury by passing upon the credibility of witnesses, yet where it appears improbable that a witness will swear to the facts stated in the application for a continuance, or where, in view of the written matter contained in the record of the case,[11] the overwhelming evidence,[12] or the uncontroverted facts,[13] it is altogether probable that such testimony, if presented, would be untrue, a continuance should be refused.[14] The falsity of such testimony must, however,

7. Fox *v.* State, 9 Ga. 373; Studstill *v.* State, 7 Ga. 2, holding, however, that if the witness whose testimony it was intended to impeach was not sworn in the trial the error was immaterial. See also Dutton *v.* State, 5 Ind. 533.

8. Earp *v.* Com., 9 Dana (Ky.) 301; State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38; State *v.* Howell, 117 Mo. 307, 23 S. W. 263; Barber *v.* State, (Tex. Crim. 1902) 69 S. W. 515; Scott *v.* State, (Tex. Crim. 1902) 68 S. W. 177; Hopkins *v.* State, (Tex. Crim. 1901) 64 S. W. 933; Tippett *v.* State, (Tex. Crim. 1901) 63 S. W. 883; Hamilton *v.* State, (Tex. Crim. 1900) 58 S. W. 93; Webb *v.* State, (Tex. Crim. 1900) 58 S. W. 82; Martin *v.* State, 41 Tex. Crim. 242, 53 S. W. 849; Shaw *v.* State, 39 Tex. Crim. 161, 45 S. W. 597; Gerstenkorn *v.* State, 38 Tex. Crim. 621, 44 S. W. 503; Butts *v.* State, 35 Tex. Crim. 364, 33 S. W. 866; Reg. *v.* Gordan, C. & M. 410, 41 E. C. L. 225. See also Myers *v.* Com., 90 Va. 705, 19 S. E. 881.

Original as distinguished from impeaching testimony.— Upon a trial for rape, where the age of the prosecutrix is in dispute, testimony that she had called the attention of a witness to the record of her birth in the family bible, which showed her to be over fifteen years of age, and that the mother of the prosecutrix represented her to have been born on a day named, which would make her over fifteen years of age, is original and not impeaching testimony. Tull *v.* State, (Tex. Crim. 1900) 55 S. W. 61.

9. State *v.* Spillman, 43 La. Ann. 1001, 10 So. 198; Lundy *v.* State, 44 Miss. 669; Taylor *v.* State, (Tex. Crim. 1897) 42 S. W. 285; Garrett *v.* State, 37 Tex. Crim. 198, 38 S. W. 1017, 39 S. W. 108.

10. Dailey *v.* State, (Tex. Crim. 1900) 55 S. W. 821; Butler *v.* State, (Tex. Crim. 1898) 44 S. W. 1089.

11. Martinez *v.* State, (Tex. Crim. 1900) 57 S. W. 829; Taylor *v.* State, (Tex. Crim. 1900) 56 S. W. 753; Shaw *v.* State, 32 Tex. Crim. 155, 22 S. W. 588.

12. Chavarria *v.* State, (Tex. Crim. 1901) 63 S. W. 312; Piles *v.* State, (Tex. Crim. 1895) 32 S. W. 529.

13. Areola *v.* State, 40 Tex. Crim. 51, 48 S. W. 195.

14. Haywood *v.* Com., 12 S. W. 131, 11 Ky. L. Rep. 355; Hubbard *v.* State, (Nebr. 1902) 91 N. W. 869; Ash *v.* State, (Tex. Crim. 1901) 63 S. W. 881; Jackson *v.* State, (Tex. Crim. 1901) 61 S. W. 404; Garcia *v.* State, (Tex. Crim. 1901) 61 S. W. 122; Dailey *v.* State, (Tex. Crim. 1900) 55 S. W. 821; Wilson *v.* State, (Tex. Crim. 1900) 55 S. W. 489; Martin *v.* State, 41 Tex. Crim. 242, 53 S. W. 849; Searcy *v.* State, 40 Tex. Crim. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344; Isham *v.* State, (Tex. Crim. 1899) 49 S. W. 594; Robinson *v.* State, (Tex. Crim. 1898) 48 S. W. 176; Maloney *v.* State, (Tex. Crim. 1898) 45 S. W. 718; Shaw *v.* State, 39 Tex. Crim. 161, 45 S. W. 597; Tanner *v.* State, (Tex. Crim. 1898) 44 S. W. 489; Boggs *v.* State, (Tex. Crim. 1897) 41 S. W. 642; Longacre *v.* State, (Tex. Crim. 1897) 41 S. W. 629; Goodson *v.* State, (Tex. Crim. 1897) 41 S. W. 604; Lamar *v.* State, (Tex. Crim. 1897) 39 S. W. 677; Reed *v.* State, (Tex. Crim. 1897) 38 S. W. 613; McGriff *v.* State, (Tex. Crim. 1897) 38 S. W. 789; Gregory *v.* State, (Tex. Crim. 1896) 37 S. W. 752; McIver *v.* State, (Tex. Crim. 1896) 37 S. W. 745; Snodgrass *v.* State, 36 Tex. Crim. 207, 36 S. W. 477; Hudson *v.* State, (Tex. Crim. 1896) 36 S. W. 452; Johnson *v.* State, (Tex. Crim. 1896) 35 S. W. 387; Collins *v.* State, (Tex. Crim. 1896) 34 S. W. 949; Wilkins *v.* State, 35 Tex. Crim. 525, 34 S. W. 627; Blair *v.* State, (Tex. Crim. 1896) 33 S. W. 967; Tate *v.* State, 35 Tex. Crim. 231, 33 S. W. 121; Whitaker *v.* State, (Tex. Crim. 1895) 31 S. W. 518; Teague *v.* State, (Tex. Crim. 1895) 31 S. W. 401; Linhart *v.* State, 33 Tex. Crim. 504, 27 S. W. 260; Neel *v.* State, 33 Tex. Crim. 408, 26 S. W. 726; Waul *v.* State, 33 Tex. Crim. 228, 26 S. W. 199; Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421; Loakman *v.* State, 32 Tex. Crim. 563, 25 S. W. 22; Lafferty *v.* State, (Tex. Crim. 1893) 24 S. W. 507; Hastings *v.* State, 32 Tex. Crim. 372, 23 S. W. 797; Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027, 26 S. W. 75; Laurence *v.* State, 31 Tex. Crim. 601, 21 S. W. 766; McKinney *v.* State, 31 Tex. Crim. 583,

appear clearly probable,[15] and the court will grant a new trial upon the ground of the absence of witnesses with greater liberality when the evidence in the case is all presumptive than where the guilt of the accused is more manifest.[16]

(3) PROBABILITY OF AFFECTING RESULT. It is also a principle well recognized by the courts that where the evidence sought to be introduced, although perhaps material, would nevertheless, in view of the established facts, not have probably influenced the finding of the jury, a refusal to grant the continuance will not be considered error.[17]

(B) *Compliance With Statutory Provisions.* A statute, limiting the number of witnesses in criminal cases to a certain number on each side, unless by formal application it is made to appear that an additional number is required to meet the ends of justice, must be complied with to entitle the defendant to a continuance on the ground of absent witnesses.[18]

(C) *Should Be the Only Witnesses Familiar With Facts.* It is also well established that the courts will not consider it an abuse of discretion to refuse a continuance on the ground of absent witnesses, where it appears that the facts sought to be proved by them could be proved by other witnesses present,[19] or whose presence could probably have been secured.[20] It has, however, been held that, inasmuch as a defendant is entitled to any number of witnesses within reason, a refusal to grant a continuance because of an absent witness merely on the

21 S. W. 683; Griffin *v.* State, (Tex. Crim. 1892) 20 S. W. 552; Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936; Massie *v.* State, 30 Tex. App. 64, 16 S. W. 770; Ulrich *v.* State, 30 Tex. App. 61, 16 S. W. 769; Hooper *v.* State, 29 Tex. App. 614, 16 S. W. 655; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454; McCormick *v.* State, 26 Tex. App. 678, 9 S. W. 277; Peterson *v.* State, 25 Tex. App. 70, 7 S. W. 530; Collins *v.* State, 24 Tex. App. 141, 5 S. W. 848; Doss *v.* State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618; Harvey *v.* State, 21 Tex. App. 178, 17 S. W. 158; Fleming *v.* State, (Tex. App. 1890) 15 S. W. 173; Kilgore *v.* State, (Tex. App. 1889) 11 S. W. 830; Riden *v.* State, (Tex. App. 1887) 5 S. W. 829; Lillard *v.* State, 17 Tex. App. 114; Chandler *v.* State, 15 Tex. App. 587; Lyons *v.* State, 9 Tex. App. 636.

15. Ratliff *v.* State, 12 Tex. App. 330.

16. Worthy *v.* State, 44 Ga. 449.

17. State *v.* Rice, (Ida. 1901) 66 Pac. 87; State *v.* Dale, 89 Mo. 579, 1 S. W. 760; State *v.* Davis, 76 Mo. App. 586; Drye *v.* State, (Tex. Crim. 1900) 55 S. W. 65; Robinson *v.* State, (Tex. Crim. 1898) 48 S. W. 176; Henry *v.* State, 38 Tex. Crim. 306, 42 S. W. 559; Cline *v.* State, 34 Tex. Crim. 415, 31 S. W. 175; Land *v.* State, 34 Tex. Crim. 330, 30 S. W. 788; Womack *v.* State, (Tex. Crim. 1894) 25 S. W. 772; Boyett *v.* State, 26 Tex. App. 689, 9 S. W. 275; Moseley *v.* State, 25 Tex. App. 515, 8 S. W. 652. In State *v.* Cochran, 147 Mo. 504, 516, 49 S. W. 558, it is said: "It is not in every case, even where the desired testimony is material and in all probability true, that this court will reverse the judgment of the trial court upon the ground of its refusal to grant a continuance because of the absence and want of such testimony. It is only in case the evidence adduced at the trial would impress this court with the conviction, not merely that the defendant might have in all probability been prejudiced in his rights by the denial of such continuance, but that it was reasonably probable that if the absent witness had been present and testified before the jury a different result would have been reached by them."

18. State *v.* Carter, 51 La. Ann. 442, 25 So. 385, holding that this was especially true where it did not appear but that the testimony sought to be adduced would not be cumulative.

19. *California.*— People *v.* Ah Fat, 48 Cal. 61.

Georgia.— Wiggins *v.* State, 84 Ga. 488, 10 S. E. 1089; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Griffin *v.* State, 26 Ga. 493.

Kentucky.— Kennedy *v.* Com., 78 Ky. 447.

Mississippi.— Helm *v.* State, 67 Miss. 562, 7 So. 487.

Missouri.— State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Hays, 24 Mo. 369.

Oklahoma.— Hyde *v.* Territory, 8 Okla. 69, 56 Pac. 851.

Oregon.— State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

Texas.— Barkham *v.* State, 41 Tex. Crim. 105, 52 S. W. 73; Shaw *v.* State, 39 Tex. Crim. 161, 45 S. W. 597; Thompson *v.* State, 33 Tex. Crim. 217, 26 S. W. 198; Scott *v.* State, (Crim. 1894) 25 S. W. 783; Jackson *v.* State, 31 Tex. Crim. 552, 21 S. W. 367; Higginbotham *v.* State, (Crim. 1892) 20 S. W. 360.

20. *Kansas.*— State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

Mississippi.— Smith *v.* State, 58 Miss. 867.

Oregon.— State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561.

Texas.— Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607; Johnson *v.* State, 31 Tex. Crim. 456, 20 S. W. 985; Fisher *v.* State, 4 Tex. App. 181.

Utah.— People *v.* Garns, 2 Utah 260.

ground that there were other witnesses to the difficulty is error, where it appears that the testimony of the absent witness is material and important.[21]

(D) *Probability of Procuring Witness.* It is also well settled that a refusal to grant a continuance will not be considered an abuse of discretion where the witness is beyond the jurisdiction or compulsory process of the court, or his whereabouts is unknown, and there is no reasonable certainty of the party asking the continuance being able to produce such witness at the next term;[22] and the same rule applies where a witness is so unwell or infirm that there is no reasonable expectation of being able to procure his attendance.[23] Where, however, the affidavit for a continuance conforms to the statutory requirements, the non-residence of the witness does not of itself justify the court in refusing a continuance where the statute provides for obtaining testimony by deposition;[24] although it is otherwise if defendant knew a sufficient length of time before the trial to have secured such deposition that the witness was beyond the reach of a subpœna,[25] or was too unwell to attend.[26] But the question is not merely whether or not the court will be able to coerce or enforce the attendance of the absent witness; if there is reasonable ground to believe that such witness will be had by a continuance it should be granted, although he be without the state,[27] or in a very infirm or

21. Carter *v.* State, 37 Tex. Crim. 403, 35 S. W. 378; Clark *v.* State, (Tex. Crim. 1895) 33 S. W. 224.

22. *Arizona.*— Halderman *v.* Territory, (1900) 60 Pac. 876.

Arkansas.— Lane *v.* State, 67 Ark. 290, 54 S. W. 870; Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

California.— People *v.* Wade, 118 Cal. 672, 50 Pac. 841; People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; People *v.* Lewis, 64 Cal. 401, 1 Pac. 490.

Florida.— Easterlin *v.* State, (1901) 31 So. 350; Gladden *v.* State, 13 Fla. 623.

Georgia.— Minder *v.* State, 113 Ga. 772, 39 S. E. 284; Owens *v.* State, 110 Ga. 292, 34 S. E. 1015; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Illinois.— Perteet *v.* People, 70 Ill. 171.

Kentucky.— Benge *v.* Com., 92 Ky. 1, 17 S. W. 146, 13 Ky. L. Rep. 308; Lisle *v.* Com., 82 Ky. 250; Kennedy *v.* Com., 78 Ky. 447; Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004; Com. *v.* Brewer, 10 Ky. L. Rep. 196; Galloway *v.* Com., 7 Ky. L. Rep. 166.

Louisiana.— State *v.* Baptiste, 108 La. 586, 32 So. 461; State *v.* Timberlake, 50 La. Ann. 308, 23 So. 276; State *v.* Nash, 45 La. Ann. 1137, 13 So. 732, 734; State *v.* Morgan, 39 La. Ann. 214, 1 So. 456; State *v.* Nicholson, 14 La. Ann. 785.

Massachusetts.—Com. *v.* Millard, 1 Mass. 6.

Mississippi.— Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Dec. 70.

Missouri.— State *v.* Day, 100 Mo. 242, 12 S. W. 365.

Nebraska.— See Tatum *v.* State, 61 Nebr. 229, 85 N. W. 40.

New York.— People *v.* Judah, 2 Wheel. Crim. 26.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

South Carolina.— State *v.* Murphy, 48 S. C. 1, 25 S. E. 43; State *v.* Files, 1 Treadw. 234, 3 Brev. 304.

Texas.—Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Young *v.* State, (Crim. 1901) 60 S. W. 767; O'Toole *v.* State, 40 Tex. Crim. 578, 51 S. W. 244; Stevens *v.* State, (Crim. 1899) 49 S. W. 105; Byrd *v.* State, 39 Tex. Crim. 609, 47 S. W. 721; Sims *v.* State, (Crim. 1898) 45 S. W. 705; Lerman *v.* State, (Crim. 1897) 40 S. W. 286; King *v.* State, 34 Tex. Crim. 228, 29 S. W. 1086; Gentry *v.* State, (Crim. 1892) 20 S. W. 551; Beatey *v.* State, 16 Tex. App. 421; Barrett *v.* State, 9 Tex. App. 33.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1322, 1332.

Where the witness is a fugitive from justice, continuances should not be granted on the vague hypothesis that perhaps at some indefinite time in the future such fugitive may be secured, as it is essential in criminal as well as civil matters that there should be an end to litigation. Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004; State *v.* Baum, 51 La. Ann. 1112, 26 So. 67; Harris *v.* State, 8 Tex. App. 90. See also People *v.* Cleveland, 49 Cal. 577; Maloney *v.* State, (Tex. Crim. 1898) 45 S. W. 718. It has, however, been held that in a prosecution for murder, where defendant expected to prove by an absent witness that he (the witness) did the killing, the continuance should not be denied on the ground alone that it is improbable that such absent witness would subject himself to arrest and give evidence, showing his own guilt, of the offense. State *v.* Farr, 33 Iowa 553.

23. State *v.* Bowman, 161 Mo. 88, 62 S. W. 996; Chavarria *v.* State, (Tex. Crim. 1901) 63 S. W. 312; Brittain *v.* State, (Tex. Crim. 1897) 40 S. W. 297.

24. State *v.* Barrett, 8 Iowa 536.

25. State *v.* Farrington, 90 Iowa 673, 57 N. W. 606.

26. Gregory *v.* State, (Tex. Crim. 1897) 39 S. W. 572.

27. Hunt *v.* Com., 24 S. W. 623, 15 Ky. L. Rep. 591; White *v.* Com., 4 Ky. L. Rep. 373; People *v.* Vermilyea, 7 Cow. (N. Y.) 369; U. S. *v.* Workman, 28 Fed. Cas. No. 16,764. See also Hewitt *v.* Com., 17 Gratt. (Va.) 627.

unwell condition.[28] So too if defendant, by relying on the promise of a witness to attend who resides outside the jurisdiction of the court, omits to take his deposition, a continuance should, upon the failure of such witness to appear, ordinarily be granted.[29]

b. Record Evidence or Depositions. An application for a continuance to procure record evidence or depositions rests substantially on the same merits as when made because of the absence of witnesses; the granting is therefore often largely in the discretion of the court,[30] and a showing of due diligence is necessary;[31] but where a party has fulfilled all legal requirements, a refusal to grant a continuance to enable him to procure such evidence is error.[32]

c. Admissions of Absent Testimony to Prevent Continuances — (I) *RIGHT TO MAKE.* In a few earlier cases it was held that the system of criminal jurisprudence requires the presence of the witnesses both for and against an accused, and that the state could not, by any admission whatever, preclude a defendant from his right of having the witnesses personally present at the trial;[33] but the practice at present, although subject to different limitations in different jurisdictions, is to allow such admissions.[34]

(II) *NECESSITY OF MAKING.* Statutes providing for the granting of continuances, where the adverse party will admit that the facts to which it is alleged the absent witness will swear shall be read as his actual testimony, are permissive only, and an accused cannot be compelled to give his consent to such admission and be forced to trial.[35]

(III) *CONSTITUTIONALITY OF STATUTES* — (A) *In General.* The constitutionality of the statutes regulating admissions has been attacked on various grounds,[36] and it of course goes without saying that no convenience of the court

28. Phillips *v.* Com., 90 Va. 401, 18 S. E. 841. See also Reg. *v.* Chapman, 8 C. & P. 558, 34 E. C. L. 890, Reg. *v.* Tait, 2 F. & F. 553.

29. People *v.* Brown, 46 Cal. 102; Brown *v.* State, 65 Ga. 332.

30. State *v.* Damery, 48 Me. 327; Miller *v.* State, (Tex. Crim. 1899) 50 S. W. 704.

31. Batson *v.* State, 36 Tex. Crim. 606, 38 S. W. 48.

32. State *v.* Brown, 55 Kan. 766, 42 Pac. 363; State *v.* Hagan, 22 Kan. 490; State *v.* Klinger, 43 Mo. 127; Lutton *v.* State, 14 Tex. App. 518. See also Brady *v.* Com., 1 Bibb (Ky.) 517; Reg. *v.* Mohhs, 2 F. & F. 18.

Necessity of application for commission to procure deposition.— Under N. D. Rev. Codes, §§ 8385, 8389, which prescribes the method of obtaining the depositions of non-resident witnesses, an application for a continuance or postponement to take such non-resident witness' testimony will not be granted unless an application for a commission to procure the testimony as provided by statute is at the same time requested. State *v.* Murphy, 9 N. D. 175, 82 N. W. 738.

33. Dominges *v.* State, 7 Sm. & M. (Miss.) 475, 45 Am. Dec. 315; Goodman *v.* State, Meigs (Tenn.) 195, 197, where the court said: "It were needless to urge upon practical and enlightened minds the difference, in point of legitimate effect, between the personal presence of candid and respectable witnesses who testify to facts in their detail, ramification, and bearing, and the general admission of these by an attorney-general, little impressing, perhaps, the minds of the jury, and constituting, as to its extent and bearing, a fruitful source of difficulty and dispute. It were needless to urge how such a practice would tempt the unfortunate defendant, if he must forego the advantage of the personal attendance of his witnesses, to seek an undue equivalent by amplifying, at the hazard of perjury, the statement in his affidavit, so as to obtain the broadest possible admission from the State. In every view, therefore, as it regards the rights of the defendant, and the safe, equal, and pure administration of justice, the practice referred to is improper and erroneous." See also Taylor *v.* Com., 9 Ky. L. Rep. 316; People *v.* Vermilyea, 7 Cow. (N. Y.) 369, where, although the admission was received, it is said that the practice of requiring concessions in such cases is novel; and, the court apprehends, not well calculated to advance justice.

34. See *infra*, III, B, 2, c, (IV).

35. State *v.* Emerson, 90 Mo. 236, 2 S. W. 274.

Sufficiency of admission.— An admission need not be made in the exact language of the statute. Toliver *v.* Com., 104 Ky. 760, 47 S. W. 1082, 20 Ky. L. Rep. 906. See also State *v.* Schoonover, 21 Ind. App. 520, 52 N. E. 779, holding that where a prosecutor makes a statement of what facts an absent witness will testify to, and defendant merely admits the "statement," such admission must, in the light of the statutes of that state governing the same, be considered an admission of the truth of such statement; and the defendant cannot deny the same.

36. See *infra*, III, B, 2, c, (III), (A), (B).

or condition of the docket of the cases for trial or statutory enactment can authorize the denial of any of the rights guaranteed to a party by the constitution of the state[37] or of the United States.[38]

(B) *Particular Guaranties* — (1) RIGHT TO FACE WITNESSES. The provisions found in the various state constitutions providing that in all criminal prosecutions the accused shall have the right to meet the witnesses face to face applies only to witnesses against him, and therefore are in no way infringed by an admission;[39] and, it is held, the accused may waive his right to face the adverse witnesses.[40]

(2) RIGHT TO COMPULSORY PROCESS. The constitutional guaranty to an accused of the right of compulsory process for the attendance of his witnesses should not be trifled with or made a dead letter;[41] and no rule of practice or statute can be applied or so interpreted as to contravene this guaranty[42] or deny the right to such process, and a reasonable time for its service or execution.[43] Where, because of the sickness of the witness,[44] or his absence outside the jurisdiction of the court,[45] his presence could not, by compulsory process, be enforced, no question can arise. But under other circumstances the courts are not in accord as to just when a statute contravenes this guaranty. Where a party, although realizing the necessity of the same, has asked for no compulsory process,[46] or fails to disclose what he expects to prove by absent witnesses,[47] or where the state, by virtue of a statute, has granted the defendant every compulsory process at its command, which has been unavailingly employed by defendant to compel their attendance, a refusal to continue the cause upon an admission on the part of the state has been held, upon able judicial reasoning, not to be a denial of one's constitutional right.[48]

(IV) *NATURE OF ADMISSION REQUIRED* — (A) *In General* — (1) AS TESTIMONY ONLY. While it has been held that in the absence of express affirmative

37. Walker *v.* State, 117 Ala. 85, 23 So. 670.

38. State *v.* Berkley, 92 Mo. 41, 52, 4 S. W. 24, where Sherwood and Brace, JJ., held that a statute providing that, upon the application of a defendant in a criminal case for a continuance, the state might prevent such continuance by consenting that the facts set out in an application or affidavit for the continuance are what the witness, if present, would testify to, was in conflict with section 1, of the fourteenth amendment of the constitution of the United States, the former judge saying: "Here are two defendants in the same court, both on trial for their lives; both make equally meritorious applications for a continuance. In one case, the prosecuting attorney graciously waives the interposition of his veto, and the trial court is consequently allowed to exercise its ordinary judicial discretion, and the grounds therefor being ample, the continuance goes, and that defendant secures, as a matter of favor, what belongs to him as a home-born constitutional right — the attendance of his witnesses. In the other case, the prosecuting attorney does veto the application; does overrule the judicial discretion of the court; does override the constitutional right of the defendant; and so the latter is forced into a trial on whose result his life depends, with nothing better than a piece of paper, on which is written something which, on its face, does not bear even so much probative force as hearsay testimony."

39. Wilson *v.* People, 3 Colo. 325; Keating *v.* State, 160 Ill. 480, 43 N. E. 724; Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948, 17 Ky. L. Rep. 1091, 32 L. R. A. 108; Petty *v.* State, 4 Lea (Tenn.) 326.

40. U. S. *v.* Sacramento, 2 Mont. 239, 25 Am. Rep. 742.

41. State *v.* Fairfax, 107 La. 624, 31 So. 1011; State *v.* Adam, 40 La. Ann. 745, 5 So. 30; State *v.* Berkley, 92 Mo. 41, 4 S. W. 24.

42. Walker *v.* State, 117 Ala. 85, 23 So. 670.

43. Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948, 32 L. R. A. 108; State *v.* Dawson, 90 Mo. 149, 1 S. W. 827; State *v.* Hickman, 75 Mo. 416.

44. State *v.* Wiltsey, 103 Iowa 54, 72 N. W. 415.

45. State *v.* Hutchinson, 14 Wash. 580, 45 Pac. 156.

46. Childress *v.* State, 86 Ala. 77, 5 So. 775.

47. State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008, where it is said that it has never been held that the right of "compulsory process" entitles a defendant to a continuance save upon his compliance with those conditions which are required alike by the common law and by the jurisprudence of the state.

48. Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948, 17 Ky. L. Rep. 91, 32 L. R. A. 108; State *v.* Jennings, 81 Mo. 185, 51 Am. Rep. 236; State *v.* Hickman, 75 Mo. 416.

In Missouri, however, by a later interpretation, such a statute has, in one jurisdiction, by a divided court, been held unconstitutional. State *v.* Berkley, 92 Mo. 41, 4 S. W. 24 [*followed* in State *v.* Dyke, 96 Mo. 298, 9 S. W. 925; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102].

enactment a statute providing for the reception of admissions to prevent continuances in civil cases does not apply to criminal actions,[49] in some jurisdictions, either by virtue of such enactment or by judicial interpretation, such provisions have been held applicable to criminal procedure, and in many such jurisdictions an admission only that the absent witness would testify as alleged is required.[50] So too it has been held where no statutes applicable to continuances in either civil or criminal cases have been enacted, that where the adverse party admits the alleged testimony of the absent witness as evidence only, the matter then rests in the discretion of the court;[51] and many cases, not apparently resting on any specific statutory enactment, have held that the admission of the testimony which it is alleged the absent witness will give need be only as evidence and not as uncontrovertible.[52]

(2) As Absolutely True. Inasmuch, however, as the testimony of a witness delivered *ore tenus* could not possibly do more than establish the absolute truth of his statement, the courts, having in view the speedy, as well as the fair, administration of justice, hold that if the adverse party will admit as absolutely true the facts to which it is alleged the absent party will swear, it cannot be held that one is thereby detrimentally deprived of his witness;[53] and a continuance should, upon an admission of this nature, be denied.[54] But while there are some jurisdictions holding to the contrary,[55] and while in others there are conflicting decisions, yet it may be said, by perhaps the weight of authority, that in the absence of a statute to the contrary, an admission of the absolute and unchallenged verity of such testimony is required.[56]

(B) *Where Witness Is Outside Jurisdiction of Court.* Whatever may be the holding of a court as to the nature of the admission required where the witness

49. Van Meter *v.* People, 60 Ill. 168; Wassels *v.* State, 26 Ind. 30.

50. *Idaho.*—Territory *v.* Gurthie, 2 Ida. 398, 17 Pac. 39.

Kansas.— State *v.* Bartley, 48 Kan. 421, 29 Pac. 701.

Montana.—Territory *v.* Perkins, 2 Mont. 467 [*approved* in Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750].

Ohio.—See Comerford *v.* State, 23 Ohio St. 599.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504.

See 14 Cent. Dig. tit. "Criminal Law," § 1343.

By rule of court.— Under the earlier procedure in Kansas this matter was governed by rule of court, the substance of which seems to have been subsequently embodied in the statute. Thompson *v.* State, 5 Kan. 159.

51. Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; Catron *v.* State, 52 Nebr. 389, 72 N. W. 354; Fanton *v.* State, 50 Nebr. 351, 69 N. W. 953, 36 L. R. A. 158.

52. *Idaho.*— State *v.* St. Clair, (1898) 53 Pac. 1.

Iowa.— State *v.* McComb, 18 Iowa 43; State *v.* Mooney, 10 Iowa 506.

Kansas.— State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284 [*citing* State *v.* Lund, 49 Kan. 580, 31 Pac. 146].

Kentucky.— Johnson *v.* Com., 94 Ky. 578, 23 S. W. 507, 15 Ky. L. Rep. 281.

Louisiana.— State *v.* Colbert, 29 La. Ann. 715.

Missouri.— State *v.* Jewell, 90 Mo. 467, 3 S. W. 77; State *v.* Henson, 81 Mo. 384; State *v.* Hatfield, 72 Mo. 518. But see *supra*, Missouri cases in other sections.

See 14 Cent. Dig. tit. "Criminal Law," § 1343.

53. Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Nichols *v.* Com., 11 Bush (Ky.) 575.

54. *Arkansas.*— Baker *v.* State, 58 Ark. 513, 25 S. W. 603.

Indiana.— Carmon *v.* State, 18 Ind. 450.

Kentucky.— Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Nichols *v.* Com., 11 Bush 575; Smith *v.* Com., 42 S. W. 1138, 19 Ky. L. Rep. 1073.

Mississippi.— Browning *v.* State, 33 Miss. 47.

New York.— People *v.* Wilson, 3 Park. Crim. 199; People *v.* Foot, 1 Wheel. Crim. 70.

Texas.— Gardner *v.* State, (Crim. 1900) 59 S. W. 1114.

See 14 Cent. Dig. tit. "Criminal Law," § 1344.

55. See *supra*, III, B, 2, c, (IV), (A), (1).

56. *California.*— People *v.* Diaz, 6 Cal. 248.

Illinois.— Van Meter *v.* People, 60 Ill. 168; Willis *v.* People, 2 Ill. 399.

Indiana.— Wassels *v.* State, 26 Ind. 30; McLaughlin *v.* State, 8 Ind. 281; Wheeler *v.* State, 8 Ind. 113 [*overruling* Hamilton *v.* State, 3 Ind. 552]; State *v.* Schoonover, 21 Ind. App. 520, 52 N. E. 779.

Mississippi.— See Dominges *v.* State, 7 Sm. & M. 475, 45 Am. Dec. 315.

Missouri.— State *v.* Loe, 98 Mo. 609, 12 S. W. 254; State *v.* Dyke, 96 Mo. 298, 9 S. W.

could perhaps be produced, it is agreed that where the witness is not subject to compulsory process, a party who is permitted to have the benefit of his testimony in language suggested or employed by himself without subjection to the test of a cross-examination is in no way prejudiced; and an admission of the same as testimony only is all that should be required.[57]

(c) *Under Express Criminal Statute.* The fact that, in a jurisdiction where the court requires an admission of the absolute truth of the facts to which it was held an absent witness would testify, to prevent a continuance or postponement, an unscrupulous criminal often might, by the aid of an ingenious counsel, prolong or indefinitely delay the trial of his cause, or else compel the state to admit facts for the purpose of a trial which in effect would be equivalent to his acquittal, has induced the enactment, in some states, of provisions especially applicable to the granting of continuances in criminal cases.[58] These provisions in some states require the admission of the truth of the testimony of the absent witness to prevent a continuance at the same term at which the indictment was rendered,[59] but leave it to the discretion of the court as to whether or not the alleged absent testimony shall be admitted as truth or as evidence only when a continuance is asked at a term subsequent to the one at which the indictment was found.[60]

(v) *CONTRADICTION OF ADMISSION.* Where the absolute truth of an alleged witness' testimony is required to be admitted, such testimony cannot of course be contradicted or impeached,[61] but evidence competent for other purposes and not introduced for the purpose of contradiction may be admitted, although it incidentally tends to contradict facts admitted to be true.[62] Where the statement is admitted as testimony only, it may of course be impeached on certain grounds;[63]

925; State *v.* Warden, 94 Mo. 648, 8 S. W. 233; State *v.* Neiderer, 94 Mo. 79, 6 S. W. 708; State *v.* Berkley, 92 Mo. 41, 4 S. W. 24.

Nevada.— State *v.* Salge, 2 Nev. 321.

New Mexico.— In this jurisdiction, while the statute only requires that the adverse party admit that the witness will "testify" to the facts alleged in the application, yet the court, in interpreting the same, say that the evident intent of it is not to allow a party opposing the continuance to deny the truth of the matters alleged therein. Territory *v.* Kinney, 3 N. M. 369, 9 Pac. 599.

New York.— People *v.* Vermilyea, 7 Cow. 369.

North Carolina.— State *v.* Twiggs, 60 N. C. 142.

Tennessee.— State *v.* Baker, 13 Lea 326.

Texas.— De Warren *v.* State, 29 Tex. 464; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Francis *v.* State, (Crim. 1900) 55 S. W. 488.

57. People *v.* Savant, 112 Mich. 297, 70 N. W. 576; Petty *v.* State, 4 Lea (Tenn.) 326; State *v.* Hutchinson, 14 Wash. 580, 45 Pac. 156.

58. Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948, 17 Ky. L. Rep. 1091, 32 L. R. A. 108.

59. Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; Hardesty *v.* Com., 88 Ky. 537, 11 S. W. 589, 11 Ky. L. Rep. 43 (holding that under the Kentucky statutes it was necessary to avoid a continuance at the term at which the indictment was found to admit the facts stated to be true, although on account of the alleged insanity of the defendant the affidavit was made by a third party); Ross *v.* Com., 59 S. W. 28, 24 Ky. L. Rep. 1621.

60. See Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612.

61. Van Meter *v.* People, 60 Ill. 168; Vinegar *v.* Com., 42 S. W. 351, 19 Ky. L. Rep. 840.

62. Burchfield *v.* State, 82 Ind. 580.

63. Where the prosecution consents that the affidavit for a continuance may be read as a deposition of the absent witness, such affidavit cannot be impeached on the ground that the defendant might with reasonable diligence have procured the attendance of the witness or taken his deposition, that he had good reason to believe that if the witness would so testify the testimony would be untrue, or that there is no such person in existence as the one named in the affidavit. Inasmuch as to permit the defendant's belief as to what the absent witness would testify to if present, or the actual existence of such witness, to be put in issue would bring new and independent matters before the court for trial which would have the effect to extend the testimony outside of the points in issue and would require defendant to be prepared to answer to particular facts of which he had no notice. So too if a party knowingly makes a false and corrupt affidavit to gain further time he can be duly convicted of perjury; but it is not proper to thus try a party for perjury when he is charged with some other offense. State *v.* Roark, 23 Kan. 147.

The supposed absent witness may be introduced personally to impeach and contradict the facts to which it is alleged he will testify, where the presence of such witness can be produced by the party during the trial. Edmonds *v.* State, 34 Ark. 720; State *v.* Mann, 83 Mo. 589.

but this can be done only when the rules for the introduction of rebutting testimony can be and are observed.[64]

(VI) *USE OF ADMISSION ON SUBSEQUENT TRIAL.* Where a continuance is obviated by an admission by the adverse party of the alleged testimony of an absent witness, and the trial results in a disagreement, such admission, it has been held, must be again received if the accused is again placed on trial at the same term;[65] but where the cause is not determined during the term at which the admission is made, as the applicant is thus afforded a chance to obtain such witnesses or their testimony, the admission cannot be used as a matter of right at a subsequent term.[66]

(VII) *ARRIVAL OF WITNESS BEFORE CLOSE OF TRIAL.* Where a statement of the testimony of a witness has been admitted, owing to his absence, the court may, upon his appearance, before the close of the introduction of the testimony, allow the witness himself to be placed upon the stand;[67] and where this proceeding is asked by one of the parties it is a wise exercise of discretion on the part of the court to do so.[68]

(VIII) *SCOPE OF ADMISSION.* A party cannot, after obviating a continuance, by admitting the affidavit or application as evidence of the absent witness, introduce only a portion of the same to the jury, as the accused is entitled to have it considered in its entirety.[69] So too the admission must be coextensive with the material and competent part of the alleged absent testimony;[70] but a party cannot, by embodying improper or irrelevant matter in his affidavit, require his adversary in order to avoid a continuance to admit the same.[71] Hence an admission will be understood as contemplating only material and relevant testimony,[72] and not matter which, were the witness present in person, would be inadmissible.[73] Nor need an admission be of the testimony of alleged absent witnesses other than those who have been summoned or who may possibly be secured.[74]

3. AGREEMENT OF COUNSEL. The mere agreement of counsel to continue a cause does not require the court to grant a continuance.[75]

4. CONTAGIOUS DISEASE OF WITNESS. It has been held a sufficient ground for a continuance that the material witnesses had become afflicted with a contagious disease so that their attendance at the trial would be dangerous to the public.[76]

5. INCOMPETENCY OF WITNESS TO TAKE OATH. Where the incompetency of a material witness to take an oath arises from ignorance due to a neglect of instruction, it has been held proper to grant a continuance until such witness can be instructed in its nature and obligation;[77] but where the infirmity arises from no neglect, as where the witness was too young to have been taught, it has been doubted whether it is the proper procedure to postpone the trial.[78]

64. State *v.* Shannehan, 22 Iowa 435; State *v.* Morton, 59 Kan. 338, 52 Pac. 890; State *v.* Hickman, 75 Mo. 416.

65. State *v.* Lund, 49 Kan. 580, 31 Pac. 146.

66. Powers *v.* State, 87 Ind. 144; State *v.* Felter, 32 Iowa 49; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102.

67. Betts *v.* State, 66 Ga. 508.

68. State *v.* Pinnell, 93 Mo. 480, 6 S. W. 221.

69. Wheeler *v.* State, 8 Ind. 113 [*followed* in McLaughlin *v.* State, 8 Ind. 281]. See also Davis *v.* State, 92 Ala. 20, 9 So. 616.

70. People *v.* Brown, 54 Cal. 243. But the fact that the state fails to admit a fact not controverted and amply proven by other evidence is not ground for reversal. Phipps *v.* State, 36 Tex. Crim. 216, 36 S. W. 753.

71. State *v.* Sater, 8 Iowa 420.

72. State *v.* Sater, 8 Iowa 420.

73. State *v.* Chopin, 10 La. Ann. 458.

74. Were the rule otherwise, an applicant for a continuance might merely by inserting in his motion the names of fictitious witnesses or persons whom the sheriff could not serve present an array of evidence for which there was in reality no foundation whatever, and thus secure a continuance by fraud. State *v.* Daniels, 49 La. Ann. 954, 22 So. 415.

75. The court may refuse to ratify such an agreement, and, unless some legal reason is shown whereby an injustice has been done, such action is not error. Keaton *v.* State, (Tex. Crim. 1900) 57 S. W. 1125.

76. Reg. *v.* Taylor, 15 Cox C. C. 8.

77. Rex *v.* White, 1 Leach C. C. 286. See also Reg. *v.* Nicholas, 2 C. & K. 246, 2 Cox C. C. 136, 61 E. C. L. 246; Reg. *v.* Baylis, 4 Cox C. C. 23.

78. Reg. *v.* Nicholas, 2 C. & K. 246, 2 Cox C. C. 136, 61 E. C. L. 246, where, however,

6. Intoxication of Witness. Where a witness, whose evidence is very material to, and would likely influence the result of, the trial is, on account of intoxication, incapacitated from testifying at the time he is called, the court should grant a postponement or continuance until the witness is sober.[79]

7. Illness or Mental Incapacity of Accused. A request for a continuance on the ground of illness or temporary mental aberration[80] is addressed largely to the discretion of the court.[81] The exercise of such discretion will not be held to be abused where the court determines his alleged physical disability or illness by a personal inspection or examination[82] or by an examination of physicians as to the ability of the accused to undergo the probable excitement and nervous strain of a trial,[83] even though a physician certifies that accused is in a bad nervous and physical condition.[84] Nor need the court accept the statement of a single physician, but may appoint a number to examine him, and act upon their majority report,[85] or place him in charge of a committee of physicians and act upon their report.[86] The mere fact that defendant is very excitable, whether this is occasioned by his state of health or otherwise, is not sufficient ground for a continuance,[87] and where the defendant occasions his condition or temporary absence by the voluntary use of intoxicating liquor it is not an abuse of discretion to refuse a continuance.[88] But neither the statutes nor the common law will permit the trial or punishment of an insane person,[89] and if at the time of trial there is reason to believe the accused insane, his condition should be investigated by a jury, and if he is found to be insane, the trial should be continued until he regains his sanity.[90]

8. Insufficient Preparation For Trial — a. On Part of Counsel. A request for a continuance on the ground that counsel has not had a reasonable time to prepare a defense is addressed to the sound discretion of the court, to be exercised of course upon a consideration of the intricacy of the law or other facts and circumstances involved, and the action of the court is not a favored ground for reversal.[91] It is essential that the accused show no lack of diligence in endeavor-

the court expressly said that it would lay down no general rule, as there might be cases of this nature where a postponement would be proper.

79. McDow *v.* State, 10 Tex. App. 98.

80. The temporary insanity complained of must be clearly proved, and where the physician called upon to prove this condition testifies that in negro lingo the defendant was "playing possum" it is no abuse of discretion to proceed with the trial. Especially is this true where the defendant, as soon as the motion was overruled, recovered his mental equilibrium and was vigilant and ready in prompting his counsel throughout the trial. State *v.* George, 37 La. Ann. 786.

81. State *v.* Ward, 14 La. Ann. 673; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

82. Hardwick *v.* Com., 7 Ky. L. Rep. 363.

83. State *v.* Silvius, 22 R. I. 322, 47 Atl. 888; Madden *v.* State, (Tenn. 1901) 67 S. W. 74.

84. State *v.* Lee, 58 S. C. 335, 36 S. E. 706.

85. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

86. State *v.* Rogers, 56 Kan. 362, 43 Pac. 256.

87. Harvey *v.* State, 67 Ga. 639.

88. State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; Branch *v.* State, 35 Tex. Crim. 304, 33 S. W. 356.

89. State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

A person is deemed sane when his memory is unimpaired and he is capable of comprehending his own condition in reference to his trial and the crime of which he is charged, and in possession of every faculty requisite to conducting a rational defense against the accusation; although he may be deranged on other subjects, or suffering from a chronic and latent disease of the brain which, under the excitement of intoxicating drink or other conditions or circumstances, may lead him to irrational acts. *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378; Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216. See, generally, Insane Persons.

90. People *v.* Farrell, 31 Cal. 576; Gruber *v.* State, 3 W. Va. 699. See also People *v.* Rhinelander, 2 N. Y. Crim. 335.

91. *California.*— People *v.* Collins, 75 Cal. 411, 17 Pac. 430.

Florida.— Jenkins *v.* State, 31 Fla. 196, 12 So. 677.

Georgia.— Baker *v.* State, 111 Ga. 141, 36 S. E. 607; Charlon *v.* State, 106 Ga. 407, 32 S. E. 347.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161.

Louisiana.— State *v.* Wilson, 33 La. Ann. 261.

New York.— See People *v.* Shea, 147 N. Y. 78, 41 N. E. 505, 69 N. Y. St. 320.

ing to employ counsel,[92] and the affidavit of want of sufficient time comes with more grace from the counsel than from the accused himself.[93] So too the excuse that the counsel have been so busily engaged in other professional matters that they have been unable to devote the proper time to the case in question is not received with favor where defendant employs his own counsel,[94] although the same reasons are inapplicable where counsel is appointed by the court, and greater indulgence should be allowed.[95] But where no lack of diligence is shown, either on the part of the accused or his counsel, it is reversible error to refuse to grant a continuance where it is clear that counsel have had insufficient time to investigate and examine the law applicable to the case.[96]

b. On Part of Accused. Where it is clear that the prisoner has not had a reasonable opportunity between the date of the offense and that of the trial to procure witnesses and prepare his defense a continuance should be granted;[97] but it must appear that lack of preparation did not arise from defendant's own laches.[98] So too a trial on a second indictment for the same offense will not be continued,

See 14 Cent. Dig. tit. "Criminal Law," § 1317.

What constitutes reasonable time is dependent upon the nature of the offense, the facilities for procuring interviews with attorneys, and the number thereof necessary to be interviewed. Where the homicide was admitted and the only question involved was the degree of the offense, and all the witnesses were present in court it was held not to be an abuse of discretion to refuse a continuance where counsel were assigned on Monday and the trial set for the following Wednesday. Walton *v.* State, 79 Ga. 446, 5 S. E. 203. See also Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228, 32 Wkly. Notes Cas. (Pa.) 113, where it was held that it was not an abuse of discretion to refuse a continuance where the senior counsel for the defendant was assigned more than a month before the trial, the junior counsel five days before, and the power to compel the attendance of witness being easily and readily obtained.

Where the court was compelled to commit defendant's counsel for contempt, by reason of such counsel's intoxication, an adjournment for a reasonable time thereafter to allow other counsel to become familiar with the facts of the case is all that defendant has a right to claim, and a continuance is properly denied. People *v.* Warren, 130 Cal. 678, 63 Pac. 87.

92. Maloney *v.* Traverse, 87 Iowa 306, 54 N. W. 155.

93. Smith *v.* State, 132 Ind. 145, 31 N. E. 807; Burchfield *v.* State, 82 Ind. 580.

94. The weakness of this excuse lying in the fact that a defendant could in all likelihood have employed other attorneys who could have given him the proper attention. Smith *v.* State, 132 Ind. 145, 31 N. E. 807; Burchfield *v.* State, 82 Ind. 580.

95. State *v.* Collins, 104 La. 629, 29 So. 180, 81 Am. St. Rep. 150; State *v.* Simpson, 38 La. Ann. 23.

96. The reason being that to deny a continuance in such case would be to convert the inestimable right usually guaranteed a party charged with crime of being heard by counsel, into a meaningless formality.

Georgia.— Blackman *v.* State, 76 Ga. 288.

Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966.

Louisiana.— State *v.* Deschamps, 41 La. Ann. 1051, 7 So. 133; State *v.* Brooks, 39 La. Ann. 239, 1 So. 421; State *v.* Simpson, 38 La. Ann. 23; State *v.* Ferris, 16 La. Ann. 424. See also State *v.* Collins, 104 La. 629, 29 So. 180, 81 Am. St. Rep. 150.

Missouri.— State *v.* Lewis, 74 Mo. 222.

Oklahoma.— Miller *v.* U. S., 8 Okla. 315, 57 Pac. 836.

England.— Reg. *v.* Taylor, 11 Cox C. C. 340.

See 14 Cent. Dig. tit. "Criminal Law," § 1317.

97. *Georgia.*—Dowda *v.* State, 71 Ga. 481; Whitley *v.* State, 38 Ga. 50; Metts *v.* State, 29 Ga. 271; Poole *v.* State, 18 Ga. 567.

Illinois.— Conley *v.* People, 80 Ill. 236; Wray *v.* People, 78 Ill. 212.

Kentucky.— Brooks *v.* Com., 100 Ky. 194, 37 S. W. 1043, 18 Ky. L. Rep. 702.

Louisiana.— State *v.* Horn, 34 La. Ann. 100.

South Carolina.— State *v.* Lewis, 1 Bay 1.

Texas.— Gaines *v.* State, (Crim. 1899) 53 S. W. 623; Mapes *v.* State, 14 Tex. App. 129.

See 14 Cent. Dig. tit. "Criminal Law," § 1316.

But see Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840, where by virtue of statute a defendant indicted under the gaming act was forced to a trial without due preparation.

98. *Arkansas.*— Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

Florida.— Ballard *v.* State, 31 Fla. 266, 12 So. 865.

Idaho.— State *v.* Rice, (1901) 66 Pac. 87.

Kansas.— State *v.* Coggins, 10 Kan. App. 455, 62 Pac. 247.

Kentucky.— Hayden *v.* Com., 45 S. W. 886, 20 Ky. L. Rep. 274; Moody *v.* Com., 43 S. W. 209, 19 Ky. L. Rep. 1198.

Missouri.— State *v.* Inks, 135 Mo. 678, 37 S. W. 942.

Texas.— Holmes *v.* State, 38 Tex. Crim. 370, 42 S. W. 996.

See 14 Cent. Dig. tit. "Criminal Law," § 1316.

the first indictment having been found a sufficient time previously.[99] Nor will a second trial, the jury having disagreed in the first,[100] be continued. The mere fact that the accused has been in jail in another county should not excuse him from preparing his defense.[101]

9. Public Excitement and Prejudice. It has been held that the clear existence of an excited state of the public mind against the accused should entitle him to a continuance until there has been a reasonable time for the excitement to subside and the mind of the community to become tranquilized.[102] Other courts regard this as very material matter to be shown in an application for a change of venue, but do not consider it sufficient ground for a continuance;[1] and under a statute disqualifying as a juror any one who, from having seen the crime committed, has formed or expressed any opinion as to the prisoner's guilt or innocence, who has any prejudice or bias against him, or who is not perfectly impartial between the state and prisoner, it has been repeatedly held that public excitement alone was not a sufficient ground;[2] although under such a statute if the court is in doubt as to the sufficiency of other grounds on which the continuance is claimed, this may well be considered as turning the scale in favor of granting the same.[3] In any event such excitement must be such that its natural tendency would be to intimidate or swerve the jury;[4] and as the court in which the cause is pending can much better determine the propriety of a postponement on this ground than the appellate court, it requires a very strong showing to induce the upper court to interfere.[5]

10. Surprise — a. In General. Where it is made to appear to the satisfaction of the court that the applicant for a continuance is so taken by surprise by some unexpected occurrence or the introduction of unexpected testimony which, by reasonable diligence he could not have anticipated, that a fair trial cannot be had

99. Dobson *v.* State, (Ark. 1891) 17 S. W. 3; Wells *v.* Com., 6 S. W. 150, 9 Ky. L. Rep. 658.

100. State *v.* White, 98 Iowa 346, 67 N. W. 267.

101. Long *v.* State, 38 Ga. 491; McDermott *v.* State, 89 Ind. 187; Mask *v.* State, 32 Miss. 405. See also Ballard *v.* State, 31 Fla. 266, 12 So. 865.

102. Bishop *v.* State, 9 Ga. 121; Com. *v.* Dunham, Thach. Crim. Cas. (Mass.) 516; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

A reasonable time in which it may fairly be assumed that the public excitement has sufficiently abated depends of course upon the heinousness of the offense committed and the susceptibility of the public mind to undue excitement upon the commission of such offenses. Two years would seem to be clearly a sufficient time (Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814); and in several cases it has been held that the judge did not abuse his discretion in assuming that the public prejudice had become sufficiently lulled after the expiration of five months after the commission of the offense (Revel *v.* State, 26 Ga. 275; Poole *v.* State, 18 Ga. 567; Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528).

"Public excitement," within the legal meaning of that term, means more than the excitement which is a natural consequence of criminal conduct, as the latter is merely a fair expression of public sentiment. Com. *v.* Carson, 1 Wheel. Crim. (N. Y.) 487.

Where the excitement is occasioned by the escape and recapture of the accused, he is not entitled to a continuance, especially after the lapse of one term of court since his incarceration. Wright *v.* State, 18 Ga. 383.

1. *Idaho.*— State *v.* Rice, (1901) 66 Pac. 87; State *v.* Corcoran, (1900) 61 Pac. 1034.
Kentucky.— Laughlin *v.* Com., 37 S. W. 590, 18 Ky. L. Rep. 640.
Oregon.— State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.
Texas.— Leach *v.* State, (Crim. 1899) 53 S. W. 630; Jones *v.* State, 37 Tex. Crim. 433, 35 S. W. 975; Baw *v.* State, 33 Tex. Crim. 24, 24 S. W. 293; Miller *v.* State, 32 Tex. Crim. 319, 20 S. W. 1103; Miller *v.* State, 31 Tex. Crim. 609, 31 S. W. 925, 37 Am. St. Rep. 836.
Virginia.— Joyce *v.* Com., 78 Va. 287.
See 14 Cent. Dig. tit. "Criminal Law," § 1318.

Newspaper publications, referring to an offense which the accused is alleged to have committed, in prejudicial or aggravated terms, are not sufficient grounds for a continuance on the ground of their undue affectation of the public mind. State *v.* Norris, 2 N. C. 429, 1 Am. Dec. 564; State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

2. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Lovett *v.* State, 60 Ga. 257; Brinkley *v.* State, 54 Ga. 371; Mitchell *v.* State, 41 Ga. 527; Thomas *v.* State, 27 Ga. 287; Thompson *v.* State, 24 Ga. 297.

3. Maddox *v.* State, 32 Ga. 581, 79 Am. Dec. 307.

4. State *v.* Ford, 37 La. Ann. 443.

5. Walker *v.* State, 136 Ind. 663, 36 N. E. 356; Hubbard *v.* State, (Tex. App. 1902) 67 S. W. 413.

a continuance or postponement should be granted;[6] but it is not error to refuse a continuance on the ground of surprise at the introduction of evidence, when the defendant should, from the nature of the case, naturally expect or anticipate the evidence, or when by law he is chargeable with knowledge that such evidence would be properly competent.[7]

b. What May Constitute — (I) *Absence of Expected Witness.* Where defendant is surprised by the absence of a witness who had been present during the trial, or whom he had every reason to expect would be present, the proper procedure is not to urge the matter as ground for a new trial, but to move the court for a postponement or continuance,[8] an unadvised refusal of which by the court may constitute error.[9] So too this course should be pursued where the unexpected absence of the witness is attributable to the error of a ministerial officer.[10]

(II) *Introduction of Unexpected Witnesses.* Where a defendant is surprised by the introduction of witnesses whose names were not indorsed on the information at the time of filing, a continuance should be granted, allowing him time and opportunity to examine their character and credibility and prepare to meet their testimony;[11] but where there is no fraud or deception practised on a defendant, and he goes to trial under the impression that the principal witness for the state will not be present to testify against him, the introduction of such witness will not entitle him to a continuance.[12]

(III) *Unexpected Testimony of State's Witnesses.* Where, on a trial, witnesses for the state testify to facts or circumstances which, from the nature of the case, are wholly unexpected by defendant, or in actual or apparent contradiction to their former testimony, thereby taking defendant by surprise, a postponement or continuance sufficient to procure disproving evidence should be granted;[13] but it has been held that defendant must disclose the manner in which he expects to meet the new phase of the evidence;[14] nor will a continuance be granted where the applicant has made no effort to ascertain what the probable testimony of such witness would be.[15]

(IV) *Unexpected Testimony of Defendant's Witnesses.* The defendant in a criminal case cannot as a rule claim a continuance on the ground that he was surprised by the testimony offered or withheld by his own witnesses,[16]

6. McKinney *v.* State, 8 Tex. App. 626 (holding also that an application of this character is not precluded by the previous overruling of an ordinary application); Reg. *v.* Flannagan, 15 Cox C. C. 403.

7. Fraser *v.* State, 112 Ga. 13, 37 S. E. 114; King *v.* State, 21 Ga. 220; State *v.* Seery, 95 Iowa 652, 64 N. W. 631.

8. Smith *v.* State, 40 Tex. Crim. 391, 50 S. W. 938; Higginbotham *v.* State, 3 Tex. App. 447.

9. Joseph *v.* Com., 1 S. W. 4, 8 Ky. L. Rep. 53; Cotton *v.* State, 4 Tex. 260 [*approved* in Price *v.* People, 131 Ill. 223, 23 N. E. 639].

10. State *v.* Thomas, 40 La. Ann. 151, 3 So. 589.

11. People *v.* Price, 74 Mich. 37, 41 N. W. 853; People *v.* Evans, 72 Mich. 367, 40 N. W. 473. But see People *v.* Symonds, 22 Cal. 348, where it is held that the introduction of witnesses whose names were not indorsed on the indictment or information, does not as a matter of right entitle the defendant to a continuance, but that he must make affidavit or otherwise show to the court that he is in fact surprised by the introduction of such testimony.

12. Townsend *v.* State, 5 Tex. App. 574.

13. Rankin *v.* Com., 82 Ky. 424; Lowry *v.* Com., 63 S. W. 977, 23 Ky. L. Rep. 1240; State *v.* Newsum, 129 Mo. 154, 31 S. W. 605; Shulze *v.* State, 28 Tex. App. 316, 12 S. W. 1084; Withers *v.* State, 23 Tex. App. 396, 5 S. W. 121; Hodde *v.* State, 8 Tex. App. 382; Reg. *v.* Flannagan, 15 Cox C. C. 403.

14. Dixon *v.* State, 46 Nebr. 298, 64 N. W. 961.

15. Evans *v.* State, 13 Tex. App. 225.

16. Wing *v.* Com., 7 Ky. L. Rep. 227 (holding that the fact that a material witness had testified in favor of the accused on a former trial, and when introduced on a later trial stated that he knew nothing about the facts, and that his former testimony was not true, would not necessitate a continuance, where it appeared that he had been threatened with violence by an unknown party if he again gave the same testimony, although the counsel for the accused knew of the threat, but did not know before the witness was introduced that he would not testify as before); Rankin *v.* Com., 6 Ky. L. Rep. 407 (holding also that the fact that a witness for the accused who had been sworn had while on the stand made admissions affecting his own credibility, and before he could be recalled and sworn had fled, was no ground for discharging the jury and continuing the case).

although by virtue of statutory provisions the rule in some jurisdictions would appear to be otherwise.[17]

(v) *UNEXPECTED WITHDRAWAL OF COUNSEL.* Where the leading or material counsel for a defendant suddenly withdraws from the case during the trial, it is error to refuse a continuance to give the new counsel time to prepare the defense.[18]

C. As Affected by Number of Continuances Granted. It has been said that the same degree of promptness and diligence in preparing for trial should not be required of the defendant at the term to which the indictment is returned as at a subsequent term after a continuance has been granted;[19] and while in the absence of statute a definite distinction is rarely declared by the courts between a showing necessary to be made for a subsequent continuance and that of the first, it is clear from the phraseology often employed that successive continuances are not regarded with favor.[20] A court will rarely, if ever, tolerate two applications on the same grounds at the same term,[21] although they may be differently stated;[22] and where a continuance has been refused, another motion at the same term will not be entertained unless upon material facts not existing at the time the former was made, or upon facts which, if existing, it is clear were not, and by the exercise of reasonable diligence could not have been, known at such time.[23]

D. Diligence an Essential Element to Sufficiency of Ground — 1. IN GENERAL. The courts, whose duty it is to administer justice both on behalf of the state as well as of the accused, steadfastly refuse to allow the negligence or passiveness of either of the parties to a criminal action to delay criminal justice, and will refuse a continuance to procure evidence of witnesses no matter how material or important it may be, unless it is shown that the applicant has used due diligence to procure such testimony.[24] And this rule is adhered to with strictness where the testimony sought does not, in the light of the record and preponder-

17. Webb *v.* State, 9 Tex. App. 490.

But a defendant cannot be said to be surprised by a witness' testimony which was the same as that given on the examining trial. Bailey *v.* State, 37 Tex. Crim. 579, 40 S. W. 281.

18. Jackson *v.* State, 88 Ga. 784, 15 S. E. 677; Wray *v.* People, 78 Ill. 212; Claxon *v.* Com., 30 S. W. 998, 17 Ky. L. Rep. 284.

19. North *v.* People, 139 Ill. 81, 28 N. E. 966.

20. See, generally, the following cases:

Louisiana.— State *v.* Hornsby, 33 La. Ann. 1110.

Missouri.— State *v.* Lynn, 169 Mo. 664, 70 S. W. 127; State *v.* Dyer, 139 Mo. 199, 40 S. W. 768.

North Carolina.— State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364.

Texas.— Ash *v.* State, (Crim. 1901) 63 S. W. 881; Dement *v.* State, 39 Tex. Crim. 271, 45 S. W. 917; McGee *v.* State, 31 Tex. Crim. 71, 19 S. W. 764.

Washington.— State *v.* Burns, 19 Wash. 52, 52 Pac. 316.

Where there is no special statutory provision for a third continuance to enable the prisoner to get witnesses the granting of such continuance is within the discretion of the court. Burrell *v.* State, 18 Tex. 713.

Because of the absence of a witness for whom a previous continuance has been granted, a subsequent application for a continuance is subjected to perhaps a stricter scrutiny than the former motion. People *v.* Leyshon, 108 Cal. 440, 41 Pac. 480; Johnson *v.* State, 58 Ga. 491; Walknp *v.* Com., 20 S. W. 221, 14 Ky. L. Rep. 337; Scott *v.* State, (Tex. Crim. 1894) 25 S. W. 783. Although where justice clearly requires it, the fact that several continuances have been granted should not operate to defeat the granting of another. State *v.* Walker, 69 Mo. 274, where a reversal was ordered for a refusal to grant a sixth continuance. See also Preston *v.* State, 4 Tex. App. 186.

On the ground of sickness of counsel a continuance for a second time is not regarded with favor. State *v.* Dubois, 24 La. Ann. 309. See also People *v.* Hildebrandt, 16 Misc. (N. Y.) 195, 38 N. Y. Suppl. 958, 74 N. Y. St. 548. And this is true especially where the accused has been given notice that another continuance on that ground would not be granted. Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; Nixon *v.* State, 85 Ga. 455, 11 S. E. 874; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

21. McCorkle *v.* State, 14 Ind. 39.

22. State *v.* Redmond, 37 La. Ann. 774.

23. Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Brinkley *v.* State, 54 Ga. 371; Wilson *v.* State, 33 Ga. 207; Robetaille's Case, 5 City Hall Rec. (N. Y.) 171; Withers *v.* State, 30 Tex. App. 383, 17 S. W. 936.

24. *California.*— People *v.* Breen, 130 Cal. 72, 62 Pac. 408.

Florida.— Jones *v.* State, (1902) 32 So. 793.

Georgia.— Kidd *v.* State, 101 Ga. 528, 28 S. E. 990; Allen *v.* State, 10 Ga. 85.

ance of evidence adduced, appear to be probably true,[25] or where it does not appear that the witness can probably be secured if the trial is continued,[26] or that his testimony could affect the verdict.[27] The accused, however, must be accorded all reasonable facilities in the preparation of his defense,[28] and, in extreme cases, where the evidence sought to be adduced is very material to defendant, it has been held that he should be allowed a continuance notwithstanding the fact that he has failed in a measure to exercise due diligence.[29]

2. What Constitutes — a. In General. What constitutes due diligence must of course depend upon the material and important facts and circumstances of each particular case; no general rule can be laid down or formulated by which the court may be governed; the proximity of the witness, his facilities for travel, and the facilities of communicating with him must be considered,[30] as well as the

Idaho.— State *v.* Corcoran, (1900) 61 Pac. 1034.

Illinois.— Dacey *v.* People, 116 Ill. 555, 6 N. E. 165.

Iowa.— State *v.* Spurbeck, 44 Iowa 667.

Kansas.— State *v.* Lewis, 56 Kan. 374, 43 Pac. 265; State *v.* McClain, 49 Kan. 730, 31 Pac. 790; State *v.* Emmons, 45 Kan. 397, 26 Pac. 679; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676.

Kentucky.— Earp *v.* Com., 9 Dana 301; Saylor *v.* Com., 57 S. W. 614, 22 Ky. L. Rep. 472; Moody *v.* Com., 43 S. W. 209, 19 Ky. L. Rep. 1198; Helton *v.* Com., 29 S. W. 331, 16 Ky. L. Rep. 464; Goodin *v.* Com., 16 S. W. 451, 13 Ky. L. Rep. 123.

Louisiana.— State *v.* Gaubert, 49 La. Ann. 1692, 22 So. 930; State *v.* Morgan, 39 La. Ann. 214, 1 So. 456; State *v.* Nelson, 28 La. Ann. 46; State *v.* Allemand, 25 La. Ann. 525.

Massachusetts.—Com. *v.* Millard, 1 Mass. 6.

Mississippi.— Lamar *v.* State, 63 Miss. 265.

Missouri.— State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; State *v.* Banks, 118 Mo. 117, 23 S. W. 1079; State *v.* McCoy, 111 Mo. 517, 20 S. W. 240; State *v.* Carter, 98 Mo. 176, 11 S. W. 624; State *v.* Able, 65 Mo. 357; State *v.* Nell, 79 Mo. App. 243.

Nebraska.— Hubbard *v.* State, (1902) 91 N. W. 869; Tatum *v.* State, 61 Nebr. 229, 85 N. W. 40.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805; Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

South Carolina.— State *v.* Smith, 8 Rich. 460.

Texas.— Goodson *v.* State, 32 Tex. 121; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Hubbard *v.* State, (Crim. 1902) 67 S. W. 413; Corley *v.* State, (Crim. 1901) 66 S. W. 453; Hopkins *v.* State, (Crim. 1901) 64 S. W. 923; Perez *v.* State, (Crim. 1901) 62 S. W. 748; Brice *v.* State, (Crim. 1901) 61 S. W. 121; Hargrove *v.* State, (Crim. 1899) 51 S. W. 1123; Winters *v.* State, (Crim. 1899) 51 S. W. 1110; Luttrell *v.* State, (Crim. 1899) 51 S. W. 930; Isham *v.* State, (Crim. 1899) 49 S. W. 581; Butler *v.* State, (Crim. 1898) 44 S. W. 1089; Gerstenkorn *v.* State, (Crim. 1898) 44 S. W. 503; Haile *v.* State, (Crim. 1898) 43 S. W. 999; Harmanson *v.* State, (Crim. 1897) 42 S. W. 995; Bishop *v.* State, (Crim. 1896) 35 S. W. 170; Evans *v.* State, (Crim. 1895) 31 S. W. 648; Craft *v.* State, (Crim. 1895) 31 S. W. 367; Scott *v.* State, (Crim. 1894) 25 S. W. 783; Brown *v.* State, 32 Tex. Crim. 119, 22 S. W. 596; Laurence *v.* State, 31 Tex. Crim. 601, 21 S. W. 766; Murphy *v.* State, (Crim. 1893) 21 S. W. 45; Wolfforth *v.* State, 31 Tex. Crim. 387, 20 S. W. 741; Brooks *v.* State, 26 Tex. App. 184, 9 S. W. 562; May *v.* State, 22 Tex. App. 595, 3 S. W. 781; Childers *v.* State, 16 Tex. App. 524; Greenwood *v.* State, 9 Tex. App. 638; Huebner *v.* State, 3 Tex. App. 458.

Virginia.— Moore *v.* Com., 9 Leigh 639.

Washington.— State *v.* Hutchinson, 14 Wash. 580, 45 Pac. 156; State *v.* Brooks, 4 Wash. 328, 30 Pac. 147.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1335, 1336.

25. Sebastak *v.* State, (Tex. Crim. 1901) 64 S. W. 242; Williams *v.* State, (Tex. Crim. 1900) 58 S. W. 98; Nite *v.* State, 41 Tex. Crim. 340, 54 S. W. 763; Paee *v.* State, 41 Tex. Crim. 203, 51 S. W. 953, 53 S. W. 689; Shilling *v.* State, (Tex. Crim. 1899) 51 S. W. 240; Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735.

26. People *v.* Winters, 125 Cal. 325, 57 Pac. 1067; Hopkins *v.* State, (Tex. Crim. 1899) 53 S. W. 619.

27. Garza *v.* State, 39 Tex. Crim. 358, 46 S. W. 242.

28. State *v.* Thomas, 40 La. Ann. 151, 3 So. 589.

29. Tull *v.* State, (Tex. Crim. 1900) 55 S. W. 61.

30. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118 (where it appeared that the subpœna for an absent witness had been sent to the proper sheriff more than thirty days before the time set for trial, which writ was returned two weeks thereafter, not served; and that thirteen days before the trial defendant learned that said witness was in Oregon, whereupon he wrote her to return, as the mere traveling to where she was and returning, if defendant had sought to obtain her deposition, would have occupied nine days, and it appeared that he was without means and in jail, it was held that due diligence was exercised); State *v.* Scott, 44 Iowa 93 (where the offense of which the defendant was accused having been committed on board a Mississippi river steamer, the application for a continuance showed with clearness that two of defendant's witnesses were boatmen, ordinarily plying between St. Louis and

length of time accused has had the benefit of counsel [31] or the length of time he has been released on bail.[32] Due diligence means, however, not only a timely effort to obtain testimony after its existence is known or discovered, but also diligence in discovering the existence of such testimony,[33] or the actual residence or location of witnesses known to possess a knowledge of material facts.[34] If an accused, by permission of the court, refuses to send an officer thereof after an absent witness,[35] does not avail himself of an opportunity to put his witnesses under a recognizance,[36] has in open court discharged his witnesses,[37] or has failed to avail himself of a continuance granted for the purpose of securing testimony of absent witnesses,[38] a continuance will not be granted. So too due diligence requires that a defendant who is informed of the intended departure of a witness shall make an effort to induce him to remain or to secure his testimony by deposition.[39]

b. Employment of Statutory Process — (i) *In General* — (a) *Necessity of* — (1) In General. It is incumbent upon a party who seeks a continuance on account of the absence of witnesses or evidence to show that he had used the ordinary means provided by statute to obtain such witnesses or their testimony where such means would be effectual.[40] Hence a continuance will be denied if,

points below it on the river, and that effort had been made to locate them by writing to them at St. Louis, New Orleans, and intermediate points, it was held that sufficient diligence was thereby shown to entitle defendant to a continuance). On the other hand, where the facilities for travel between the place of trial and the residence of the witness is such that he could have easily arrived, the continuance will not be granted, in the absence of special extenuating circumstances, on account of his absence. Murphy *v.* State, 6 Ind. 490; Drye *v.* State, (Tex. Crim. 1900) 55 S. W. 65.

31. State *v.* Pagels, 92 Mo. 300, 4 S. W. 931, holding that where counsel had been appointed six months previous to the time of trial, but nothing had been done to ascertain the line of defense or prepare therefor, a continuance is properly refused.

32. Price *v.* State, 57 Ark. 165, 20 S. W. 1091, holding that a refusal of continuance was not error where it appeared that defendant had had eight months in which to prepare for trial after having been released on bail, and that he had made no effort to secure the testimony of other persons who could in all probability testify to facts sought to be adduced from the witness to secure whose presence the continuance was asked.

The forfeiture of a bail-bond does not deprive an accused of the right to have his witnesses; and where the witnesses were present when the case was called and before the forfeiture, but had been discharged by the court, a continuance should have been granted to allow the defendant opportunity to secure their attendance again. Ballard *v.* State, (Tex. App. 1891) 15 S. W. 1101.

33. State *v.* Bell, 49 Iowa 440.

34. Johnson *v.* State, (Tex. Crim. 1899) 50 S. W. 1018; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944. See also Vanwey *v.* State, 41 Tex. 639.

That such witnesses are not residents of the state or county is considered in determining what constitutes diligence in locating their whereabouts. State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182; Lancaster *v.* State, (Tex. Crim. 1895) 31 S. W. 515. See also Massey *v.* State, (Tex. Crim. 1897) 40 S. W. 726.

The issuance of process upon vague information as to the location of witnesses does not show sufficient diligence. Scott *v.* State, (Tex. Crim. 1894) 25 S. W. 783.

35. Phillips *v.* State, 95 Ga. 478, 20 S. E. 270; State *v.* Gray, 19 Nev. 212, 8 Pac. 456. See also Roberts *v.* State, (Tex. 1891) 16 S. W. 255, holding that it was not error to refuse a continuance on account of an absent witness, where an officer of the court was willing to go after her, but on request of defendant's attorney did not do so, because such witness was acting as a nurse for certain sick children, and that there was no one else to care for them, in the absence of evidence of any efforts to procure others to so act in her place.

36. Radford *v.* Com., 11 S. W. 12, 10 Ky. L. Rep. 877; Borer *v.* State, (Tex. Crim. 1894) 28 S. W. 951; Martin *v.* State, 9 Tex. App. 293; Parkerson *v.* State, 9 Tex. App. 72.

37. Robson *v.* State, 83 Ga. 166, 9 S. E. 610. See, however, State *v.* Miller, 65 Iowa 60, 21 N. W. 181, holding that a continuance was properly granted where witnesses had been excused by the prosecution at the close of the first trial of the case, because the prosecutor in view of the public interest in the case believed that a jury for a second trial at the same term would be difficult to obtain, and that therefore the case would not be again called for that term.

38. State *v.* Fox, 79 Mo. 109; Davis *v.* State, 85 Tenn. 522, 3 S. W. 348.

39. People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; State *v.* Good, 132 Mo. 114, 33 S. W. 790.

40. *California.*— People *v.* Jocelyn, 29 Cal. 562.

Illinois.— Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Kansas.— State *v.* Miller, 63 Kan. 62, 64 Pac. 1033.

where the witness is without the state, no interrogatories are applied for,[41] or if within the state no subpœna or process is sued out;[42] although it has been held that where defendant's wife is an important witness in his behalf, a continuance should not be refused merely because she was not subpœnaed, where it appears that she was present, and that but a short time before she was called upon to testify she had been taken suddenly sick.[43]

(2) NATURE OF PROCESS. Inasmuch as a process for collecting a fine is not the means provided by statute to be used to secure the attendance of witnesses, the fact that a capias pro fine has been awarded against a defaulting witness does not excuse a party from suing out new process for him.[44]

(B) *Time of Suing Out* — (1) IN GENERAL. It must affirmatively appear[45] in the application for a continuance that the defendant himself[46] has been guilty of no laches in suing out process for his witnesses, as any unnecessary delay will be fatal.[47] The determination of what should be considered unnecessary delay must of course be determined by the facts involved in the particular case; generally speaking, the defendant must make active research and effort to secure his witnesses immediately after he is indicted or the information is filed against him. He cannot wait until a short time before trial to issue process for them.[48] So too

Kentucky.— Helton *v.* Com., 14 S. W. 953, 12 Ky. L. Rep. 660.

Pennsylvania.— Com. *v.* Gross, 1 Ashm. 281.

Tennessee.— State *v.* Evans, 1 Overt. 211.

See 14 Cent. Dig. tit. "Criminal Law," § 1338.

41. Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73.

42. *Georgia.*— Smith *v.* State, 97 Ga. 352, 23 S. E. 830; Lewis *v.* State, 89 Ga. 803, 15 S. E. 772; Cogswell *v.* State, 49 Ga. 103.

Indiana.— State *v.* Norman, 16 Ind. 192.

Kentucky.— Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757; Marler *v.* Com., 24 S. W. 608, 15 Ky. L. Rep. 557; Hilton *v.* Com., 16 S. W. 826, 13 Ky. L. Rep. 158.

Louisiana.— State *v.* Lejeune, 52 La. Ann. 463, 26 So. 992; State *v.* Veillon, 49 La. Ann. 614, 21 So. 856; State *v.* Coudier, 36 La. Ann. 291.

Mississippi.— Smith *v.* State, 58 Miss. 867.

Missouri.— State *v.* Emory, 12 Mo. App. 593.

Oregon.— State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

Texas.— Davis *v.* State, (Crim. 1900) 56 S. W. 53; Stouard *v.* State, 27 Tex. App. 1, 10 S. W. 442; Hart *v.* State, 14 Tex. App. 657. See also Stegall *v.* State, 32 Tex. Crim. 100, 22 S. W. 146, 40 Am. St. Rep. 761.

Utah.— People *v.* Garns, 2 Utah 260.

Washington.— State *v.* Brooks, 4 Wash. 328, 30 Pac. 147.

See 14 Cent. Dig. tit. "Criminal Law," § 1338.

43. Phillips *v.* State, 35 Tex. Crim. 480, 34 S. W. 272.

44. Handline *v.* State, 6 Tex. App. 347.

45. Logan *v.* State, 39 Tex. Crim. 573, 47 S. W. 645; McKinney *v.* State, (Tex. Crim. 1895) 30 S. W. 786.

46. For if the delay is due to the negligence or inactivity of the sheriff or other official the accused should not be compromised thereby. Thomas *v.* State, 95 Ga. 484, 22 S. E. 315. See also Salisbury *v.* Com., 3 Ky. L. Rep. 211.

47. Hubbard *v.* State, (Nebr. 1902) 91 N. W. 869; State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65; Byrd *v.* State, 39 Tex. Crim. 609, 47 S. W. 721; Clark *v.* State, (Tex. Crim. 1896) 36 S. W. 273; Mitchell *v.* State, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456.

48. In the absence of sufficient excuse for the delay, it is not sufficient diligence to sue out process on the day of trial (Boyle *v.* People, 4 Colo. 176, 34 Am. Rep. 76; Harris *v.* State, 97 Ga. 408, 24 S. E. 145; State *v.* Barker, 43 Kan. 262, 23 Pac. 575; State *v.* Venables, 40 La. Ann. 215, 3 So. 727; Gaston *v.* State, 11 Tex. App. 143; *In re* Mull, 8 Gratt. (Va.) 695); or until the term during which the trial will be held (Blackmore *v.* State, (Ark. 1888) 8 S. W. 940; Wells *v.* State, (Ark. 1888) 8 S. W. 826; Washington *v.* State, 35 Tex. Crim. 154, 32 S. W. 693; Vaden *v.* State, (Tex. Crim. 1894) 25 S. W. 777). The length of time before trial which would constitute diligence in suing out the process is dependent of course upon the time elapsing after a defendant learns of the date of the trial, the distance of his witnesses, and facilities for serving process at his command. Thus it has been held that a party suing out process only a few days before the trial, he having been indicted four months previously (Davids *v.* People, 192 Ill. 176, 61 N. E. 537); ten days before trial, where defendant knows for two months when his trial will occur (State *v.* Kindred, 148 Mo. 270, 49 S. W. 845); one day before trial, defendant knowing the date of trial ten days previous (State *v.* Thompson, 132 Mo. 301, 34 S. W. 31); one day before trial, he having been arrested for over a year (Roberts *v.* State, (Tex. Crim. 1899) 51 S. W. 383); two and one-half months after indictment and only fifteen days before trial (Underwood *v.* State, 38 Tex. Crim. 193, 41 S. W. 618); five days before the court convened, he having been

delays of this nature are critically viewed where the applicant has been accorded a previous continuance;[49] but the issuance of subpœnas the day one is arrested,[50] or as soon as he can learn who the material witnesses are after the timely procurement of counsel,[51] is sufficient diligence. And the inability of an accused to employ counsel because of the prison rules or his financial embarrassment is also a material consideration in determining what is an excusable delay.[52] So too it may be said that where a subpœna has been delivered to the proper official a reasonable time before the time for trial, but has not been returned, a party thus shows *prima facie* that he has exercised due diligence and is unready for trial; and the court should give him credit for an honest intention and continue the case.[53]

(2) Further or Subsequent Process. Due diligence requires not only that timely activity be observed in instituting legal process, but that where this proc-

indicted six months previous (Flores *v.* State, (Tex. Crim. 1897) 38 S. W. 790); five days before trial, defendant having been indicted for four months (Childers *v.* State, 37 Tex. Crim. 392, 35 S. W. 654); fifteen days before trial, defendant having been indicted for six months (Rial *v.* State, (Tex. Crim. 1895) 33 S. W. 226); nine days before trial, he having been arrested for two months (Dean *v.* State, (Tex. Crim. 1895) 29 S. W. 477); or three days before trial, defendant having been indicted for several months (Franklin *v.* State, 34 Tex. Crim. 203, 29 S. W. 1088) cannot be said to have exercised due diligence. And in fact any unnecessary delay on the part of defendant in suing out a process will not be tolerated by the court. Thus a defendant whose trial is set for nineteen days after the indictment, and who delays fourteen days in applying for process (Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527); who delays fourteen days after arrest, his trial occurring seventeen days thereafter (Davis *v.* State, 38 Tex. Crim. 681, 44 S. W. 1099); who, in an interval of eighteen days for preparation, delays suing out process for eleven days (Collins *v.* State, (Tex. Crim. 1896) 34 S. W. 949); or who, having an interval of five weeks for preparation, delays action until eleven days before trial (Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215) will be denied a continuance because of his neglect.

For further illustrative cases showing a fatal delay in suing out process see the following:

Georgia.— Glover *v.* State, 89 Ga. 391, 15 S. E. 496.

Kentucky.— Com. *v.* Brewer, 10 Ky. L. Rep. 196.

Missouri.— State *v.* Emory, 79 Mo. 461.

Texas.— Henderson *v.* State, 22 Tex. 593; Frazier *v.* State, (Crim. 1901) 64 S. W. 934; Gutirrez *v.* State, (Crim. 1900) 59 S. W. 274; Squires *v.* State, (Crim. 1899) 54 S. W. 770; Speights *v.* State, 41 Tex. Crim. 323, 54 S. W. 595; Highsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919; Shaw *v.* State, 39 Tex. Crim. 161, 45 S. W. 597; Christian *v.* State, (Crim. 1897) 39 S. W. 682; Hudson *v.* State, (Crim. 1896) 36 S. W. 452; Teague *v.* State, (Crim. 1895) 31 S. W. 401; Chapman *v.* State, (Crim. 1895) 30 S. W. 225. See also Garza *v.* State, (Crim. 1899) 49 S. W. 103.

Wisconsin.— Dingman *v.* State, 48 Wis. 485, 4 N. W. 668.

See 14 Cent. Dig. tit. "Criminal Law," § 1337.

49. State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Burns, 54 Mo. 274; State *v.* Murphy, 46 Mo. 430; Swofford *v.* State, 3 Tex. App. 76; Holt *v.* Com., 2 Va. Cas. 156.

50. Hull *v.* State, (Tex. Crim. 1898) 47 S. W. 472. Where a defendant because of his confinement did not learn what a certain witness would state until thirty minutes before called on to answer the indictment which had been just returned into court, he cannot be charged with laches in suing out process. St. Clair *v.* Com., 42 S. W. 341, 19 Ky. L. Rep. 982.

51. Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607; Holder *v.* State, 13 Tex. App. 601.

52. Jones *v.* State, 10 Lea (Tenn.) 585; Allphin *v.* State, 41 Tex. 79.

53. Dutton *v.* State, 5 Ind. 533; Williams *v.* State, (Miss. 1898) 23 So. 547; Walton *v.* Com., 32 Gratt. (Va.) 855. See also State *v.* Adam, 40 La. Ann. 745, 5 So. 30; State *v.* Egan, 37 La. Ann. 368.

The practice of the parties to subpœna their witnesses according to the assignment of causes, while not of itself perhaps an excuse for delay, should be considered in connection with other circumstances in determining whether or not the party is guilty of laches. State *v.* Dakin, 52 Iowa 395, 3 N. W. 411.

Where a subpœna issued six days before the trial was by mistake served on the wrong person, a defendant cannot be said to be guilty of negligence where, on learning of the mistake, another subpœna was served four days before the trial, at the witness' usual place of residence, but not on him personally, and another subpœna was issued on the day of the trial, which had not yet been returned. State *v.* Burwell, 34 Kan. 312, 8 Pac. 470.

Where search for a material witness is begun three weeks before the commencement of the trial term and continued up to the time of trial, and the whereabouts of the desired witness is learned only two days before the

ess has not been obeyed or is returned unexecuted, the applicant makes no unnecessary delay in suing out further process.[54]

(II) *Defective Issuance, Delivery, or Service*—(A) *Issuance.* Under a statute requiring that the subpœnas shall be signed by a certain official, such subpœna, if made out and signed by another party, not in the immediate presence of such official, although perhaps with his assent, is nevertheless invalid, and cannot therefore form a legal basis for a motion to continue on the ground of the absence of the witness for whom such subpœna was issued.[55]

(B) *Delivery to Wrong Official.* It is a lack of proper diligence to place process for witnesses who live in an adjoining county in the hands of the sheriff of the county of the forum, although it may appear that the witnesses reside at a point more accessible to that officer than to the official of the county of their residence.[56]

(C) *Insufficient Service of Subpœna.* A defendant cannot be held responsible or made to suffer for a dereliction of duty on the part of the officer serving a process, and a return thereon of merely "not found," "not served," or "not executed," will, where the evidence sought to be procured is shown to be material, authorize a continuance to the same extent as if the process had not been returned.[57]

c. Furnishing Identifying Information. It is also a lack of diligence on the part of a party summoning witnesses to fail to give proper information to the officer to enable him to more readily find such witnesses,[58] whether such information be of the name of the desired witness,[59] or as to his whereabouts,[60] when such information is known to the applicant.

d. Supervision of Execution or Return of Process. Due diligence requires that a party applying for a process shall follow up the same and see that it has been issued,[61] and make effort to ascertain what progress is being made in the due service of the same; and where the process has not been returned, to present a motion in court requiring the official to make such return, so that he can see what has been done.[62]

e. Preparation For Trial Before Indictment. In the greater number of jurisdictions the courts hold that a party has the right to compulsory process for witnesses after his arrest or recognizance before an indictment or information is found, while in a few the opposite view is taken; but in either of such jurisdictions it is agreed that the failure to prepare for trial and subpœna witnesses before an indictment or information is found is not such lack of diligence as will preclude a party from demanding a continuance.[63]

trial, a party is not guilty of unnecessary delay. State *v.* Stone, 65 Iowa 366, 21 N. W. 681.

54. State *v.* Williams, 69 Mo. 110; Jackson *v.* State, (Tex. Crim. 1899) 51 S. W. 389; Snodgrass *v.* State, 36 Tex. Crim. 207, 36 S. W. 477; Myers *v.* State, (Tex. Crim. 1896) 33 S. W. 865; Tate *v.* State, 35 Tex. Crim. 231, 33 S. W. 121. See also Stultz *v.* State, (Tex. Crim. 1894) 24 S. W. 649.

55. Horton *v.* State, 112 Ga. 27, 37 S. E. 100.

56. Coward *v.* State, 6 Tex. App. 59.

57. Neyland *v.* State, 13 Tex. App. 536, 544, where the court said: "If the facts are stated in the return, the court will be better enabled to act advisedly in the premises in determining whether the witness is accessible at all, and can probably be obtained if the continuance be granted; and, on the other hand, a proper legal return will also in many instances afford ample ground to the defendant for suing out the additional and more compulsory writ of attachment, to enforce the attendance."

58. State *v.* Johnson, 47 La. Ann. 1225, 17 So. 789.

59. State *v.* Spooner, 41 La. Ann. 780, 6 So. 879, where a continuance was denied where the subpœna was directed to be served on "Richard English," who appeared at the trial, and it was subsequently claimed that "Richard English, Jr." was the party desired as a witness.

60. State *v.* Lewis, 45 La. Ann. 24, 11 So. 874; McGrath *v.* State, 35 Tex. Crim. 413, 34 S. W. 127, 941.

61. Gaines *v.* State, (Tex. Crim. 1898) 47 S. W. 1012; Johnson *v.* State, 4 Tex. App. 268.

62. Mitchell *v.* State, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456; Payton *v.* State, 35 Tex. Crim. 508, 34 S. W. 615. See also Kirk *v.* State, (Tex. Crim. 1896) 37 S. W. 440; Fernandez *v.* State, 4 Tex. App. 419.

63. *Colorado.*— Hockley *v.* People, (1902) 69 Pac. 512.

Georgia.— Allen *v.* State, 10 Ga. 85.

Kentucky.— Salisbury *v.* Com., 3 Ky. L. Rep. 211.

3. Excuse For Failure to Exercise Diligence — a. In General. The mere fact that an absent witness had promised the applicant for a continuance that he would be present,[64] that the applicant had been informed that the witness would be present,[65] that the witness had been admonished by the court to be present,[66] that he was jointly indicted with the defendant and was under bonds to appear for trial,[67] or that the failure to subpœna the witness arose from a misunderstanding between defendant and his attorneys[68] does not excuse a party from exercising diligence in instituting legal process to secure the attendance of the witness.

b. Improbability of Securing Witness First Day of Trial. The mere fact that the time elapsing between the time an applicant for a continuance was indicted and the day set for trial is a few days less than the time required to have process on a witness executed and returned does not justify a party in failing to sue out such process where, by law, the court may sit for a sufficient time after the day of trial, and the applicant has no reason to believe that the court will adjourn on that or an earlier day.[69]

c. Reliance Upon Subpœna Only. A party is not justified in relying merely upon a subpœna for the attendance of a witness;[70] if the same is returned unexecuted[71] or is not obeyed, compulsory process, which is usually provided for in criminal cases, must be employed.[72] Hence where the statute provides for the attachment of witnesses where they have failed to appear by process of subpœna, this course must be pursued to constitute a proper exercise of diligence.[73]

d. Reliance Upon Process For Former Trial. In some jurisdictions it seems that witnesses once summoned are bound to attend all terms of court until the cause is tried, or until they are regularly discharged from further attendance; and in such jurisdictions it is not a lack of diligence to fail to subpœna them for a subsequent term.[74] In other jurisdictions, however, the mere fact that a witness had obeyed the subpœna and was present at a former term does not justify a party in failing to subpœna him for a subsequent term to which the trial has been continued.[75]

e. Reliance Upon Opposite Party's Process. Proper diligence requires a party desiring a witness to use all available legal means in his own behalf, and not depend upon the diligence exercised by the opposite party.[76]

Missouri.— State *v.* Wood, 68 Mo. 444.

Texas.— Dinkens *v.* State, 42 Tex. 250.

United States.— U. S. *v.* Moore, 26 Fed. Cas. No. 15,805, Wall. Sr. 23.

64. Marks *v.* State, 101 Ind. 353; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519; Clark *v.* State, 40 Tex. Crim. 127, 49 S. W. 85.

65. State *v.* Barker, 43 Kan. 262, 23 Pac. 575.

66. Rainwater *v.* Com., 5 Ky. L. Rep. 103.

67. It not being averred that such witness' trial had not been continued to a future time. Anderson *v.* State, 28 Ind. 22.

68. Weaver *v.* State, 154 Ind. 1, 55 N. E. 858. See also Goodman *v.* State, 4 Tex. App. 349.

69. Shanks *v.* State, 25 Tex. Suppl. 326.

70. Hence where he merely causes a second subpœna to issue where the former one has been disobeyed, he is chargeable with a lack of diligence. Isham *v.* State, (Tex. Crim. 1899) 49 S. W. 594.

71. Burns *v.* State, (Tex. Crim. 1899) 51 S. W. 905.

72. Radford *v.* Com., 11 S. W. 12, 10 Ky. L. Rep. 877; Cannon *v.* State, 75 Miss. 364, 22 So. 827; Reynolds *v.* State, 7 Tex. App. 516. See also Wiggins *v.* State, 84 Ga. 488, 10 S. E. 1089; Isaacs *v.* U. S., 159 U. S. 487, 16 S. Ct. 51, 40 L. ed. 229.

73. State *v.* McGinn, 109 Iowa 641, 80 N. W. 1068; State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468; Holland *v.* State, 38 Tex. 474; Williams *v.* State, 34 Tex. 151; Longacre *v.* State, (Tex. Crim. 1897) 41 S. W. 629; Bratt *v.* State, (Tex. Crim. 1897) 41 S. W. 624; Clark *v.* State, 38 Tex. Crim. 121, 40 S. W. 992; Mitchell *v.* State, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456; Freese *v.* State, (Tex. Crim. 1893) 21 S. W. 189; Massie *v.* State, 30 Tex. App. 64, 16 S. W. 770.

74. State *v.* Davis, 37 La. Ann. 441.

75. Harvey *v.* State, 35 Tex. Crim. 545, 34 S. W. 623; Polk *v.* State, 35 Tex. Crim. 495, 34 S. W. 633; Summers *v.* State, (Tex. Crim. 1895) 33 S. W. 124.

76. State *v.* Luke, 104 Mo. 563, 16 S. W. 242.

Extent and limits of rule.— Hence an accused desiring a witness cannot rely upon the fact that the state has issued process for him (State *v.* Hayden, 45 Iowa 11; Clark *v.* State, 40 Tex. Crim. 127, 49 S. W. 85; Byrd *v.* State, 39 Tex. Crim. 609, 47 S. W. 721; Tanner *v.* State, (Tex. Crim. 1898) 44 S. W. 489; Drake *v.* State, 5 Tex. App. 649), unless he shows that the state has exhausted all compulsory process and used all possible diligence (Mixon *v.* State, 36 Tex. Crim. 66, 35 S. W. 394). So too while it may be the practice of

f. Reliance Upon Bond or Recognizance. Where a witness has been placed under bond or recognizance to appear in court, and is not present at the proper time, due diligence requires not only that the bond or recognizance shall be forfeited, but that additional process for his appearance shall be demanded by the party whose witness he is.[77]

IV. APPLICATION.

A. Necessity. Generally speaking a party desiring a continuance must make the proper application therefor, and it is not error to rule the cause to trial where no such application or motion has been made.[78]

B. Form of Application — 1. **In General.** It is usually necessary that the application be made in writing,[79] although where a party is known to have sufficient grounds, the prosecution may, as a matter of favor to him, waive the formality of a written statement.[80] So too it may be said that the material facts which a statute requires to be set forth in an affidavit cannot be supplied by merely attaching to the one presented an old affidavit, however formal, which has served its purpose at a previous term.[81]

2. **Verification.** Unless the motion or application for a continuance is verified by affidavit it will not as a rule be recognized by the court, and no error arises in refusing the continuance in such a case.[82]

C. Time of Application. An application for a continuance on the ground of an absent witness, made before it is known whether or not such witness would be in attendance, is clearly premature.[83] So too it has been held that it would be premature to apply for a continuance before a defendant had pleaded.[84] Where the existence of the ground is known a sufficient length of time beforehand, an application should be made before the jury has been impaneled and sworn,[85]

a court, where the same witness is desired in several cases, to authorize process for him in only one case, yet due diligence requires an application for process in each case. Isham *v.* State, (Tex. Crim. 1899) 49 S. W. 594. In a few jurisdictions, however, it is held that where the state has taken the necessary steps to have a witness appear in its behalf, the accused has a right to rely on the good faith of the commonwealth, and to expect the attendance of such witness. Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 1001; Rex *v.* Macarthy, C. & M. 625, 41 E. C. L. 339.

77. Speights *v.* State, 41 Tex. Crim. 323, 54 S. W. 595; Henderson *v.* State, (Tex. Crim. 1897) 42 S. W. 559; Christian *v.* State, (Tex. Crim. 1897) 39 S. W. 682; Hill *v.* State, 18 Tex. App. 665.

78. Johnson *v.* State, 85 Ga. 561, 11 S. E. 844; Harrison *v.* State, 83 Ga. 129, 9 S. E. 542; State *v.* Underwood, 44 La. Ann. 1114, 11 So. 823; Callahan *v.* State, 30 Tex. 488; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833. See also Tiller *v.* State, 110 Ga. 250, 34 S. E. 204; Watts *v.* State, 26 Ga. 231; Steele *v.* Com., 3 Dana (Ky.) 84.

79. Hathaway *v.* State, (Tex. Crim. 1902) 70 S. W. 88.

80. McKinney *v.* State, 8 Tex. App. 626, holding, however, that in such case the writing only is waived, and the other burdens and liabilities attaching to a continuance remain the same.

81. Sutherlin *v.* State, 108 Ind. 389, 9 N. E. 298.

82. *California.*— People *v.* Ward, 105 Cal. 335, 38 Pac. 945.

Colorado.— See Holland *v.* People, (Sup. 1902) 69 Pac. 519.

Louisiana.—State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008; State *v.* Perique, 42 La. Ann. 403, 7 So. 599.

Michigan.— People *v.* Mason, 63 Mich. 510, 30 N. W. 103.

New York.— See Hagerman's Case, 3 City Hall Rec. 73.

Tennessee.— Mitchell *v.* State, 92 Tenn. 668, 23 S. W. 68.

United States.— U. S. *v.* Frink, 25 Fed. Cas. No. 15,171, 4 Day (Conn.) 471, Brunn. Col. Cas. 90.

See 14 Cent. Dig. tit. "Criminal Law," § 1350.

83. Story *v.* State, 68 Miss. 609, 10 So. 47.

84. Reg. *v.* Bolam, 2 M. & Rob. 192.

In Virginia the common law in this particular has been modified by statute and such motion may be entertained before as well as after arraignment. Anderson's Case, 84 Va. 77, 3 S. E. 803; Joyce *v.* Com., 78 Va. 287.

85. *California.*— People *v.* Logan, 123 Cal. 114, 56 Pac. 56; People *v.* Beam, 66 Cal. 394, 5 Pac. 677.

Louisiana.— State *v.* Lindsey, 14 La. Ann. 42.

Mississippi.— Fletcher *v.* State, 60 Miss. 675.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

Texas.— Moore *v.* State, 39 Tex. Crim. 266, 45 S. W. 809.

although it is otherwise where such information was not discovered beforehand and the equities of the case are clearly with defendant.[86] In some jurisdictions the matter is specially regulated by statute;[87] and in compliance therewith an applicant must, after having gone to trial, show that some unexpected occurrence which no reasonable diligence could have anticipated has arisen whereby he was so taken by surprise that a fair trial could not be had.[88]

D. By Whom Made. A motion for a continuance may be supported by the prisoner's own affidavit.[89] Under certain conditions the court may require, in conjunction therewith, the affidavit of an absent witness.[90]

E. Requisites and Sufficiency — 1. In General. As some of the requisites to the sufficiency of grounds for a continuance cannot well appear by the allegations of the affidavit itself,[91] and as the sufficiency of the grounds may be determined in some instances by matters *dehors* the affidavit,[92] it would not be a sufficient nor accurately correct statement to merely lay down the broad proposition that the affidavit must clearly and fully set forth the grounds on which the continuance is asked. Its sufficiency must be determined by the controlling facts and circumstances of each particular case. It may, however, be said that it must be full, satisfactory, and direct as to all material allegations.[93] If reliance is placed on a statute it must be made in compliance therewith.[94] Nothing can be presumed in its aid.[95] It must clearly show that affiant would be injured by a denial of his motion,[96] and if made by a defendant must negative his guilt[97] and

See 14 Cent. Dig. tit. "Criminal Law," § 1362.

86. Skaro *v.* State, 43 Tex. 88.

87. State *v.* Benge, 61 Iowa 658, 17 N. W. 100, holding that under the statutes of that state a motion for a continuance must be filed the second day of the term, or as soon thereafter as it becomes certain that such motion will be necessary before the trial.

88. Stanley *v.* State, 16 Tex. App. 392.

Where such surprise is not shown and the continuance is therefore properly refused, the court should nevertheless consider the substance of the application in passing on a motion for a new trial. Stanley *v.* State, 16 Tex. App. 392.

89. Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491. See also Fogarty *v.* State, 80 Ga. 450, 453, 5 S. E. 782, where the court said: "While other persons might testify that the witness has been subpœnaed, and as to the materiality of his testimony, the defendant alone can testify as to whether the witness is absent by his procurement or consent, or that the motion is not made for the purpose of delay only. If, therefore, any other person undertakes to swear to these grounds, or to the grounds of the motion generally, we think that counsel for the State has a right to cross-examine him as to the truth of the grounds set out in his affidavit. There is no reason shown in the record why this defendant could not have made this affidavit."

Error in name of affiant.— An affidavit for a continuance should not be disregarded merely on the ground that it was signed by a name different than that by which the party was indicted, it appearing from extrinsic facts and circumstances that the two parties are one and the same. Golden *v.* State, 19 Ark. 590, where defendant was indicted under the name of "Harrison Golden," and the motion for the continuance was signed by "Alexander Golden."

90. Mendum *v.* Com., 6 Rand. (Va.) 704. But see Kennedy *v.* State, 81 Ind. 379.

91. Thus the probability of the truth of the affidavit, and that the absent evidence would likely affect the result, both of which are essential requisites to a continuance on the ground of absent witnesses. See *supra*, III, B, 2, (III), (A), (2), (3).

92. See *infra*, IV, H, *et seq.*

93. Thompson *v.* State, 24 Ga. 297; Allen *v.* State, 10 Ga. 85.

Predication of indictment for perjury.—The facts should be stated with such certainty that an indictment for perjury can be predicated thereon. McCulloch *v.* State, (Tex. Crim. 1895) 33 S. W. 230.

Vague and uncertain allegations.— An allegation on the ground of the absence of a witness who, it is alleged, would swear that he was "in the vicinity" of the spot at which the alleged crime was committed (Russell *v.* State, 33 Tex. Crim. 424, 26 S. W. 990), or that a certain fact had been made known to defendant "a short time" before the killing took place (Winkfield *v.* State, 41 Tex. 148) is too vague and uncertain. See also Williams *v.* State, 10 Tex. App. 114.

94. Weaver *v.* State, 154 Ind. 1, 55 N. E. 858; State *v.* Penney, 113 Iowa 691, 84 N. W. 509; Isham *v.* State, (Tex. Crim. 1899) 49 S. W. 594; State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

95. Thomas *v.* State, 17 Tex. App. 437.

96. Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

97. Steele *v.* People, 45 Ill. 152; Crane *v.* State, 94 Tenn. 86, 28 S. W. 317; Bellew *v.* State, 5 Humphr. (Tenn.) 567; Rex *v.* Rat-

state the grounds of his defense.[98] A continuance should not, however, be refused on purely technical grounds,[99] nor is it required that affiant shall state his belief in regard to matters which he bases solely on facts previously stated.[1]

2. Stating Conclusions. It is essential that the affidavit or application state with detail the facts and conditions relied on as constituting the ground for a continuance, and not mere conclusions which the pleader, through his own personal knowledge of the facts, has formed.[2] Thus it is not generally enough to merely allege that the testimony is material,[3] or merely that public excitement exists, without showing facts on which such belief is predicated.[4]

3. Allegations on Information and Belief. So too it is not sufficient for the affidavit to state merely that affiant is "informed and believes" of the existence of a certain ground. He must state the facts on which his belief is founded, that the court may judge as to whether or not his conclusions are reasonable and well founded;[5] and if affiant alleges that he has been informed of certain facts or conditions, the names and whereabouts of the informants should be given.[6]

4. Particular or Special Averments — a. Name and Residence of Witness. If the ground alleged is the absence of a witness, the affidavit must, unless there are peculiar circumstances excusing such definiteness, state the name and residence of such witness,[7] or otherwise designate his location so that the court may

cliffe, 1 Wils. C. P. 150. See also Cullen *v.* State, (Tex. Crim. 1895) 30 S. W. 219.

98. Beavers *v.* State, 58 Ind. 530; Crane *v.* State, 94 Tenn. 86, 28 S. W. 317.

Mere insinuations as to the probable nature of the defense are insufficient. Knight *v.* State, 5 Humphr. (Tenn.) 599.

99. Thus where defendant was indicted for theft of a "gelding," and in his affidavit for a continuance he alleged that he could not safely go to trial without the testimony of two witnesses by whom he expected to prove that the "horse" alleged to have been stolen was sold to him by one of the witnesses, it was error to refuse a continuance because the affidavit called the animal a "horse" instead of a "gelding." Trevinio *v.* State, 1 Tex. App. 72.

1. Austine *v.* People, 110 Ill. 248.

2. *Colorado.*— Chase *v.* People, 2 Colo. 509.

Indiana.— Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218.

Kentucky.— Duncan *v.* Com., 6 Ky. L. Rep. 441.

Louisiana.— State *v.* McCoy, 29 La. Ann. 593.

Missouri.— State *v.* Pinnell, 93 Mo. 480, 6 S. W. 221.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Texas.— Cockburn *v.* State, 32 Tex. 359; Willis *v.* State, (Crim. 1900) 55 S. W. 829; Stevens *v.* State, (Crim. 1899) 49 S. W. 105; Von Senden *v.* State, (Crim. 1898) 45 S. W. 725; Brown *v.* State, (Crim. 1896) 37 S. W. 749; Shirley *v.* State, 37 Tex. Crim. 475, 36 S. W. 267; Lewallen *v.* State, (Crim. 1894) 24 S. W. 907; Halloway *v.* State, (Crim. 1894) 24 S. W. 649; Summerlin *v.* State, 3 Tex. App. 444.

Washington.— State *v.* Wilson, 9 Wash. 218, 37 Pac. 424.

See 14 Cent. Dig. tit. "Criminal Law," § 1351.

Fact distinguished from conclusion.— A witness who has seen the body of deceased after death is not precluded from stating that there was nothing unnatural in its appearance or position, on the ground that such a statement is a mere conclusion. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118.

3. Smith *v.* State, 132 Ind. 145, 31 N. E. 807; State *v.* Strattman, 100 Mo. 540, 13 S. W. 814. See People *v.* Vermilyea, 7 Cow. (N. Y.) 369, where it is held that if there is no cause for suspicion that the object is delay, it is sufficient to state that the absent witness is material, that he cannot be procured at the time the trial is about to be brought on, and that there is reasonable ground to expect his future attendance; but if there are circumstances attending the application which arouse the suspicion of the court, it will require him to be more minute in stating the facts on which the application rests.

4. Stevens *v.* State, 93 Ga. 307, 20 S. E. 331; Cook *v.* State, 26 Ga. 593; Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117.

5. *California.*— People *v.* Leyshon, 108 Cal. 440, 41 Pac. 480; People *v.* Francis, 38 Cal. 183.

Florida.— Gladden *v.* State, 12 Fla. 562. See also Dansey *v.* State, 23 Fla. 316, 2 So. 692.

Iowa.— State *v.* Rorabacher, 19 Iowa 154.

Minnesota.— State *v.* McCartey, 17 Minn. 76.

Oregon.— State *v.* O'Neil, 13 Oreg. 183, 9 Pac. 284.

Texas.— Labbaite *v.* State, 6 Tex. App. 257.

See 14 Cent. Dig. tit. "Criminal Law," § 1352.

6. Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355; Brown *v.* State, 23 Tex. 195; Pullen *v.* State, 11 Tex. App. 89.

7. *Alabama.*— White *v.* State, 86 Ala. 69, 5 So. 674.

Colorado.— Wilson *v.* People, 3 Colo. 325.

know at the time the application is made whether he is or is not within its jurisdiction.[8]

b. Cause of Absence of Witness. The affidavit for a continuance on the ground of an absent witness should show proper excuse for his absence,[9] although it has been held that where all the facts specially required by the statute have been averred he is entitled to a continuance regardless of the cause of the absence;[10] and it is usually held to be necessary that the application contain an averment that the witness is not absent by the consent, connivance, or procurement of the applicant.[11]

c. Specific Facts Expected to Be Shown — (i) *In General.* In an application for a continuance on the ground of absent witnesses, it is not sufficient to state in general terms or by indefinite allegations what the absent testimony will be; it must specifically set forth the facts expected to be proved by such witnesses, so that the court may judge of the materiality of the same.[12] While it has been argued

Georgia.— Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528.

Illinois.— Shirwin *v.* People, 69 Ill. 55.

Indiana.— Webb *v.* State, 21 Ind. 236.

Iowa.— State *v.* Penney, 113 Iowa 691, 84 N. W. 509; State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485; State *v.* Sater, 8 Iowa 420; State *v.* Tilghman, 6 Iowa 496.

Louisiana.— State *v.* Primeaux, 39 La. Ann. 673, 2 So. 423.

Mississippi.— Smith *v.* State, 58 Miss. 867.

Missouri.— State *v.* Henson, 81 Mo. 384; State *v.* Underwood, 76 Mo. 630.

New York.— People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 19 N. Y. St. 506, 6 N. Y. Crim. 393; People *v.* Horton, 4 Park. Crim. 222.

Tennessee.— Nelson *v.* State, 32 Tenn. 482.

Texas.— Wright *v.* State, 37 Tex. Crim. 627, 40 S. W. 491; Colton *v.* State, 7 Tex. App. 50; Wolf *v.* State, 4 Tex. App. 332; Johnson *v.* State, 4 Tex. App. 268. See also Wolf *v.* State, 4 Tex. App. 332.

West Virginia.— See State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

See 14 Cent. Dig. tit. "Criminal Law," § 1353.

8. Richardson *v.* People, 31 Ill. 170.

9. Sutton *v.* State, 145 Ill. 279, 34 N. E. 420; People *v.* Hildebrandt, 16 Misc. (N. Y.) 195, 38 N. Y. Suppl. 958, 74 N. Y. St. 548.

10. Cutler *v.* State, 42 Ind. 244.

11. *Arkansas.*—Blackmore *v.* State, (1888) 8 S. W. 940.

Florida.— Bryant *v.* State, 34 Fla. 291, 16 So. 177.

Georgia.— Polite *v.* State, 78 Ga. 347; Collins *v.* State, 78 Ga. 87.

Illinois.— Sutton *v.* People, 145 Ill. 279, 34 N. E. 420; Crews *v.* People, 120 Ill. 317, 11 N. E. 404.

Indiana.— Beavers *v.* State, 58 Ind. 530; Cutler *v.* State, 42 Ind. 244.

Mississippi.— Carter *v.* State, (1898) 24 So. 307.

Missouri.— State *v.* Bryant, 93 Mo. 273, 6 S. W. 102.

New York.—People *v.* Hildebrandt, 16 Misc. 195, 38 N. Y. Suppl. 958, 74 N. Y. St. 548.

Texas.— Robinson *v.* State, (Crim. 1898) 48 S. W. 176; Pullen *v.* State, 11 Tex. App. 89; White *v.* State, 9 Tex. App. 41.

See 14 Cent. Dig. tit. "Criminal Law," § 1358.

12. *Alabama.*— Walker *v.* State, 117 Ala. 85, 23 So. 670; White *v.* State, 86 Ala. 69, 5 So. 674.

California.— People *v.* Ah Fat, 48 Cal. 61.

Delaware.— State *v.* Hawkins, 2 Pennew. 474, 47 Atl. 618.

Florida.— Boyd *v.* State, 33 Fla. 316, 14 So. 836.

Georgia.— Wiggans *v.* State, 101 Ga. 501, 29 S. E. 26.

Illinois.— Moody *v.* People, 20 Ill. 315.

Indiana.— Warner *v.* State, 114 Ind. 137, 16 N. E. 189.

Iowa.— State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485; State *v.* Sater, 8 Iowa 420; State *v.* Tilghman, 6 Iowa 496.

Kentucky.— Goodin *v.* Com., 16 S. W. 451, 13 Ky. L. Rep. 123.

Louisiana.—State *v.* Bassenger, 39 La. Ann. 918, 3 So. 55; State *v.* Comstock, 36 La. Ann. 308; State *v.* Rountree, 32 La. Ann. 1144.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Luke, 104 Mo. 563, 16 S. W. 242; State *v.* Underwood, 76 Mo. 630.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— People *v.* Horton, 4 Park. Crim. 222; People *v.* Hettick, 1 Wheel. Crim. 399.

Ohio.—Comerford *v.* State, 23 Ohio St. 599.

Oregon.— State *v.* Huffman, 39 Oreg. 48, 63 Pac. 1.

Texas.— Wright *v.* State, 44 Tex. 645; Holland *v.* State, 38 Tex. 474; Harrison *v.* State, (Crim. 1902) 69 S. W. 500; Davis *v.* State, (Crim. 1902) 69 S. W. 73; Villereal *v.* State, (Crim. 1901) 61 S. W. 715; Taul *v.* State, (Crim. 1901) 61 S. W. 394; Munoz *v.* State, (Crim. 1901) 60 S. W. 759; Dudley *v.* State, 40 Tex. Crim. 31, 48 S. W. 179; Brooks *v.* State, 39 Tex. Crim. 622, 47 S. W. 640; Dancy *v.* State, (Crim. 1898) 46 S. W. 247; Cooper *v.* State, (Crim. 1898) 44 S. W. 1109; Pilot *v.* State, 38 Tex. Crim. 515, 43 S. W. 112, 1024; Wright *v.* State, 37 Tex. Crim. 627, 40 S. W. 491; Norton *v.* State, (Crim. 1897) 39 S. W. 578; Payton *v.*

that to disclose at the time the continuance is desired, facts to which it is expected an absent witness will swear, may in many instances work a hardship or injustice upon a party in the presentation of his case,[13] it is nevertheless generally held by the courts to be necessary to the proper administration of justice that the expected testimony be set out with such definiteness and detail as will enable the court to judge from the issues presented by the pleadings whether or not such absent testimony is material and indispensable to a fair and just trial.[14] This is especially true where the defense sought to be established is that of an alibi.[15] So too it has been held that the means which a witness had of knowing the facts should if possible be shown;[16] and if the absent testimony is expected to be used to contradict the testimony of an anticipated witness, the affidavit should allege that the anticipated testimony is false.[17] So too it should allege that the testimony of an absent

State, 35 Tex. Crim. 508, 34 S. W. 615; Bain *v.* State, (Crim. 1896) 33 S. W. 966; King *v.* State, 34 Tex. Crim. 228, 29 S. W. 1086; Johnson *v.* State, 34 Tex. Crim. 115, 29 S. W. 473; Campbell *v.* State, (Crim. 1894) 28 S. W. 808; Damron *v.* State, (Crim. 1894) 27 S. W. 7; Thompson *v.* State, 33 Tex. Crim. 217, 26 S. W. 198; Emmerson *v.* State, 33 Tex. Crim. 89, 25 S. W. 289; White *v.* State, 32 Tex. Crim. 625, 25 S. W. 784; Rollins *v.* State, 32 Tex. Crim. 566, 25 S. W. 125; Martin *v.* State, 32 Tex. Crim. 441, 24 S. W. 512; Holland *v.* State, 31 Tex. Crim. 345, 20 S. W. 750; Johnson *v.* State, 4 Tex. App. 268; Huebner *v.* State, 3 Tex. App. 458; Mitchell *v.* State, 1 Tex. App. 194.

Virginia.— See Bledsoe *v.* Com., 6 Rand. 673.

England.— Reg. *v.* Savage, 1 C. & K. 75, 47 E. C. L. 75; Rex *v.* Jones, 8 East 31, 9 Rev. Rep. 368.

See 14 Cent. Dig. tit. "Criminal Law," § 1354.

13. This principle has been given judicial recognition by the courts of Tennessee, and in Nelson *v.* State, 2 Swan (Tenn.) 482, it is held that the reason is that at the first term the accused may not have had sufficient time to ascertain what, and by whom, he would be able to prove the particular facts; and for that reason he should not be required to show to the court what facts he expected to prove upon his first application. This ruling was also made in State *v.* Morris, 1 Overt. (Tenn.) 220, and is approved in Jones *v.* State, 10 Lea (Tenn.) 585; but that the facts must be set out in an application for a subsequent continuance see *infra*, IV, E, 6.

14. *Georgia.*— Allen *v.* State, 10 Ga. 85; State *v.* Pettibone, T. U. P. Charlt. 300.

Illinois.— Crews *v.* People, 120 Ill. 317, 11 N. E. 404; Shirwin *v.* People, 69 Ill. 55; Steele *v.* People, 45 Ill. 152; Moody *v.* People, 20 Ill. 315.

Indiana.— Hubbard *v.* State, 7 Ind. 160.

Iowa.— State *v.* Bennett, 52 Iowa 724, 2 N. W. 1103; State *v.* Williams, 8 Iowa 533.

Kentucky.— Green *v.* Com., 24 S. W. 117, 15 Ky. L. Rep. 566; Salisbury *v.* Com., 3 Ky. L. Rep. 211.

Louisiana.— State *v.* Celestin, 48 La. Ann. 272, 19 So. 119; State *v.* Johnson, 41 La. Ann. 574, 7 So. 670; State *v.* Redmond, 37 La. Ann. 774; State *v.* Clark, 37 La. Ann. 128.

Michigan.— People *v.* Anderson, 53 Mich. 60, 18 N. W. 561.

Missouri.— State *v.* Rice, 149 Mo. 461, 51 S. W. 78; State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

Nebraska.— Burgo *v.* State, 26 Nebr. 639, 42 N. W. 701.

Oregon.— State *v.* Wong Gee, 35 Oreg. 276, 57 Pac. 914.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

Texas.— Bowman *v.* State, 40 Tex. 8; Bruton *v.* State, 21 Tex. 337; Williamson *v.* State, 36 Tex. Crim. 225, 36 S. W. 444; White *v.* State, 32 Tex. Crim. 625, 25 S. W. 784; Lane *v.* State, 16 Tex. App. 172; Lewis *v.* State, 15 Tex. App. 647; Johnson *v.* State, 4 Tex. App. 268; Mitchell *v.* State, 1 Tex. App. 194.

Virginia.— Schonberger *v.* Com., 86 Va. 489, 10 S. E. 713.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,342.

See 14 Cent. Dig. tit. "Criminal Law," § 1355.

15. Dove *v.* State, 36 Tex. Crim. 105, 35 S. W. 648; State *v.* Wilson, 9 Wash. 218, 37 Pac. 424.

16. Eubanks *v.* People, 41 Ill. 486.

An affidavit that the prosecuting witness has threatened to kill accused, and that such threat had been communicated to the defendant, is insufficient if it fails to show how the witness, who it is alleged would so testify, knew of such threat. Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48.

17. Territory *v.* Barth, (Ariz. 1887) 15 Pac. 673. Evidence of symptoms of malaria, such as pains in the back, head, and neck, accompanied by dizziness, are not to be rejected as immaterial, when the affidavit alleges that such evidence is needed for the purpose of asking hypothetical questions of medical witnesses, merely because the affidavit does not allege that the deceased died of malaria. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118.

witness is not cumulative;[18] but a continuance should not be refused merely because an affiant is unable to state whether or not a witness would testify to anything in addition to his testimony at a former trial.[19]

(II) *Effect of Inadmissibility of Part of Averments.* If a part of the alleged testimony for which a continuance is sought is inadmissible, it has been held not to be the duty of the trial court to distinguish the admissible from the inadmissible, and receive the one and exclude the other; but it may exclude the affidavit as an entirety.[20]

d. Truth of Expected Testimony. The affidavit must also aver that the affiant believes that the testimony which he expects the absent witness to give is true.[21]

e. Facts Constituting Diligence. A mere statement that accused has used due diligence is insufficient;[22] the effort constituting such diligence must be fully and distinctly set forth,[23] whether it be by exhausting the process of the court or otherwise,[24] or facts excusing such diligence must be shown.[25] If sufficient time has elapsed, after the existence of a witness became known to defendant, to have process issued, it must be alleged that timely[26] issuance of such process was had,[27]

18. State *v.* Carter, 51 La. Ann. 442, 25 So. 385.

19. Gwatkin *v.* Com., 10 Leigh (Va.) 687. See also People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79.

20. Berney *v.* State, 69 Ala. 233.

21. Wilhelm *v.* People, 72 Ill. 468; Long *v.* People, 34 Ill. App. 481; Benge *v.* Com., 92 Ky. 1, 17 S. W. 146, 13 Ky. L. Rep. 308; Green *v.* Com., 24 S. W. 623, 15 Ky. L. Rep. 536; State *v.* Alred, 115 Mo. 471, 22 S. W. 363; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102. But see North *v.* People, 139 Ill. 81, 28 N. E. 966, where it was held that where the affidavit shows that affiant believes that the facts are in substance the same as that to which the absent witness will testify, a direct averment that the desired testimony is true is not essential.

22. State *v.* Hays, 24 Mo. 369.

23. *California.*— People *v.* Ashnauer, 47 Cal. 98; People *v.* Williams, 24 Cal. 31; People *v.* Baker, 1 Cal. 403.

Colorado.— Wilson *v.* People, 3 Colo. 325.

Florida.— Ballard *v.* State, 31 Fla. 266, 12 So. 865; Gladden *v.* State, 12 Fla. 562.

Illinois.— Shirwin *v.* People, 69 Ill. 55.

Indiana.— Conrad *v.* State, 144 Ind. 290, 43 N. E. 221; Smith *v.* State, 132 Ind. 145, 31 N. E. 807; State *v.* Place, 127 Ind. 194, 26 N. E. 768; McDermott *v.* State, 89 Ind. 187; Merrick *v.* State, 63 Ind. 327.

Iowa.— State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485.

Kentucky.— Benge *v.* Com., 92 Ky. 1, 17 S. W. 146, 13 Ky. L. Rep. 308; Stephens *v.* Com., 6 S. W. 456, 9 Ky. L. Rep. 742; Galloway *v.* State, 7 Ky. L. Rep. 162; Salisbury *v.* Com., 3 Ky. L. Rep. 211.

Louisiana.—State *v.* Bassenger, 39 La. Ann. 918, 3 So. 55; State *v.* Ryan, 30 La. Ann. 1176; State *v.* Allemand, 25 La. Ann. 525.

Mississippi.— Weeks *v.* State, 31 Miss. 490.

Missouri.— State *v.* Luke, 104 Mo. 563, 16 S. W. 242; State *v.* Wilson, 85 Mo. 134; State *v.* Simms, 68 Mo. 305.

Nevada.—State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

New Mexico.— Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21.

New York.— People *v.* McGonegal, 17 N. Y. Suppl. 147, 42 N. Y. St. 307.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

Texas.— Guagando *v.* State, 41 Tex. 626; Gregory *v.* State, (Crim. 1898) 48 S. W. 577; Longacre *v.* State, (Crim. 1897) 41 S. W. 629; Othold *v.* State, (Crim. 1896) 33 S. W. 1084; Robertson *v.* State, (Crim. 1895) 29 S. W. 478; Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Moseley *v.* State, 25 Tex. App. 515, 8 S. W. 652; Hughes *v.* State, 18 Tex. App. 130; Barrett *v.* State, 18 Tex. App. 64; Timbrook *v.* State, 18 Tex. App. 1; Childers *v.* State, 16 Tex. App. 524; Lane *v.* State, 16 Tex. App. 172; Bowen *v.* State, 3 Tex. App. 617; O'Mealy *v.* State, 1 Tex. App. 180.

Virginia.— *In re* Hurd, 5 Leigh 715.

See 14 Cent. Dig. tit. "Criminal Law," § 1359.

24. People *v.* Thompson, 4 Cal. 238.

25. Richardson *v.* People, 31 Ill. 170.

26. For it is essential that the affidavit clearly show when the process was issued, so that it may appear that diligence in suing out the same was exercised. Miller *v.* State, 42 Ind. 544; Kendall *v.* Com., 19 S. W. 173, 14 Ky. L. Rep. 15; State *v.* White, 126 Mo. 591, 29 S. W. 591; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; Van Brown *v.* State, 34 Tex. 186; Wade *v.* State, (Crim. 1899) 54 S. W. 582. See also Townsend *v.* State, 5 Tex. App. 574.

27. *California.*— People *v.* Lampson, 70 Cal. 204, 11 Pac. 593.

Florida.— Gass *v.* State, (1902) 32 So. 109.

Georgia.— Pledger *v.* State, 77 Ga. 242, 3 S. E. 320; Wright *v.* State, 18 Ga. 383.

Illinois.— Trask *v.* People, 151 Ill. 523, 38 N. E. 248.

Indiana.— State *v.* Norman, 16 Ind. 192;

and that the process was placed in the hands of the proper officer for service.[28] And if a subpœna or other process has been issued but not executed, the time at which the process was returned must be alleged,[29] or other necessary averments must be made showing clearly that diligence had been exercised in suing out or procuring the service of subsequent process.[30]

f. That Facts Cannot Be Shown by Other Witnesses. Ordinarily the rule is that it must appear in the affidavit either by express averment or necessary intendment that the facts sought to be proved by the absent witnesses could not be proven by other witnesses;[31] but where it is shown that there will be a conflict in the evidence in regard to such facts, inasmuch as the testimony of the absent witness alone might raise a reasonable doubt, an averment in such case is not a necessary requisite.[32]

g. That Witness May Probably Be Secured. An application for a continuance on the ground of an absent witness must also show the probability of, and give assurance of, the attendance of such witness at the time to which it is proposed to continue the case, and state the facts on which the belief of a subsequent attendance is founded, so that the court may see that such belief is a well-founded reasonable expectation and not a mere hope.[33]

Haverstick *v.* State, 6 Ind. App. 595, 32 N. E. 785, 34 N. E. 99.

Kentucky.— Smith *v.* Com., (1891) 17 S. W. 868.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

New York.— Eighmy *v.* People, 79 N. Y. 546.

Texas.— Kyle *v.* State, (Crim. 1899) 53 S. W. 846; Williams *v.* State, 10 Tex. App. 114.

See 14 Cent. Dig. tit. "Criminal Law," § 1360.

28. Oats *v.* U. S., 1 Indian Terr. 152, 38 S. W. 673; Unsel *v.* Com., 87 Ky. 368, 8 S. W. 144, 10 Ky. L. Rep. 90; Mackey *v.* Com., 4 Ky. L. Rep. 179; Pullen *v.* State, 11 Tex. App. 89; Atkins *v.* State, 11 Tex. App. 8; Burton *v.* State, 9 Tex. App. 605; Cooper *v.* State, 7 Tex. App. 194; Fields *v.* State, 5 Tex. App. 616; Johnson *v.* State, 4 Tex. App. 268; Grant *v.* State, 2 Tex. App. 163; Buie *v.* State, 1 Tex. App. 452; Murray *v.* State, 1 Tex. App. 417; Cantu *v.* State, 1 Tex. App. 402; Murry *v.* State, 1 Tex. App. 174. See also Edwards *v.* State, 69 Ga. 737; Townsend *v.* State, 41 Tex. 134.

29. Barrett *v.* State, 18 Tex. App. 64.

30. People *v.* Weaver, 47 Cal. 106; Hill *v.* State, 36 Tex. Crim. 438, 37 S. W. 736; Bain *v.* State, (Tex. Crim. 1896) 33 S. W. 966; Blain *v.* State, 34 Tex. Crim. 448, 31 S. W. 368; Barrett *v.* State, 18 Tex. App. 64; Lewis *v.* State, 15 Tex. App. 647; Summerlin *v.* State, 3 Tex. App. 444; Dill *v.* State, 1 Tex. App. 278. But see People *v.* Lee, 1 Wheel. Crim. (N. Y.) 17, where a failure in the affidavit to make an allegation of this nature was held not fatal where the court, from the time the indictment was found, could clearly see that the defendant had not had sufficient time to prepare for trial.

31. *California.*— People *v.* Ashnauer, 47 Cal. 98; People *v.* Gaunt, 23 Cal. 156; People *v.* Quincy, 8 Cal. 89; People *v.* Thompson, 4 Cal. 238.

Georgia.— Phelps *v.* State, 75 Ga. 571; Anderson *v.* State, 72 Ga. 98; Allen *v.* State, 10 Ga. 85.

Illinois.— Dunn *v.* People, 109 Ill. 635.

Indiana.— Fleming *v.* State, 11 Ind. 234.

Iowa.— State *v.* Penney, 113 Iowa 691, 84 N. W. 509; State *v.* Williams, 8 Iowa 533; State *v.* Sater, 8 Iowa 420.

Louisiana.— State *v.* Manceaux, 42 La. Ann. 1164, 8 So. 297; State *v.* Landrum, 37 La. Ann. 799; State *v.* Comstock, 36 La. Ann. 308; State *v.* Robinson, 29 La. Ann. 364.

Mississippi.— Smith *v.* State, 58 Miss. 867.

Missouri.— State *v.* Alred, 115 Mo. 471, 22 S. W. 363; State *v.* Lett, 85 Mo. 52; State *v.* Simms, 68 Mo. 305; Freleigh *v.* State, 8 Mo. 606; State *v.* Heinze, 45 Mo. App. 403.

Nebraska.— Burgo *v.* State, 26 Nebr. 639, 42 N. W. 701.

Nevada.— State *v.* Marshall, 19 Nev. 240, 8 Pac. 672.

Tennessee.— Rhea *v.* State, 10 Yerg. 258.

Texas.— Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; Robinson *v.* State, (Crim. 1898) 48 S. W. 176.

Virginia.— Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

Washington.— State *v.* Murphy, 9 Wash. 204, 37 Pac. 420; State *v.* Brooks, 4 Wash. 328, 30 Pac. 147.

See 14 Cent. Dig. tit. "Criminal Law," § 1356.

32. North *v.* People, 139 Ill. 81, 28 N. E. 966.

33. *California.*— People *v.* Ah Yute, 53 Cal. 613; People *v.* Ah Fat, 48 Cal. 61; People *v.* Ashnauer, 47 Cal. 98.

Colorado.— Wilson *v.* People, 3 Colo. 325.

Georgia.— Collins *v.* State, 78 Ga. 87; Pledger *v.* State, 77 Ga. 242, 3 S. E. 320; Lovett *v.* State, 60 Ga. 257; Allen *v.* State, 10 Ga. 85.

Illinois.— Shirwin *v.* People, 69 Ill. 55; Euhanks *v.* People, 41 Ill. 486; Richardson *v.* People, 31 Ill. 170.

Iowa.— State *v.* Shupe, 16 Iowa 36, 85 Am. Dec. 485.

h. Should Disclaim Purpose of Delay. It is also usually held to be a necessary requisite of the affidavit that it contain an averment that the continuance is not sought for the purpose of vexation or delay.[34]

5. Alternative Averments. An application for a continuance, alleging the grounds therefor in the alternative, is not sufficiently certain and definite.[35]

6. Second or Further Continuance. The affidavit should show whether or not the continuance is sought for the first time,[36] as under the procedure of some jurisdictions greater particularity and conciseness is required in an application for a subsequent continuance than in that for the first.[37]

F. Corroborative or Supplemental Affidavits. An applicant should state the facts on which he relies, distinctly and fully at first, and supplemental affidavits should not be received.[38]

Kentucky.— Blanks *v.* Com., 105 Ky. 41, 48 S. W. 161, 20 Ky. L. Rep. 1037; Earp *v.* Com., 9 Dana 301; Com. *v.* Brewer, 10 Ky. L. Rep. 196; Smith *v.* Com., 5 Ky. L. Rep. 776.

Louisiana.— State *v.* Mansfield, 52 La. Ann. 1355, 27 So. 887; State *v.* Underwood, 44 La. Ann. 1114, 11 So. 823; State *v.* Johnson, 41 La. Ann. 574, 7 So. 670; State *v.* Williams, 36 La. Ann. 854; State *v.* Robinson, 29 La. Ann. 364.

Mississippi.— Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70.

Missouri.— State *v.* Alred, 115 Mo. 471, 22 S. W. 363; State *v.* Wilson, 85 Mo. 134.

Nebraska.— Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

Nevada.— State *v.* Gray, 19 Nev. 212, 8 Pac. 456; State *v.* Rosemurgey, 9 Nev. 308.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Oregon.— State *v.* Leonard, 3 Oreg. 157.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

Texas.— Smith *v.* State, 22 Tex. App. 316, 3 S. W. 684; Strickland *v.* State, 13 Tex. App. 364; Colton *v.* State, 7 Tex. App. 50.

Virginia.— Hurd *v.* Com., 5 Leigh 715.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

See 14 Cent. Dig. tit. "Criminal Law," § 1357.

34. *California.*— People *v.* Putnam, 129 Cal. 258, 61 Pac. 961; People *v.* Thompson, 4 Cal. 238.

Georgia.— Cobb *v.* State, 110 Ga. 314, 35 S. E. 178; Tomlin *v.* State, 110 Ga. 268, 34 S. E. 845; Farmer *v.* State, 95 Ga. 498, 20 S. E. 494; Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; Polite *v.* State, 78 Ga. 347; Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

Louisiana.— State *v.* Nathaniel, 52 La. Ann. 558, 26 So. 1008.

Missouri.— State *v.* Clark, 147 Mo. 20, 47 S. W. 886; State *v.* Heinze, 45 Mo. App. 403.

Texas.— Roberts *v.* State, (Crim. 1899) 51 S. W. 383; Peck *v.* State, 5 Tex. App. 611; Zumwalt *v.* State, 5 Tex. App. 521.

See 14 Cent. Dig. tit. "Criminal Law," § 1349.

35. People *v.* Francis, 38 Cal. 183, where an affidavit stating that the affiant believed that he could procure the attendance of witnesses residing out of the state or their depositions by the next term of the court was held defective as being in the alternative.

36. Reid *v.* State, (Tex. Crim. 1900) 57 S. W. 662; Sims *v.* State, (Tex. Crim. 1898) 45 S. W. 705; Washington *v.* State, 35 Tex. Crim. 156, 32 S. W. 694; Ming *v.* State, (Tex. Crim. 1893) 24 S. W. 29.

Where a former application for a continuance is refused, and instead thereof the cause is postponed to another day in the same term, a subsequent application on the day to which the cause was postponed is not a second application within the meaning of the statute, and need not comply with the requirements therein provided for second applications. State *v.* Maguire, 69 Mo. 197. But see Miller *v.* State, (Tex. Crim. 1900) 60 S. W. 673.

37. State *v.* Whitton, 68 Mo. 91; State *v.* Lawther, 65 Mo. 454; Com. *v.* Carson, 1 Wheel. Crim. (N. Y.) 487.

In Tennessee a continuance at the first term may be had by either party on a general affidavit, but at a second or subsequent term it must state the facts he expects to be able to prove by the several persons named as desired witnesses. Nelson *v.* State, 2 Swan (Tenn.) 482. Nor is this rendered less necessary by the fact that the second application was made at a special and not a general term. Leach *v.* State, 99 Tenn. 584, 42 S. W. 195. See also State *v.* Morris, 1 Overt. (Tenn.) 220, where it was held that a defendant in a capital case need not, upon his first application for a continuance, disclose the facts to which an absent witness would swear.

In Texas the second application must, by virtue of the Code of Criminal Procedure, specifically state that the testimony cannot be procured from any other source known to the accused, and that the accused has reasonable expectation of procuring it at the next term. Myers *v.* State, (Tex. Crim. 1901) 62 S. W. 750; Mathews *v.* State, 41 Tex. Crim. 98, 51 S. W. 915; Land *v.* State, 34 Tex. Crim. 330, 30 S. W. 788.

38. State *v.* Buckner, 25 Mo. 167; State *v.* Evans, 1 Overt. (Tenn.) 211.

But where the ground on which the continuance is requested is one necessarily known by other parties, such as public excitement or prejudice, corroborative affidavits or evidence of other parties should be offered. Ballard *v.* State, 31 Fla. 266, 12 So. 865;

G. Amendments. The grant of leave to amend the affidavit is discretionary with the trial court.[39]

H. Right to Contradict or Discredit Affidavit — 1. By Private Opinion of Court. An application for a continuance should not be denied because of the private opinion of the court regarding the integrity and credibility of the affiant,[40] although in case of suspicion the court may consider what has passed in court[41] or come to its knowledge by virtue of its connection in the case.[42] The demeanor, conduct, and conversation of the accused in the presence of the court may be considered.[43]

2. By Inconsistent Allegations in Previous Application. Where defendant's application for a continuance contains a palpable and unexplained contradiction of material allegations in his former application, a continuance may properly be denied.[44]

3. By Counter-Affidavits — a. In General. In some jurisdictions counter-affidavits will not be received.[45] In other jurisdictions the opposite rule prevails.[46] Where the prosecution introduces counter-affidavits the cross-examination of such affiants by the defense should be limited to matters embraced in their affidavits.[47]

Quinn *v.* Com., 63 S. W. 792, 23 Ky. L. Rep. 1302.

39. Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509; McKinney *v.* State, 8 Tex. App. 626.

Where there is no appearance of bad faith the amendment should be allowed. People *v.* Horton, 4 Park. Crim. (N. Y.) 222. And where it is clear that the prosecution could not have been surprised by an amendment, and that the defect in the application was known to the prosecution at the time that the continuance was asked, and where the other equities in the case are clearly with defendant, a refusal to allow the amendment is error. McNeally *v.* State, 5 Wyo. 59, 36 Pac. 824.

40. Frain *v.* State, 40 Ga. 529; Copenhaven *v.* State, 14 Ga. 22; Fox *v.* State, 9 Ga. 373, 376 (where it is said: "Can the Court, when the showing is sufficient, refuse it on account of his personal knowledge of the character of the party making it, and of the witness whose testimony that party is seeking to assail — a knowledge not drawn from evidence before the Court, but from his private sources of information? He, beyond all controversy, cannot. He has no discretion to act upon such knowledge. The discretion allowed in applications for a continuance must be within the law, and must spring out of, and be bounded by what transpires in the case. It cannot be justified upon what the Court, as a man, may or may not know. Justice is administered according to general rules; rules which, if applicable in a single case, must be applicable in all like cases, no matter who are the parties, or what their character"); Baker *v.* Com., 10 S. W. 386, 10 Ky. L. Rep. 746; State *v.* Bolds, 37 La. Ann. 312; Welch *v.* Com., 90 Va. 318, 18 S. E. 273.

41. Such for instance as previous continuances and the forfeiture of a recognizance. Griffin *v.* State, 26 Ga. 493.

42. State *v.* Abshire, 47 La. Ann. 542, 17 So. 141; Strauss *v.* State, 58 Miss. 53. See also Wells *v.* Com., 13 S. W. 915, 12 Ky. L. Rep. 111; Territory *v.* Nugent, 1 Mart. (La.) 108.

43. People *v.* Horton, 4 Park. Crim. (N. Y.) 222.

44. Bratton *v.* State, 34 Tex. Crim. 477, 31 S. W. 379. But see Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118, holding that it was not ground for refusing a continuance to procure evidence of an absent witness as to certain facts, that defendant, on a former application for a continuance to procure other witnesses to prove such facts, swore that he could not prove them by any others whose testimony could be so readily produced.

45. *Georgia.*— See Bishop *v.* State, 9 Ga. 121.

Illinois.— Price *v.* People, 131 Ill. 223, 23 N. E. 639; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165.

Indiana.— Cutler *v.* State, 42 Ind. 244.

Iowa.— If the affidavit for a continuance is on the ground of the absence of a material witness, and fully states the requisites provided by the statute, the continuance follows as a matter of course, and the affidavit is not traversable; but where the affidavit is not made on the statutory ground, counter-affidavits may be received. State *v.* Wells, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 823.

Kentucky.— Wells *v.* Com., 13 S. W. 915, 12 Ky. L. Rep. 111.

Louisiana.— State *v.* Abshire, 47 La. Ann. 542, 17 So. 141; State *v.* Bolds, 37 La. Ann. 312; State *v.* Simien, 30 La. Ann. 296.

Nebraska.— Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108; Hair *v.* State, 14 Nebr. 503, 16 N. W. 829.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1364, 1365.

46. State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117; State *v.* Bailey, 94 Mo. 311, 7 S. W. 425; Riggs *v.* Fenton, 3 Mo. 28. See also Com. *v.* Gross, 1 Ashm. (Pa.) 281.

47. Williams *v.* State, 69 Ga. 11.

Where defendant has not put his character in issue it is error to allow a judgment

And as applications for continuances are addressed to the court, it would seem that the proper practice should be not to allow any evidence concerning the same to be placed before the jury.[48]

b. As Determined by Nature of Averments Sought to Be Discredited. In some jurisdictions the right to introduce counter-affidavits is determined by the portion of the application sought to be contradicted. If it is intended to controvert the facts which are proposed to be shown by the absent witness it is clear that such practice would put in issue before the court material facts which should be only passed upon by the jury, and would often deprive one of the advantage sometimes accruing by having his witnesses before the jury, and is therefore not permissible.[49] Counter-affidavits showing what such witnesses have sworn to on a former trial,[50] or that the witness if present would not swear to the matter stated by defendant,[51] are, however, allowable. Moreover in some jurisdictions it is the practice, said to have been brought down from the common law,[52] to allow counter-affidavits to be offered for the purpose of negativing allegations in the application other than those pertaining to what the witness will testify, such as that of diligence or of the probability of securing the proposed testimony.[53]

V. HEARING AND DETERMINATION.

A. Presumptions. An application for continuance must in some respects be drawn more carefully than a pleading, and will be accorded no favorable intendment,[54] for it will be presumed that the defendant will make the strongest possible statements in his own favor that the facts will warrant.[55] Presumptions will not, however, be indulged against a prisoner's application for a continuance, because of the absence of a material witness, unless based on competent evidence or facts legally before the court,[56] and where a reasonable doubt exists as to whether or not an accused has been afforded sufficient assistance to enable him to procure his witnesses, he should be given the benefit of such doubt.[57]

B. Burden of Proof. The burden is on the party asking a continuance to show the necessity therefor,[58] and that he has exercised due diligence.[59]

C. Imposition of Condition by Court. Strictly speaking, an accused should rely upon all his grounds for a continuance upon his first application, and where

of a conviction against him to be introduced and read in evidence, to overcome his application for a continuance on the ground of the absence of a witness by whom he expected to prove his good character. Felsenthal *v.* State, 30 Tex. App. 675, 18 S. W. 644.

48. Lankster *v.* State, (Tex. Crim. 1900) 59 S. W. 888; Mask *v.* State, 34 Tex. Crim. 136, 31 S. W. 408. But see McGee *v.* State, 31 Tex. Crim. 71, 19 S. W. 764.

49. *Arizona.*— Halderman *v.* Territory, (1900) 60 Pac. 876.

Arkansas.— Lane *v.* State, 67 Ark. 290, 54 S. W. 870.

Georgia.— Horn *v.* State, 62 Ga. 362.

Iowa.— State *v.* Dakin, 52 Iowa 395, 3 N. W. 411.

Kentucky.— Salisbury *v.* Com., 79 Ky. 425, 3 Ky. L. Rep. 211.

Texas.— Lane *v.* State, (Crim. 1894) 28 S. W. 202; Dixon *v.* State, 2 Tex. App. 530. See 14 Cent. Dig. tit. "Criminal Law," §§ 1364, 1365.

50. Johnson *v.* State, 65 Ga. 94.

51. Halderman *v.* Territory, (Ariz. 1900) 60 Pac. 876.

The contradiction in such case is not of the absent witness, but of the defendant; it does not deny what the absent witness would swear to, but what defendant says he would swear to. Williams *v.* State, 69 Ga. 11.

52. Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Murray *v.* State, 1 Tex. App. 174.

53. Lane *v.* State, 67 Ark. 290, 54 S. W. 870; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153; Hyde *v.* State, 16 Tex. 445, 67 Am. Dec. 630; Rucker *v.* State, 7 Tex. App. 549; Dixon *v.* State, 2 Tex. App. 530; Murray *v.* State, 1 Tex. App. 174.

54. State *v.* Good, 132 Mo. 114, 33 S. W. 790.

Where it is not shown whether the application is for a first or subsequent continuance, no presumption as to either will be indulged. But the court will require a party alleging error to specifically show where he has been wronged. Massie *v.* State, 30 Tex. App. 64, 16 S. W. 770.

55. Lane *v.* State, 67 Ark. 290, 54 S. W. 870; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Thomas *v.* State, 17 Tex. App. 437; Cantu *v.* State, 1 Tex. App. 402.

56. Halsey *v.* Com., 1 Ky. L. Rep. 121.

57. State *v.* Boitreaux, 31 La. Ann. 188.

58. Long *v.* State, 17 Tex. App. 128.

59. Walker *v.* State, 13 Tex. App. 618.

he has not done so it has been held that the court has a right to impose certain terms as the condition of a further application.[60] So too it has been held that where the granting or refusal of a continuance is within the discretion of the court, it is competent to require the applicant to pay the costs of the state as a condition of the continuance.[61]

D. Time For Which Continuance May Be Granted. A continuance, when deemed just and proper, need not necessarily be to a regular term, but if justice is as well attained, it may be to an adjourned term only.[62] Where opposition is made by the adverse party it will not be made over a regular term to a succeeding one.[63] While in some jurisdictions the length of time to which a trial may be postponed without the consent of the accused is limited by statute, yet if a continuance is ordered for a greater length of time than thus allowed, a defendant cannot claim a release on habeas corpus until the expiration of the statutory time.[64]

E. Necessity of Personal Presence of Accused. A party is not deprived of a constitutional right to appear to defend in person and by counsel because of the fact that he was not personally present when a continuance was granted, as such guaranty has reference to matters connected with the trial and not with preliminary matters such as the granting of a continuance.[65] And the granting of such continuance when the accused is not personally present, at least before his arraignment,[66] or where it appears that no injury is done the defendant,[67] is not reversible error. And unless the record negatives his personal presence, it will be presumed that he is before the court.[68]

F. Necessity of Formal Order. In some jurisdictions it is expressly declared by statute that a failure to enter a continuance on record does not operate as a discontinuance,[69] and in the absence of any express provision a failure to make such entry is not fatal, especially where the continuance operates in favor of the accused;[70] although in practice before a justice of the peace a failure to make a formal entry has been held fatal.[71]

G. Effect of Improper Refusal to Grant[72] **— 1. In General.** Although the refusal to grant a continuance may, when judged by the facts and conditions existing at the time the motion was made, have been erroneous, yet a new trial should not be granted therefor if, before the close of the trial, the wrong is corrected and no injury or prejudice to the applicant results.[73] On the other hand, although the court, when judged by the facts and evidence before it at the time

60. Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612, holding that this is especially to be considered no error where, from all the facts in the case, the accused was accorded even more privileges and consideration than he was legally entitled to.

61. And such requirements cannot be considered as requiring the applicant to pay the costs of the state for the term as part punishment in advance of his conviction, as it will be considered purely as a condition of the continuance. *In re* Esten, 9 R. I. 191.

62. State *v.* Harris, 59 Mo. 550.

63. People *v.* McLane, 1 Wheel. Crim. (N. Y.) 31.

64. *Ex p.* Ross, 82 Cal. 109, 22 Pac. 1086. Where the state is entitled to a reasonable adjournment because of the sickness of the prosecuting attorney, six days is not an unreasonable time. People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79.

65. State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888. See also Tandy *v.* State, 94 Wis. 498, 69 N. W. 160.

66. Kibler *v.* Com., 94 Va. 804, 26 S. E. 858 [*approving* Boswell *v.* Com., 20 Gratt. (Va.) 860].

67. Brooks *v.* Com., 2 Rob. (Va.) 845.

68. Benton *v.* Com., 91 Va. 782, 21 S. E. 495, which case does not, however, concede that it is necessary that an accused be personally present when a continuance is granted. See also State *v.* Linhart, 23 Iowa 314 (where the point as to whether or not an accused must be personally present is not passed upon, as the continuance in such case was held to have really arisen by operation of law, and not by order of the court, and it was clear that no possible harm was done defendant); Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

69. Harrison *v.* Com., 81 Va. 491.

70. McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65.

71. Brosde *v.* Sanderson, 86 Wis. 368, 57 N. W. 49.

72. See, generally, APPEAL AND ERROR.

73. Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Hill *v.* State, 91 Ga. 153, 16 S. E. 976; Black *v.* State, 47 Ga. 589; Mitchell *v.* State,

of passing on the motion, may be held to have exercised a sound discretion in its refusal, yet if, when all the evidence is in and everything transpiring at the trial of the cause is considered, it is clear that defendant's rights have been prejudiced, the court must remedy its mistake by granting him a new trial.[74] But where a defendant asks for trial, in the absence of a witness whose presence he had requested, the absence of such witness cannot be urged as ground for a new trial;[75] nor where defendant's motion for a continuance fails to show diligence can he supply the defect by filing another affidavit in support of a new trial.[76]

2. NECESSITY OF OBJECTIONS AND EXCEPTIONS.[77] If a party desires to take advantage of the irregular or prejudicial granting of a continuance he must make due objection at the time the same is granted,[78] as consent thereto will be implied;[79] and as error will not be presumed, such objections must appear in the bill of exceptions.[80]

VI. SETTING ASIDE CONTINUANCE.

A. Right to Set Aside. A court, by the mere granting of a continuance in a criminal case, does not thereby necessarily lose all jurisdiction of the cause for that term,[81] as the inherent power which all courts have to control their orders, judgments, and decrees during term time carries with it the authority under certain circumstances to set aside such continuance.[82]

B. Exercise of Right to Set Aside — 1. IN GENERAL. This power should be exercised only for the most cogent reasons and in such rare cases as show most plainly no abuse of discretion and no material injury to the accused.[83]

2. WHAT CONSTITUTES. The granting of a change of venue is equivalent to setting aside a continuance which has been previously granted in the same cause on the same day.[84]

CONTINUANDO.[1] In pleading, a word which was formerly used in a special declaration of trespass when the plaintiff would recover damages for several tres-

22 Ga. 211, 68 Am. Dec. 493; Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027, 26 S. W. 75; Beatey *v.* State, 16 Tex. App. 421.

74. Borroum *v.* State, (Miss. 1897) 22 So. 62; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93; Reed *v.* State, 43 Tex. 319; Jenkins *v.* State, 30 Tex. 444; Cooper *v.* State, 19 Tex. 449; McKinney *v.* State, 41 Tex. Crim. 413, 55 S. W. 337; Phillips *v.* State, 35 Tex. Crim. 480, 34 S. W. 272; Hammond *v.* State, 28 Tex. App. 413, 13 S. W. 605; Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670; McCline *v.* State, 25 Tex. App. 247, 7 S. W. 667; McAdams *v.* State, 24 Tex. App. 86, 5 S. W. 826; Covey *v.* State, 23 Tex. App. 388, 5 S. W. 283; Price *v.* State, 22 Tex. App. 110, 2 S. W. 622; Sims *v.* State, 21 Tex. App. 649, 1 S. W. 465; Roach *v.* State, 21 Tex. App. 249, 1 S. W. 464; Parker *v.* State, 18 Tex. App. 72; Tyler *v.* State, 13 Tex. App. 205; Lanbach *v.* State, 12 Tex. App. 583; Casinova *v.* State, 12 Tex. App. 554; Garrold *v.* State, 11 Tex. App. 219; Williams *v.* State, 10 Tex. App. 528.

75. Carrelo *v.* State, 32 Tex. Crim. 91, 22 S. W. 147.

76. May *v.* State, 6 Tex. App. 191.

77. See, generally, APPEAL AND ERROR.

78. Com. *v.* Dormer, 11 Gray (Mass.) 318.

79. Com. *v.* Vincent, 160 Mass. 280, 35 N. E. 852.

80. People *v.* Bell, (Cal. 1894) 36 Pac. 94; State *v.* Washington, 43 La. Ann. 919, 9 So. 927; State *v.* Frazier, 43 La. Ann. 915, 9 So. 926.

81. Sampson *v.* People, 188 Ill. 592, 59 N. E. 427; State *v.* Plowman, 28 Kan. 569.

82. State *v.* Whitsell, 55 Mo. 430; Brown *v.* State, 3 Tex. App. 294.

83. State *v.* Whitsell, 55 Mo. 430; Brown *v.* State, 3 Tex. App. 294.

Extent and limits of rule.— It should not be done when the setting aside would operate as a surprise upon the party obtaining the continuance (State *v.* Whitsell, 55 Mo. 430); and it has been held that where a continuance has been granted to the next regular term it is an unwise practice to try a defendant against his objection at a special term occurring before such term (McKay *v.* State, 12 Mo. 492; Hair *v.* State, 14 Nebr. 503, 16 N. W. 829). But where, immediately after a continuance is granted, and before the transaction of other business, the state agrees to admit the alleged testimony of an absent witness, a continuance just previously granted on that ground may be set aside and the trial ordered. State *v.* Plowman, 28 Kan. 569. See also Callahan *v.* State, 30 Tex. 488, where a continuance having been granted upon the express understanding that it should be set aside on the appearance of certain witnesses, defendant could not upon their appearance object to proceeding to trial.

84. Hamilton *v.* State, 40 Tex. Crim. 464, 51 S. W. 217.

1. Literally, by continuing; in continuing. Adams Gloss.

passes in the same action; and, to avoid multiplicity of actions, a man might in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuando* to the whole time in which the rest of the trespasses were done; which was in this form: *Continuando* (by continuing) the trespasses aforesaid, etc., from the day aforesaid, etc., until such a day, including the last trespass.[2] In criminal procedure, an allegation in any appropriate form of words that an offense whereof a day of beginning is stated is continuing to another day stated.[3]

CONTINUE. To remain in a given place or condition; to remain in connection with; to abide; to stay;[4] to extend.[5] Used in connection with an office, the term means to remain in it.[6]

CONTINUED. Extended without interruption;[7] sometimes used as equivalent to immediate.[8]

CONTINUING. Perpetrating, protracting, or prolonging from one time to another.[9] (Continuing: Consideration, see CONSIDERATION; CONTRACTS. Damages, see DAMAGES. Guaranty, see GUARANTY.)

2. Black L. Dict. [*citing* Termes de la Ley]. And see Benson *v.* Swift, 2 Mass. 50, 54, where it is said: "An action is said to be laid with a *continuando* when the injury is alleged to have been committed by continuation from one day to another, or at divers days and times between such a day and such a day." See also Richardson *v.* Northrup, 66 Barb. (N. Y.) 85, 87, where it is said: "In case of cattle trespassing on the lands of an adjoining owner, it often happens that the injury is a continuing one, committed by the different animals on the same or on different days, so that it would be almost impossible to separate the acts of trespass. It was indispensable in such cases, to avoid a multiplicity of actions, and to relieve parties from the obligation of proving distinct and independent causes of action, that they might allege the trespass with a *continuando*, and recover for such injury as they were able to prove to have been done by the defendant's cattle."

3. 1 Bishop Crim. Proc. § 394 [*quoted* in People *v.* Sullivan, 9 Utah 195, 199, 33 Pac. 701].

4. Webster Dict. [*quoted* in State *v.* Murphy, 32 Fla. 138, 197, 13 So. 705]. *Compare* Grey *v.* Newark Plank Road Co., 65 N. J. L. 51, 54, 46 Atl. 606, where it is said, construing the act of Feb. 24, 1849: "The word 'continue' is used in the sense of 'remain.'"

5. Webster Dict. [*quoted* in Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253, 263].

6. State *v.* Murphy, 32 Fla. 138, 197, 13 So. 705.

"Continue a stock-holder" in a manufacturing corporation see Bacon *v.* Pomeroy, 104 Mass. 577, 585.

7. Kleinschmidt *v.* McAndrews, 4 Mont. 8, 11, 223, 5 Pac. 281, 2 Pac. 286. See also Belknap *v.* Belknap, 2 Johns. Ch. (N. Y.) 463, 470, 7 Am. Dec. 548, where it is said: "To continue a line or ditch, does not, in the ordinary or grammatical sense, admit of any intervening substance to break the continuity. It implies uninterrupted connection; and the ditch cannot properly be said to be continued, by terminating it at the north end of the pond, and by deepening the outlet of that pond at the southeast corner."

8. Kleinschmidt *v.* McAndrews, 4 Mont. 8, 11, 223, 5 Pac. 281, 2 Pac. 286, construing Mont. Laws (1872), p. 394, § 15.

Distinguished from "actual."—The word "actual" was designed to exclude the idea of a mere formal change of possession, and the word "continued" to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, "continued change of possession," as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and absurd results. Stevens *v.* Irwin, 15 Cal. 503, 507, 76 Am. Dec. 500 [*quoted* in Porter *v.* Bucher, 98 Cal. 454, 459, 33 Pac. 335].

"Actual and continued change of possession" under Mont. Rev. Stat. p. 436, § 169, was construed in Dodge *v.* Jones, 7 Mont. 121, 14 Pac. 707.

"Continued in charge of a ship" after a licensed pilot has offered to take charge as used in an indictment, considered in Chaney *v.* Payne, 1 Q. B. 712, 1 G. & D. 348, 6 Jur. 80, 41 E. C. L. 742.

"Continued notice in a daily newspaper," requiring creditors to exhibit their accounts to the executors or administrators, within twelve months after public notice in one or more of the public newspapers of this state, was considered in Smith's Estate, 1 Ashm. (Pa.) 352, 354.

9. Engmann *v.* Immel, 59 Wis. 249, 257, 18 N. W. 182.

"Continuing and abiding by the servant in the same service during the space of one whole year," under 8 & 9 Wm. III, c. 30, see Rex *v.* Maidstone, 12 East 550, 554.

"Continuing" and "obtaining."—These two words convey a conjunctive and not a disjunctive meaning. State *v.* Dyer, 67 Vt. 690, 700, 32 Atl. 814.

"Continuing cause of forfeiture" as used in a lease see Conger *v.* Duryee, 90 N. Y. 594, 600.

"Continuing condition" as used in a statute see Rex *v.* Kent County, 13 East 220,

CONTINUING INTEREST. The interest in an estate on which a duty required by law is a charge.[10] (See, generally, TAXATION.)

CONTINUING OFFENSE. A transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy.[11]

CONTINUING ONE'S RESIDENCE. To designate the place of a person's domicil.[12]

CONTINUING SECURITY. A promissory note, payable on demand, is intended to be a continuing security.[13] (See, generally, COMMERCIAL PAPER.)

CONTINUITY OF POSSESSION. See ADVERSE POSSESSION.

CONTINUOUS. Recurring at repeated intervals, so as to be of repeated occurrence;[14] without interval or interruption.[15] (Continuous: Easement, see EASEMENTS.)

CONTINUOUS ADVERSE USE. Uninterrupted adverse use.[16] (See, generally, ADVERSE POSSESSION.)

CONTINUOUS AND UNINTERRUPTED USE. Use not interrupted by the act of the owner of the land, or by a voluntary abandonment by the party claiming an easement.[17] (See, generally, ADVERSE POSSESSION.)

CONTINUOUS CRIME. A crime which endures after the period of consummation.[18]

CONTINUOUS CURRENT. An alternated current which has been so reversed that the whole flows in one direction.[19]

CONTINUOUS LINE. A division line between adjoining tracts existing at its two extremities and for the principal part of the distance between the two tracts

12 Rev. Rep. 330; Priestley *v.* Foulds, 2 M. & G. 175, 194, 2 R. & Can. Cas. 422, 2 Scott N. R. 265, 40 E. C. L. 549.

"Continuing charge" as used in the Succession Duties Act see Lilford *v.* Atty.-Gen., L. R. 2 H. L. 63, 69, 36 L. J. Exch. 116, 16 L. T. Rep. N. S. 184, 15 Wkly. Rep. 595.

"Continuing to occupy," used in homestead exemption laws, see Walters *v.* People, 21 Ill. 178.

"Continuing trustee" see *In re* East, L. R. 8 Ch. 735, 42 L. J. Ch. 480.

10. Lilford *v.* Atty.-Gen., L. R. 2 H. L. 63, 69, 36 L. J. Exch. 116, 16 L. T. Rep. N. S. 184, 15 Wkly. Rep. 595, construing the Succession Duties Act.

11. Wharton Crim. Pl. 474 [*quoted* in People *v.* Sullivan, 9 Utah 195, 203, 33 Pac. 701, 704]. And see Marshall *v.* Smith, L. R. 8 C. P. 416, 424, 42 L. J. M. C. 108, 28 L. T. Rep. N. S. 538. *Compare* State *v.* Amry, 44 N. H. 392.

12. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170, 176, where it is said: "In the several provincial statutes of 1692, 1701 and 1767, upon this subject, the terms 'coming to sojourn or dwell,' 'being an inhabitant,' 'residing and continuing one's residence,' 'coming to reside and dwell,' are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing."

13. Brooks *v.* Mitchell, 11 L. J. Exch. 51, 52, 9 M. & W. 15 [*quoted* in Carll *v.* Brown, 2 Mich. 401, 403].

14. Wood *v.* Sutcliffe, 16 Jur. 75, 76, 21 L. J. Ch. 253, 2 Sim. N. S. 163, 8 Eng. L. & Eq. 217, 42 Eng. Ch. 163.

15. Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 402.

Distinguished from "non-continuous."— "The continuous are defined to be self perpetuating, independent of human intervention; as the flowing of streams of water, which would pass by a deed as appurtenant. The non-continuous, those which are dependant upon human intervention for their enjoyment; as ways which do not pass unless essential to the enjoyment of the estate conveyed." Providence Tool Co. *v.* Corliss Steam Engine Co., 9 R. I. 564, 573 [*citing* Lampman *v.* Mills, 21 N. Y. 505, 515].

As used in a statute relating to payment of dividends by a corporation, "continuous" is considered in Hodge *v.* U. S. Steel Corp., (N. J. 1903) 54 Atl. 1, 6.

"Continuous emigrant passage from Omaha to San Francisco" is not a contract to carry one person from Omaha to an intermediate station, and a second to another station, and so on, but only a contract to carry the same person through the entire route. Cody *v.* Central Pac. R. Co., 5 Fed. Cas. No. 2,540, 4 Sawy. 114.

"Continuous use" does not necessarily mean "constant use." Bodfish *v.* Bodfish, 105 Mass. 317, 319.

Many pieces of twine may be tied together to form a continuous kite string, many different breadths may be united to form a continuous carpet and surely two pieces of zinc may be soldered together to form a continuous strip. Brown *v.* Reed Mfg. Co., 81 Fed. 48, 49.

16. Black L. Dict. [*quoting* Davidson *v.* Nicholson, 59 Ind. 411, 414].

17. Fankboner *v.* Corder, 127 Ind. 164, 166, 26 N. E. 766.

18. U. S. *v.* Owen, 32 Fed. 534, 537, 13 Sawy. 53, such as carrying concealed weapons.

19. Westinghouse Electric, etc., Co. *v.* New England Granite Co., 103 Fed. 951, 952.

and as such recognized by the parties, although, on a portion of the distance, there is no improvement or division fence.[20]

CONTINUOUSLY. With continuity or continuation; without interruption; unbrokenly;[21] without break or interruption.[22] (See CONTINUOUS.)

CONTINUOUS PASSAGE. As referred to in a conductor's train check, the continuous passage of the person to whom it was first issued, and of no other person.[23] (See, generally, CARRIERS.)

CONTINUOUS TRIP. As applied to a railway ticket means that a purchaser who accepts and uses it, is bound to take a train which will carry him continuously through from one city to the other, both in going and returning, and not to stop off at an intermediate station while going either way.[24] (See, generally, CARRIERS.)

CONTRA. Against; in opposition to; contrary to; on the opposite side; the contrary. A term constantly used in the reports, to denote the opposition of counsel in a cause; the disallowance by the court of a point in argument (*curia contra*); and the opposition of cases cited as establishing opposite doctrines. In some of the older books, *contra* is used instead of *versus*, in the titles of causes.[25]

CONTRABAND OF WAR. See WAR.

CONTRA BONOS MORES. Against good morals.[26] (See, generally, CONTRACTS.)

CONTRA BONOS MORES INTERPOSITA. Interposed against good morals.[27]

CONTRACT LABOR LAW. See ALIENS.

CONTRACTOR. See CONTRACTS.

20. Rockwell *v.* Adams, 6 Wend. (N. Y.) 467.

21. Century Dict.

Almost, but not exactly, synonymous with "uninterruptedly." Alta Land, etc., Co. *v.* Hancock, 85 Cal. 219, 227, 24 Pac. 645, 20 Am. St. Rep. 217.

22. State *v.* Vanderbilt, 37 Ohio St. 590, 598, where it is said: "The sections allowing consolidation limit it to instances where the roads are so constructed or designed 'as to admit the passage of burden or passenger cars over any two or more of such roads continuously;' that is to say, over all the lines to be consolidated, 'without break or interruption,' or to lines 'when the several roads so united will form a continuous line for the passage of cars.' The two forms of expression mean the same thing and explain each other."

23. Walker *v.* Wabash, etc., R. Co., 15 Mo. App. 333, 341.

24. Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106, 109.

25. Burrill L. Dict.

26. Burrill L. Dict.

27. Adams Gloss.

CONTRACTS

By John Davison Lawson
Dean of Law Department, University of Missouri *

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Assignment, see ASSIGNMENTS.

Award of Arbitrators as Contract, see ARBITRATION AND AWARD.

Contracts of Particular Classes of Persons:

Administrator, see EXECUTORS AND ADMINISTRATORS.

Agent:

Generally, see PRINCIPAL AND AGENT.

Of Carrier, see CARRIERS.

Of Corporation, see BANKS AND BANKING; CORPORATIONS.

Agricultural Societies, see AGRICULTURE.

Alien, see ALIENS.

Ambassador, see AMBASSADORS AND CONSULS.

Apprentice, see APPRENTICES.

Architect, see BUILDERS AND ARCHITECTS.

Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Association, see ASSOCIATIONS; BUILDING AND LOAN SOCIETIES; CORPORATIONS; INSURANCE; JOINT STOCK COMPANIES; LABOR UNIONS; RELIGIOUS SOCIETIES.

Attorney, see ATTORNEY AND CLIENT.

For Matters Relating to — (*continued*)
Contracts of Particular Classes of Persons — (*continued*)
Auctioneer, see AUCTIONS AND AUCTIONEERS.
Bank Corporation, see BANKS AND BANKING.
Board of Health, see HEALTH.
Broker, see FACTORS AND BROKERS.
Building and Loan Association, see BUILDING AND LOAN SOCIETIES.
Builder, see BUILDERS AND ARCHITECTS.
Carrier, see CARRIERS.
College, see COLLEGES AND UNIVERSITIES.
Commission Merchant, see FACTORS AND BROKERS.
Constable, see SHERIFFS AND CONSTABLES.
Consul, see AMBASSADORS AND CONSULS.
Convict, see CONVICTS.
Corporation, see CORPORATIONS.
Co-Tenant, see JOINT TENANCY; TENANCY IN COMMON.
County, see COUNTIES.
Detective, see DETECTIVES.
Devisee, see WILLS.
Druggist, see DRUGGISTS.
Drunkard, see DRUNKARDS.
Electric Light or Power Company, see ELECTRICITY.
Exchange, see EXCHANGES.
Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Factor, see FACTORS AND BROKERS.
Gas Company, see GAS.
Guardian or Ward, see GUARDIAN AND WARD.
Hawker or Peddler, see HAWKERS AND PEDDLERS.
Hospital, see HOSPITALS.
Husband or Wife, see HUSBAND AND WIFE.
Indian, see INDIANS.
Infant, see INFANTS.
Innkeeper, see INNKEEPERS.
Insane Person, see INSANE PERSONS.
Joint Stock Company, see JOINT STOCK COMPANIES.
Joint Tenant, see JOINT TENANCY.
Labor Union, see LABOR UNIONS.
Landlord and Tenant, see LANDLORD AND TENANT.
Legatee, see WILLS.
Livery Stable Keeper, see LIVERY STABLE KEEPERS.
Married Woman, see HUSBAND AND WIFE.
Mercantile Agency, see MERCANTILE AGENCIES.
Municipality, see MUNICIPAL CORPORATIONS.
Officer:
Of College, see COLLEGES AND UNIVERSITIES.
Of Corporation, see CORPORATIONS.
Public Officer, see OFFICERS.
Parent and Child, see PARENT AND CHILD.
Partnership, see PARTNERSHIP.
Pawnbroker, see PAWNBROKERS.
Person Engaged in Unauthorized Banking, see BANKS AND BANKING.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Pilot, see PILOTS.
Principal and Agent, see PRINCIPAL AND AGENT.
Principal and Surety, see PRINCIPAL AND SURETY.
Railroad Company, see CARRIERS; RAILROADS; STREET RAILROADS.

For Matters Relating to — (*continued*)
Contracts of Particular Classes of Persons — (*continued*)
Receiver, see RECEIVERS.
Religious Society, see RELIGIOUS SOCIETIES.
School District, see SCHOOLS AND SCHOOL DISTRICTS.
Seaman, see SEAMEN.
Sheriff, see SHERIFFS AND CONSTABLES.
Society, see ASSOCIATIONS; BUILDING AND LOAN SOCIETIES; CORPORATIONS; INSURANCE; JOINT STOCK COMPANIES; LABOR UNIONS; RELIGIOUS SOCIETIES.
Spendthrift, see SPENDTHRIFTS.
State, see STATES.
Street Railroad Company, see STREET RAILROADS.
Surgeon, see PHYSICIANS AND SURGEONS.
Telegraph Company, see TELEGRAPHS AND TELEPHONES.
Telephone Company, see TELEGRAPHS AND TELEPHONES.
Tenant in Common, see TENANCY IN COMMON.
Territory, see TERRITORIES.
Town, see TOWNS.
Trustee, see TRUSTS.
United States, see UNITED STATES.
University, see COLLEGES AND UNIVERSITIES.
Warehouseman, see WAREHOUSEMEN.
Water Company, see WATERS.
Contracts Relating to Particular Subjects:
Abstract of Title, see ABSTRACTS OF TITLE.
Accord, see ACCORD AND SATISFACTION.
Adoption of Children and Surrender of Child by Parent, see ADOPTION.
Affreightment, see SHIPPING.
Agency, see PRINCIPAL AND AGENT.
Agistment, see ANIMALS.
Agriculture, see AGRICULTURE.
Alimony, see DIVORCE.
Animals, see ANIMALS.
Apprenticeship, see APPRENTICES.
Arbitration, see ARBITRATION AND AWARD.
Army and Navy, see ARMY AND NAVY.
Betterments, see IMPROVEMENTS.
Boundaries, see BOUNDARIES.
Bounty, see BOUNTIES.
Breeding Animals, see ANIMALS.
Bridge, see BRIDGES.
Canal, see CANALS.
Carriage, see CARRIERS.
Certificate of Sale, see JUDICIAL SALES.
Compensation:
Of Administrator or Executor, see EXECUTORS AND ADMINISTRATORS.
Of Attorney, see ATTORNEY AND CLIENT.
Of Broker, see FACTORS AND BROKERS.
Of Innkeeper, see INNKEEPERS.
Of Livery Stable Keeper, see LIVERY STABLE KEEPERS.
Of Officer of Corporation, see CORPORATIONS.
Of Physician, see PHYSICIANS AND SURGEONS.
Of Pilot, see PILOTS.
Of Public Officer, see OFFICERS.
Of Teacher, see SCHOOLS AND SCHOOL DISTRICTS.

For Matters Relating to — (*continued*)
Contracts Relating to Particular Subjects — (*continued*)
Compensation — (*continued*)
Salvage, see SALVAGE.
Consolidation of Corporation, see CORPORATIONS.
Construction and Maintenance:
Of Bridge, see BRIDGES.
Of Drain, see DRAINS.
Of Highway, see STREETS AND HIGHWAYS.
Of Railroad, see RAILROADS.
Of Street Railroad, see STREET RAILROADS.
Of Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES.
Of Turnpike or Toll-Road, see TOLL-ROADS.
Of Wharf, see WHARVES.
Contingent Attorney's Fees, see ATTORNEY AND CLIENT.
Continuance, see CONTINUANCES.
Convict Labor, see CONVICTS.
Copyright, see COPYRIGHTS.
Costs, see COSTS.
Crop, see CROPS.
Dower, see DOWER.
Drains and Drainage, see DRAINS.
Easement, see EASEMENTS.
Electricity, see ELECTRICITY.
Employment, see MASTER AND SERVANT.
Enlistment, see ARMY AND NAVY.
Exempt Property, see EXEMPTIONS.
Fence, see FENCES.
Ferry, see FERRIES.
Fixtnres, see FIXTURES.
Food, see FOOD.
Gas, see GAS.
Good Will, see GOOD WILL.
Ground Rent, see GROUND RENTS.
Homestead, see HOMESTEADS.
Improvements, see IMPROVEMENTS.
Indian Lands, see INDIANS.
Intoxicating Liquors, see INTOXICATING LIQUORS.
License, see LICENSES.
Liens:
Generally, see LIENS.
Maritime Liens, see MARITIME LIENS.
Of Attorney, see ATTORNEY AND CLIENT.
Of Bailee, see BAILMENTS.
Of Landlord, see LANDLORD AND TENANT.
Of Mechanic, Laborer, or Material-Man, see MECHANICS' LIENS.
Of Mortgagee, see CHATTEL MORTGAGES; MORTGAGES.
Of Pledgee, see PLEDGES.
On Animals, see ANIMALS; LIVERY STABLE KEEPERS.
On Logs, see LOGS AND LOGGING.
Limitation of Liability, see CARRIERS; SHIPPING.
Literary Property, see LITERARY PROPERTY.
Logs and Logging, see LOGS AND LOGGING.
Lottery, see LOTTERIES.
Management and Disposal of Trust Property, see TRUSTS.
Manufactures, see MANUFACTURES.
Mechanics' Liens or Claims of Liens, see MECHANICS' LIENS.

For Matters Relating to — (*continued*)
Contracts Relating to Particular Subjects — (*continued*)
Mercantile Information, see MERCANTILE AGENCIES.
Mills, see MILLS.
Mines, Mining, and Minerals, see MINES AND MINERALS.
Operation of Railroad, see RAILROADS.
Partition, see PARTITION.
Party Wall, see PARTY WALLS.
Patents and Patent Rights, see PATENTS.
Pensions, see PENSIONS.
Plank Road, see TOLL-ROADS.
Private Road, see PRIVATE ROADS.
Privileges and Exhibits at Fairs, see AGRICULTURE.
Promise to Accept Draft, see COMMERCIAL PAPER.
Public Improvements, see MUNICIPAL CORPORATIONS.
Public Lands and Interest Therein, see PUBLIC LANDS.
Right of Way, see EASEMENTS; RAILROADS.
Sale:
Of Corporate Stock, see CORPORATIONS.
Of Fertilizer, see AGRICULTURE.
Of Goods Generally, see SALES.
Of Intoxicating Liquor, see INTOXICATING LIQUORS.
Of Land, see VENDOR AND PURCHASER.
Settlement of Bastardy Proceedings, see BASTARDS.
Special Contracts Between Carrier and Passenger, see CARRIERS.
Support of Bastard Children, see BASTARDS.
Theaters and Shows, see THEATERS AND SHOWS.
Title to Mine, see MINES AND MINERALS.
Toll-Road, see TOLL-ROADS.
To Render Account, see ACCOUNTS AND ACCOUNTING.
Towage, see TOWAGE.
Trade-Marks and Trade-Names, see TRADE-MARKS AND TRADE-NAMES.
Transportation:
Of Goods, see CARRIERS.
Of Mails, see POST OFFICE.
Of Passengers, see CARRIERS.
Turnpikes, see TOLL-ROADS.
Water Rights, see WATERS.
Work and Materials, see MECHANICS' LIENS; WORK AND LABOR.
Customs, see CUSTOMS AND USAGES.
Delivery in Escrow, see ESCROWS.
Estoppel by Contract, see ESTOPPEL.
Ground for Mechanics' Liens, see MECHANICS' LIENS.
Impairing Obligation, see CONSTITUTIONAL LAW.
Interest on Contracts, see INTEREST; USURY.
Loss of Instrument, see LOST INSTRUMENTS.
Particular Classes of Express Contracts:
Accident Insurance, see ACCIDENT INSURANCE.
Accounts, see ACCOUNTS AND ACCOUNTING.
Annuities, see ANNUITIES.
Arbitration, see ARBITRATION AND AWARD.
Assignments:
Generally, see ASSIGNMENTS.
Of Copyright, see COPYRIGHTS.
Of Patent, see PATENTS.
Of Property for Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

For Matters Relating to — (*continued*)
Particular Classes of Express Contracts — (*continued*)
Assumption of Mortgage by Grantee of Property, see CHATTEL MORTGAGES; MORTGAGES.
Auction Sale, see AUCTIONS AND AUCTIONEERS.
Bail, see BAIL.
Bailment:
Generally, see BAILMENTS; DEPOSITARIES; PLEDGES; WAREHOUSEMEN.
Of Animals, see ANIMALS.
Bill:
Of Exchange, see COMMERCIAL PAPER.
Of Lading, see CARRIERS; SHIPPING.
Bond, see BAIL; BONDS.
Building Contract, see BUILDERS AND ARCHITECTS.
Carriage of Goods or Passengers, see CARRIERS.
Charter Party, see SHIPPING.
Composition, see COMPOSITIONS WITH CREDITORS.
Compromise, see COMPROMISE AND SETTLEMENT.
Contribution, see CONTRIBUTION.
Conveyance of Land, see DEEDS.
Covenant, see COVENANTS.
Credit Insurance, see CREDIT INSURANCE.
Dedication, see DEDICATION.
Deed, see DEEDS.
Deposit in Bank, see BANKS AND BANKING.
Due-Bill, see COMMERCIAL PAPER.
Employers' Liability Insurance, see EMPLOYERS' LIABILITY INSURANCE.
Employment:
Of Agents Generally, see PRINCIPAL AND AGENT.
Of Factor or Broker, see FACTORS AND BROKERS.
Of Servant, see MASTER AND SERVANT.
Exchange of Property, see EXCHANGE OF PROPERTY.
Fares, Tickets, and Special Contracts, see CARRIERS.
Fidelity and Guaranty Insurance, see FIDELITY AND GUARANTY INSURANCE.
Fire Insurance, see FIRE INSURANCE.
Franchise, see FRANCHISES.
Fraudulent Conveyance, see FRAUDULENT CONVEYANCES.
Gambling Contract, see GAMING.
Gifts, see GIFTS.
Guaranty, see GUARANTY.
Hiring:
Of Animal, see ANIMALS.
Of Property Generally, see BAILMENTS.
Of Servant, see MASTER AND SERVANT.
Indemnity, see INDEMNITY.
Insurance:
Generally, see INSURANCE.
Particular Kinds, see ACCIDENT INSURANCE; CREDIT INSURANCE; EMPLOYERS' LIABILITY INSURANCE; FIDELITY AND GUARANTY INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE; TITLE INSURANCE.
Joint Adventure, see JOINT ADVENTURES.
Judicial Sale, see JUDICIAL SALES.
Lease:
Generally, see LANDLORD AND TENANT.
Mining Lease, see MINES AND MINERALS.
Life Insurance, see LIFE INSURANCE.

For Matters Relating to — (*continued*)
Particular Classes of Express Contracts — (*continued*)
Marine Insurance, see MARINE INSURANCE.
Maritime Contracts, see ADMIRALTY.
Marriage, see MARRIAGE.
Marriage Promise, see BREACH OF PROMISE TO MARRY.
Marriage Settlement, see HUSBAND AND WIFE.
Mortgage:
Of Chattels, see CHATTEL MORTGAGES.
Of Lands, see MORTGAGES.
Note, see COMMERCIAL PAPER.
Novation, see NOVATION.
Offer of Reward, see REWARDS.
Official Bonds, see OFFICERS.
Order, see COMMERCIAL PAPER.
Partition Agreement, see PARTITION.
Partnership Agreement, see PARTNERSHIP.
Pledge, see PLEDGES.
Promise to Marry, see BREACH OF PROMISE TO MARRY.
Promissory Note, see COMMERCIAL PAPER.
Recognizance, see BAIL; RECOGNIZANCES.
Release, see RELEASE.
Retainer and Authority of Attorney, see ATTORNEY AND CLIENT.
Sale:
Of Goods, see SALES.
Of Good Will, see GOOD WILL.
Of Lands, see VENDOR AND PURCHASER.
Salvage Compensation, see SALVAGE.
Separation Agreement, see HUSBAND AND WIFE.
Services, see MASTER AND SERVANT; PRINCIPAL AND AGENT; WORK AND LABOR.
Settlement, see COMPROMISE AND SETTLEMENT.
Shipping Contracts, see SHIPPING.
Stipulations in General, see STIPULATIONS.
Submission:
Of Controversy to Court, see SUBMISSION OF CONTROVERSY.
To Arbitration, see ARBITRATION AND AWARD.
Subscription:
Generally, see SUBSCRIPTIONS.
To Stock, see CORPORATIONS.
Suretyship, see PRINCIPAL AND SURETY.
Title Insurance, see TITLE INSURANCE.
To Make Will, see WILLS.
Towage Contract, see TOWAGE.
Trust, see TRUSTS.
Undertaking, see UNDERTAKINGS.
Wharfage Contract, see WHARVES.
Particular Classes of Implied Contracts:
Account Stated, see ACCOUNTS AND ACCOUNTING.
For Money:
Had and Received, see MONEY RECEIVED.
Lent, see MONEY LENT.
Paid, see CONTRIBUTION; MONEY PAID.
For Services, see WORK AND LABOR.
For Use and Occupation of Land, see USE AND OCCUPATION.
Generally, see ASSUMPSIT, ACTION OF.
Statute of Frauds, see FRAUDS, STATUTE OF.

For Matters Relating to — (*continued*)
Particular Modes of Discharging Contracts:
Accord and Satisfaction, see ACCORD AND SATISFACTION.
Compromise, see COMPROMISE AND SETTLEMENT.
Discharge in Bankruptcy, see BANKRUPTCY.
Novation, see NOVATION.
Payment, see PAYMENT.
Release, see RELEASE.
Tender, see TENDER.
Remedies in Cases of Contract:
Abatement and Revival of Action, see ABATEMENT AND REVIVAL.
Abatement or Survival of Cause of Action, see ABATEMENT AND REVIVAL.
Action:
For Accounting, see ACCOUNTS AND ACCOUNTING.
For Breach of Covenant, see COVENANTS.
Of Assumpsit, see ASSUMPSIT, ACTION OF.
Of Covenant, see COVENANT, ACTION OF.
Of Debt, see DEBT.
Arrest in Action on Contract, see ARREST.
Attachment in Action on Contract, see ATTACHMENT.
Cancellation of Writings in Equity, see CANCELLATION OF INSTRUMENTS.
Damages for Breach of Contract, see DAMAGES.
Election of Remedies, see ELECTION OF REMEDIES.
Evidence, see EVIDENCE.
Execution, see EXECUTION.
Garnishment, see GARNISHMENT.
Injunction, see INJUNCTION.
Joinder With Actions Arising Out of Tort, see JOINDER AND SPLITTING OF ACTIONS.
Judgment, see JUDGMENTS.
Jurisdiction:
In Admiralty, see ADMIRALTY.
In Equity, see EQUITY.
Of Justice, see JUSTICES OF THE PEACE.
To Enforce Contracts Made in Another State, see COURTS.
Limitation of Action, see LIMITATIONS OF ACTIONS.
Marshalling Assets and Securities, see MARSHALLING ASSETS AND SECURITIES.
New Trial, see NEW TRIAL.
Recoupment, Set-Off, and Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.
Reformation, see REFORMATION OF INSTRUMENTS.
Specific Performance, see SPECIFIC PERFORMANCE.
Trial, see TRIAL.
Writ of Error and Appeal, see APPEAL AND ERROR.
Seal, see SEALS.
Signing of Contracts, see SIGNATURES.
Statute of Frauds, see FRAUDS, STATUTE OF.
Subrogation, see SUBROGATION.
Ultra Vires, see BANKS AND BANKING; CORPORATIONS.
Usages, see CUSTOMS AND USAGES.
Usurious Contracts, see USURY.

I. DEFINITIONS.

A. Contract Defined. A contract may be defined as an agreement between competent parties, supported by a legal consideration, and in the form, if any, prescribed by law, creating an obligation on the part of one or both to do or

refrain from doing some lawful thing.[1] To constitute a contract, the agreement must create an obligation; it must be an agreement enforceable at law — an ele-

1. An exact definition of the word "contract" is not easy to give. Various definitions have been suggested by commentators and courts, the most common of which is that of Blackstone, Kent, Marshall, and Taney, "An agreement upon sufficient consideration, to do or not to do a particular thing." 2 Bl. Comm. 442; 2 Kent Comm. 449; Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 197, 4 L. ed. 529; Taney, C. J., in Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 572, 9 L. ed. 773. And see Robinson *v.* Magee, 9 Cal. 81, 70 Am. Dec. 638; Willis *v.* Turnley, 1 Tex. App. Civ. Cas. § 789. It is in substance so defined by statute in some states. See Cal. Civ. Code, § 6549; Dak. Civ. Code, § 870; Ga. Civ. Code (1895), § 3631; La. Civ. Code (1900), § 1761. This definition, however, has been frequently criticized and is far from complete. See Metcalf Contr. 1; 1 Parson Contr. § 2; Hilliard Contr. § 2; Lawson Contr. § 6. As was said by a recent writer, if we seek to build up a definition of the word "contract" which shall include all things that have been called contracts and exclude all things which have been held not to be contracts the task is impossible. Harriman Contr. 4. Perhaps the best definition to be found in the reports is in a Kansas case: "The agreement of two competent parties about a legal and competent subject matter, upon a mutual legal consideration, with a mutuality of obligation." State *v.* Barker, 4 Kan. 379, 96 Am. Dec. 175. See also Loaiza *v.* Superior Ct., 85 Cal. 11, 30, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376; Fuller *v.* Kemp, 138 N. Y. 231, 236, 33 N. E. 1034, 52 N. Y. St. 342, 20 L. R. A. 785; Toledo Bank *v.* Bond, 1 Ohio St. 622, 657. And see Justice *v.* Lang, 42 N. Y. 493, 496, 1 Am. Rep. 576.

Other definitions of "contract." — A voluntary and lawful agreement by competent parties, for a good consideration to do or not do a specified thing. Burnett, J., in Robinson *v.* Magee, 9 Cal. 81, 70 Am. Dec. 638.

A compact between two or more parties. Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 136, 3 L. ed. 162.

A transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Washington, J., in Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 656, 4 L. ed. 629.

An agreement between two or more persons for the doing or the not doing of some particular thing. 1 Parson Contr. § 2.

Where a promise is made on one side and assented to on the other, or where two or more persons enter into an engagement with each other by a promise on either side. 2 Stephen Comm. 108, 109.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story Contr. § 1. And see Pelham *v.* State, 30 Tex. 422, 423.

A drawing of minds together until they meet. Birdseye, J., in McNulty *v.* Prentice, 25 Barb. (N. Y.) 204.

A meeting of minds of the contracting parties. Park, J., in Atwater *v.* Lockwood, 39 Conn. 45, 49.

An agreement when both parties become obligated. Hopkins, S., in Safford *v.* Wyckoff, 4 Hill (N. Y.) 442, 450.

A contract is a promise from one or more persons to another or others, either made in fact or created by the law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law. Bishop Contr. § 22.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. Anson Contr. 11.

An agreement by which two parties mutually promise and engage, or one of them promises or engages to the other, to give some particular thing or to do or abstain from doing some particular act. Hall Torts and Contr. 153.

An agreement containing a promise made by the one party for a valid consideration and agreed to by the other party. Leake Contr. 9.

An agreement or promise enforceable by law. Pollock Contr. 1.

The union of several in an accordant expression of will with the object of creating an obligation between them. Savigny Obl. II, p. 8.

A speech between two parties whereby something is to be done. The Mirror.

A bargain or agreement voluntarily made upon good consideration between two or more persons capable of contracting to do or forbear to do some lawful act. 1 Comyn Contr. 2.

A mutual assent of two or more persons competent to contract founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or to omit to do anything the performance of which is not enjoined by law. Chitty Contr. 3.

A transaction in which each party comes under an obligation to the other and each reciprocally acquires a right to what is promised by the other. 1 Powell Contr. VI.

An agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing or to do, or abstain from doing, some particular act. Pothier Obl. § 1.

When both parties will the same thing and each communicates his will to the other with a mutual engagement to carry it into effect.

ment in contract which has often been lost sight of by judges and writers. While an agreement may be void, that is, destitute of legal effect, it is absurd to speak of a void contract, for a contract is an agreement plus a legal obligation, and if there is no obligation there is no contract at all.[2]

B. Express, Implied, and Quasi or Constructive Contracts — 1. Express Contracts. An express contract is one where the intention of the parties and terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into.[3] It is an express contract, although some of its terms are dependent upon the happening of a future event.[4]

2. Implied Contracts. An implied contract, in the proper sense, is where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, as in the case where a person performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, or where a person performs services for another on request.[5] There can be no implied contract where there is an express contract between the parties in reference to the same subject-matter.[6] This rule only applies, however, where

Haynes *v.* Haynes, 1 Dr. & Sm. 426, 7 Jur. N. S. 595, 30 L. J. Ch. 578, 4 L. T. Rep. N. S. 199, 9 Wkly. Rep. 497.

An agreement between two or more persons whereby in consideration of something done or promised to be done by the party on one side the party on the other side undertakes to do or not to do a particular thing. Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

A transaction between two or more persons in which each party comes under an obligation to the other and each reciprocally acquires a right to whatever is promised or stipulated by the other. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

2. Pollock Contr. 7. "A contract," says Anson, "consists in an actionable promise or promises." Anson Contr. 11. And again: "Contract results from a combination of the two ideas of agreement and obligation." Anson Contr. 1.

3. Hertzog *v.* Hertzog, 29 Pa. St. 465; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 409.

4. Voorheis *v.* Bovell, 20 Ill. App. 538.

5. Hertzog *v.* Hertzog, 29 Pa. St. 465. And see Bixby *v.* Moore, 51 N. H. 402; People *v.* Speir, 77 N. Y. 144; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 407, 410; Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152. See also *infra*, II, C, 2, b, (III), (IV); II, C, 3, c, (III); and Master and Servant; Work and Labor.

Goods delivered.— So where goods are delivered under circumstances showing that payment was intended. See *infra*, II, C, 2, b, (III), (IV); II, C, 3, c, (III). And see Sales.

Meeting of minds.— If the contract to be proved is an actual one, a meeting of minds is as essential to an implied contract as to an express one. Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152.

Relationship of the parties may be ground for not implying a contract to pay for board and lodging or services, etc. See *infra*, II, C, 4, a, note 72.

6. *Alabama.*— Burkham *v.* Spiers, 56 Ala. 547; Vincent *v.* Rogers, 30 Ala. 471.

Connecticut.— Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Weed *v.* Weed, 22 Conn. 364; Russell *v.* South Britain Soc., 9 Conn. 508; Shepard *v.* Palmer, 6 Conn. 95; Hampton *v.* Windham, 2 Root 199; Snow *v.* Chapman, 2 Root 99; White *v.* Woodruff, 1 Root 309; Carew *v.* Bond, 1 Root 269.

Georgia.— Baldwin *v.* Lessner, 8 Ga. 71.

Illinois.— Walker *v.* Brown, 28 Ill. 378, 81 Am. Dec. 287; Cast *v.* Roff, 26 Ill. 452; Ramming *v.* Caldwell, 43 Ill. App. 175; Rollins *v.* Duffy, 14 Ill. App. 69.

Indiana.— Cranmer *v.* Graham, 1 Blackf. 406.

Kentucky.— Morford *v.* Ambrose, 3 J. J. Marsh. 688; Pringle *v.* Samuel, 1 Bibb 172.

Louisiana.— Mazureau *v.* Morgan, 25 La. Ann. 281; Willis *v.* Melville, 19 La. Ann. 13.

Maine.— Charles *v.* Dana, 14 Me. 383.

Maryland.— Speake *v.* Sheppard, 6 Harr. & J. 81; Watkins *v.* Hodges, 6 Harr. & J. 38; Hannan *v.* Lee, 1 Harr. & J. 131.

Massachusetts.— Zerrahn *v.* Ditson, 117 Mass. 553; Whiting *v.* Sullivan, 7 Mass. 107; Worthen *v.* Stevens, 4 Mass. 448.

Michigan.— Butterfield *v.* Seligman, 17 Mich. 95. And see Boughton *v.* Francis, 111 Mich. 26, 69 N. W. 94.

Minnesota.— Bond *v.* Corbett, 2 Minn. 248.

Mississippi.— Morrison *v.* Ives, 4 Sm. & M. 652.

Missouri.— Chambers *v.* King, 8 Mo. 517; Christy *v.* Price, 7 Mo. 430; Johnson *v.* Strader, 3 Mo. 359; Houck *v.* Bridwell, 28 Mo. App. 644; Davidson *v.* Beirmann, 27 Mo. App. 655.

New Hampshire.— Streeter *v.* Sumner, 19 N. H. 516.

New Jersey.—Voorhees *v.* Combs, 33 N. J. L. 494.

New York.— Preston *v.* Yates, 24 Hun 534; Harris *v.* Story, 2 E. D. Smith 363; Outwater *v.* Dodge, 7 Cow. 85; Wood *v.* Edwards, 19 Johns. 205; Clark *v.* Smith, 14 Johns. 326; Jennings *v.* Camp, 13 Johns. 94, 7 Am. Dec. 367; Raymond *v.* Bearnard, 12 Johns. 274, 7 Am. Dec. 317. And see Patterson *v.* Kelly, 59 Hun 626, 14 N. Y. Suppl. 111.

the two contracts relate to the same subject-matter, and where the provisions of the express contract would supersede those of the other.[7]

3. Quasi or Constructive Contracts. The term "implied contract" has also been applied to a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action *ex contractu*.[8] These obligations, however, are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy. They are described by the term "quasi" or "constructive" contracts.[9]

North Carolina.— Lawrence *v.* Hester, 93 N. C. 79; Winstead *v.* Reid, 44 N. C. 76, 57 Am. Dec. 571.

Ohio. — Ames *v.* Sloat, Wright 577; Hall *v.* Blake, Wright 489; Halloway *v.* Davis, Wright 129.

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

South Carolina.— Suber *v.* Pullin, 1 S. C. 273; Stent *v.* Hunt, 3 Hill 223.

Texas.—Gammage *v.* Alexander, 14 Tex. 414.

Vermont.—Hemenway *v.* Smith, 28 Vt. 701; Camp *v.* Barker, 21 Vt. 469.

Wisconsin.—Maynard *v.* Tidball, 2 Wis. 34; Baxter *v.* Payne, 1 Pinn. 501. And see Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939.

United States.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463; Krouse *v.* Deblois, 1 Cranch C. C. 138, 14 Fed. Cas. No. 7,937.

Canada.— Knox *v.* Munro, 13 Manitoba 16.

See 11 Cent. Dig. tit. "Contracts," § 5; *infra*, XII, A, 1; and Assumpsit, Action of, 4 Cyc. 326.

Exceptions to rule.—A contract may be implied, however, where the express agreement is unenforceable for certain reasons, or where there is a breach by one of the parties. See *infra*, IX, F; XII, A, 2; and Assumpsit, Action of, 4 Cyc. 328 *et seq.*; Frauds, Statute of; Infants.

7. Commercial Bank *v.* Pfeiffer, 22 Hun (N. Y.) 327.

8. 2 Bl. Comm. 443; Hertzog *v.* Hertzog, 29 Pa. St. 465. See also People *v.* Speir, 77 N. Y. 144; Wickham *v.* Weil, 17 N. Y. Suppl. 518.

9. Hertzog *v.* Hertzog, 29 Pa. St. 465, 468, where, in making the distinction between quasi or constructive contracts and implied contracts in the proper sense, the court said: "In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, in law three classes of relations called contracts. 1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. 2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. 3. Express contracts, already sufficiently distinguished."

Instances of quasi or constructive contracts. —Among the instances of quasi or constructive contracts may be mentioned cases in which one person has received money which another person ought to have received, and which the latter is allowed to recover from the former in an action of assumpsit for money had and received, or money received to the use of the plaintiff (Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Boyett *v.* Potter, 80 Ala. 476, 2 So. 534; Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394; O'Fallon *v.* Boismenu, 3 Mo. 405, 26 Am. Dec. 678; Lawson *v.* Lawson, 16 Gratt. (Va.) 230, 80 Am. Dec. 702); cases in which one person has been compelled to pay money which another ought to have paid, and which he is allowed to recover from the latter in an action of assumpsit for money paid to his use (Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677; Wells *v.* Porter, 7 Wend. (N. Y.) 119; Exall *v.* Partridge, 3 Esp. 8, 8 T. R. 308, 4 Rev. Rep. 656); cases of account stated, from which the law implies a promise which will support an action of assumpsit (Marshall *v.* Lewark, 117 Ind. 377, 20 N. E. 253; Warren *v.* Caryl, 61 Vt. 331, 17 Atl. 741; Hopkins *v.* Logan, 7 Dowl. P. C. 360, 8 L. J. Exch. 218, 5 M. & W. 241); judgments, on which an action of assumpsit or debt may be maintained, according to the circumstances, because of a promise to pay implied by law (Williams *v.* Jones, 2 D. & L. 680, 14 L. J. Exch. 145, 13 M. & W. 628); cases in which an obligation to pay money is imposed by a statute (Milford *v.* Com., 144 Mass. 64, 10 N. E. 516; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Woodstock *v.* Hancock, 62 Vt. 348, 19 Atl. 991; Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805).

Services rendered or goods delivered under unenforceable agreement.— If services are rendered or goods delivered under an agreement to pay therefor which is unenforceable because of the statute of frauds (see Frauds, Statute of) or for any reason other than illegality (see *infra*, VII), and perhaps infancy in some cases (see Infants), the law will imply a contract to pay what the services are worth or the value of the goods, as the case may be. Gay *v.* Mooney, 67 N. J. L. 27, 50 Atl. 596; Cushing *v.* Chapman, 115 Fed. 237.

As to quasi or constructive contracts see, generally, Accounts and Accounting, 1 Cyc. 375; Assumpsit, Action of, 4 Cyc. 317; Judgments; Master and Servant; Money

C. Executory and Executed Contracts. An executed contract is a contract which has been fully performed since it was made, or which was performed at the time it was made, so that nothing remains to be done on either side, and an executory contract is one which is either wholly unperformed, or in which there remains something to be done on both sides, or on one side. A contract may be executed on one side and executory on the other.[10] An executed contract of sale is a bargain and sale which has passed the property in the thing sold, while executory contracts of sale are contracts as opposed to conveyances and create rights *in personam* to a fulfilment of their terms instead of rights *in rem* to an enjoyment of the property passed.[11]

D. Promise Defined. A promise is the declaration by any person of his intention to do or forbear from anything at the request or for the use of another. A proposal when accepted becomes a promise.[12]

E. Agreement Defined. Agreement is the expression by two or more persons of a common intention to affect their legal relations;[13] it consists in their being of the same mind and intention concerning the matter agreed upon.[14]

F. Bilateral and Unilateral Contracts. A bilateral contract is a contract in which there are reciprocal promises, so that there is something to be done or forborne on both sides,[15] while a unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed.[16]

G. Commutative Contracts. "Commutative contract" is a term used in the civil law to designate a contract in which each of the contracting parties gives and receives an equivalent.[17]

H. Compact Defined. "Compact" and "contract" are used as convertible terms.[18]

LENT; MONEY PAID; MONEY RECEIVED; SALES; USE AND OCCUPATION; WORK AND LABOR.

10. McNett *v.* Cooper, 13 Fed. 586 [*citing* Bouvier L. Dict.]. See also Justice *v.* Lang, 42 N. Y. 493, 496, 1 Am. Rep. 576; Schroeppel *v.* Corning, 10 Barb. (N. Y.) 576; Parmelee *v.* Oswego, etc., R. Co., 7 Barb. (N. Y.) 599; Skelly *v.* Jefferson Branch Bank, 9 Ohio St. 607, 623; Sandusky City Bank *v.* Wilbor, 7 Ohio St. 482, 494; Mowry *v.* Kirk, 5 Ohio Dec. (Reprint) 431, 5 Am. L. Rec. 587; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 409; Madison *v.* Sharpe, 4 Coldw. (Tenn.) 275, 285; Riggs *v.* Tayloe, 2 Cranch C. C. (U. S.) 687, 20 Fed. Cas. No. 11,832 [*reversed* on other grounds in 1 Pet. (U. S.) 591, 7 L. ed. 275].

11. Denver First Nat. Bank *v.* Bissell, 2 McCrary (U. S.) 73, 4 Fed. 694. See SALES.

12. Pollock Contr. 1, 6.

One writer suggests "assurance" as a more accurate term than "promise," because promise looks only to the future, while an assurance is independent of tenses. A warranty that a horse is sound or that a ship has sailed is a contract, but it is a peculiar use of the word to call it a promise. The word has, however, become a technical legal term, being used as synonymous with the more comprehensive term "assurance." Harriman Contr. 14.

13. Anson Contr. 3.

14. Leake Contr. 2; Pollock Contr. 1. See also McGavock *v.* Morton, 57 Nebr. 385, 77 N. W. 785; Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152.

15. As in the case of mutual promises to marry, where the promise of each party is the consideration for the promise of the other, or a contract consisting of a promise on one side to furnish goods or perform services, and a promise on the other side to accept and pay for the same. See *infra*, II, C, 2, b, (v); IV, D, 10.

16. As in cases where there is a promise to pay for goods which have been delivered or services which have been rendered, or a promise to deliver goods or render services which have been paid for in advance. See *infra*, II, C, 2, b, (III), (IV); II, C, 3, c, (III).

17. Black L. Dict. In the civil law, a contract in which each of the contracting parties receives as much as he gives or an equivalent for what he gives. Burrill L. Dict. [*citing* Pothier Contr. Sale, pt. 1, § 1; Pothier Obl. pt. 1, c. 1, § 1, art. 1].

In Louisiana commutative contracts are declared to be "those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given or promised by the other." La. Civ. Code, art. 1768. See Delabigarre *v.* New Orleans Second Municipality, 3 La. Ann. 230, 237; Ridings *v.* Johnson, 128 U. S. 212, 215, 9 S. Ct. 72, 32 L. ed. 401.

18. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 130, where it is said: "It is a mutual consent of the minds of the parties concerned, respecting some property or right, that is the object of the stipulation, or something that is to be done or forborne; 'a transaction between two or more persons, in which each party comes under an obligation to the other, and each

II. AGREEMENT OR MUTUAL ASSENT.

A. Necessity For. There can be no contract in the true sense, that is, as distinguished from quasi or constructive contracts,[19] in the absence of the element of agreement, or mutual assent of the parties. This above all others perhaps is an essential element of every contract.[20] It is necessary therefore to ascertain the elements of agreement or mutual assent.

B. Essentials of Agreement in General — 1. Two or More Parties. In the first place, it is clear that two or more parties are essential to an agreement.[21]

2. Common Intention — a. In General. It is equally clear that, in order that there may be an agreement, the parties must have a distinct intention common to both. Doubt or difference is incompatible with agreement.[22] There is doubt, for example, where a person says to another, "Will you buy my horse if I am inclined to sell?" and the other says, "Possibly I will;"[23] and there is difference where a person says to another, "Will you buy my horse for one hundred dollars?" and the other says, "I will give you seventy-five for it."[24] The minds of the parties must meet as to all the terms.[25] If any portion of the proposed terms are not settled or a mode agreed upon by which they may be settled there is no agreement.[26]

b. Expressed Intention and Secret Intention Differing. The law imputes to a person an intention corresponding to the reasonable meaning of his words and

reciprocally acquires a right to whatever is promised or stipulated by the other,' and any words manifesting that *congregatio mentium*, are sufficient to constitute a contract."

19. See *supra*, I, B, 3.

20. *Illinois.*— Corcoran *v.* White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858.

Indiana.— Stagg *v.* Compton, 81 Ind. 171.

Massachusetts.— Harlow *v.* Curtis, 121 Mass. 320.

Michigan.— Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195.

New Jersey.— Potts *v.* Whitehead, 23 N. J. Eq. 512.

Pennsylvania.— Corser *v.* Hale, 149 Pa. St. 274, 24 Atl. 285; Powers *v.* Curtis, 147 Pa. St. 340, 23 Atl. 450.

Wisconsin.— Mygatt *v.* Tarbell, 85 Wis. 457, 55 N. W. 1031.

England.— Jordan *v.* Norton, 1 H. & H. 234, 7 L. J. Exch. 281, 4 M. & W. 155; Honeyman *v.* Marryatt, 6 H. L. Cas. 112, 4 Jur. N. S. 17, 26 L. J. Ch. 619; Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

And see *infra*, II, C, where many other cases are cited in treating of offer and acceptance.

21. See *infra*, V, A.

22. Smith *v.* Faulkner, 12 Gray (Mass.) 251; Anson Contr. 2. And see Havens *v.* American F. Ins. Co., 11 Ind. App. 315, 39 N. E. 40 (holding that there was no contract where a person to whom a proposal was made replied: "I am prepared to make the arrangements with you on the terms you name"); Wills *v.* Carpenter, 75 Md. 80, 83, 25 Atl. 415 (holding that there was no contract where a person wrote another, "My brother, F. A. Carpenter, has some idea of renting your farm. If you and he can agree upon terms of one third share as your rent, I will become the renter and enter into contract with you; he to work the farm," and the other replied: "I would agree to terms of one-third rent, . . . and that I would be at home to negotiate with Mr. Frank Carpenter").

23. Stagg *v.* Compton, 81 Ind. 171; Marschall *v.* Eisen Vineyard Co., 7 Misc. (N. Y.) 674, 28 N. Y. Suppl. 62, 58 N. Y. St. 375.

24. See Bruce *v.* Pearson, 3 Johns. (N. Y.) 534, where a person sent an order to another for six hogsheads of rum and other articles at a credit of six months, and the other sent only three hogsheads, and omitted part of the other articles, charging those sent at a credit of three months. It was held that there was no agreement.

Where a written instrument was signed by one party, with the intention that the other should later sign it, and a stranger changed some of its terms, and it was signed in its altered condition, it was held not binding on the first signer. McGavock *v.* Morton, 57 Nebr. 385, 77 N. W. 785.

25. Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Robinson *v.* Estes, 53 Mo. App. 582; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378.

26. *Louisiana.*— Peet *v.* Meyer, 42 La. Ann. 1034, 8 So. 534.

Michigan.— Wardell *v.* Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814.

New York.— Barrow Steamship Co. *v.* Mexican Cent. R. Co., 134 N. Y. 15, 31 N. E. 261, 45 N. Y. St. 379, 17 L. R. A. 359; Mayer *v.* McCreery, 9 N. Y. St. 114.

Pennsylvania.— Zoebisch *v.* Rauch, 133 Pa. St. 532, 19 Atl. 415.

South Carolina.— Burns *v.* Mills, 31 S. C. 53, 9 S. E. 689.

Texas.— O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. 1020.

United States.— Gill Mfg. Co. *v.* Hurd, 18 Fed. 673.

acts.[27] It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.[28] On the other hand if one sought to be held as having agreed dissented in the ordinary language of business intercourse, it is an absurdity to say he did agree merely because the other party insists that he did not understand the language.[29]

c. Communication of Intention — (I) *Necessity For.* To constitute an agreement, the intention of the parties must in some way or form be communicated, for a person's intention can be ascertained by another only by means of outward expressions, as words and acts. An intention not expressed, not communicated, withdrawn before communicated, or communicated only to a third person, is in general inoperative and immaterial to the question of agreement.[30] Telling an intention to a third person is of no more effect than noting it in one's memorandum book, which is no more than though it existed solely in one's mind.[31]

(II) *Intention Communicated Informally.* Where the intention is communicated it does not matter what is the medium of communication or how infor-

27. Coleman *v.* Roberts, 1 Mo. 97; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672; Esterly Harvesting Mach. Co. *v.* Criswell, 58 Mo. App. 471; Brewington *v.* Meskeer, 51 Mo. App. 348; *In re* East England Banking Co., L. R. 4 Ch. 14, 38 L. J. Ch. 121, 19 L. T. Rep. N. S. 299, 17 Wkly. Rep. 18; Shepherd *v.* Gillespie, L. R. 3 Ch. 764, 38 L. J. Ch. 67, 19 L. T. Rep. N. S. 196, 16 Wkly. Rep. 1133; Cox *v.* Troy, 5 B. & Ald. 474, 1 D. & R. 38, 7 E. C. L. 260; Cornish *v.* Abington, 4 H. & N. 549, 28 L. J. Exch. 202, 7 Wkly. Rep. 504; Browne *v.* Hare, 3 H. & N. 484, 27 L. J. Exch. 372; Leake Contr. 2. And see Smith *v.* Hughes, L. R. 6 Q. B. 597, 607, 40 L. J. Q. B. 221, 25 L. T. Rep. N. S. 329, 19 Wkly. Rep. 1059, where it is said by Blackburn, J.: "The rule of law is that stated in Freeman *v.* Cooke, 2 Exch. 654, 12 Jur. 777, 18 L. J. Exch. 114. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

28. Harris *v.* Amoskeag Lumber Co., 97 Ga. 465, 25 S. E. 519; Hand *v.* Gas Engine, etc., Co., 167 N. Y. 142, 60 N. E. 425; Dillon *v.* Anderson, 43 N. Y. 231; Brown *v.* Hare, 3 H. & N. 484, 495, 27 L. J. Exch. 372 (where it is said by Bramwell, J.: "If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention"). See also *infra*, VIII, B, 2.

Conflicting views.—Holland, criticizing Savigny's analysis of contract in including "an agreement of the wills of the parties" as a necessary element, maintains that the law does not require that contracting parties have a common intention, but only that they shall seem to have one; that the law looks not at the will itself but at the will as voluntarily manifested. He holds that the law does not require a union of wills but only that it shall appear so. Holland El. Jur. 228. On the other hand English and American writers generally, in defining agreement as the meeting of minds, require the wills of the parties to be the same. But if either party has manifested his agreement either by words or conduct, he is not allowed to say that he did not really agree. "A contract," says Anson, "as a legal transaction, can exist only in such a form as may be perceptible to a court of law. It is only from the words and conduct of the parties that a court can form any conclusion as to their intention. If their words or their acts are inconsistent with any supposition but that they meant to agree, or if one has so spoken or acted as to lead the other necessarily to that conclusion, the court will not permit the obvious construction of words or conduct to be denied. But, after all, it is the intention of the parties which the courts endeavour to ascertain; and it is their intention to agree which is regarded as a necessary inference from words or conduct of a certain sort." Anson Contr. 11.

29. Dunning *v.* Thomas, 10 Colo. 84, 14 Pac. 49.

30. Troustine *v.* Sellers, 35 Kan. 447, 11 Pac. 441; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297; Lancaster *v.* Elliott, 28 Mo. App. 86; Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352; Leake Contr. 2.

Communication of offer see *infra*, II, C, 2, e.

Communication of acceptance see *infra*, II, C, 3, e.

31. Bramwell, B., in Browne *v.* Hare, 3 H. & N. 484, 27 L. J. Exch. 372. And see Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897; Horton *v.* New York L. Ins. Co., 151 Mo. 604, 52 S. W. 356; Fiedler *v.* Tucker, 13 How. Pr. (N. Y.) 9; *In re* National Sav. Bank Assoc., L. R. 4 Eq. 9, 36 L. J. Ch. 748, 16 L. T. Rep. N. S. 308, 15 Wkly. Rep. 754;

mal the words used may be.[32] It may be orally or in writing, by advertisement, placard, handbill, letter, messenger, or telegram.[33]

C. Offer and Acceptance — 1. In General. Every agreement, whether written or oral, is the result of, and springs from, offer and acceptance. The written contract by which one agrees for a certain sum to sell his land to another is simply the expression of a common intention arrived at by them at a moment when the former says, "I will sell you my land" for such sum, and the latter replies, "I will take it at that price," or *vice versa*. So of the multiform transactions of business and social life; the sending of an order by a merchant, the arrival of the goods ordered; the taking up of a book or a basket of fruit by a person in a store; the entry by a passenger into a public conveyance, or of a person into the dining-room of a hotel or restaurant and the furnishing of a meal by the proprietor. There is always the offer and acceptance; sometimes in words alone, sometimes by act alone, sometimes by both words and act.[34]

2. Offer — a. Definition. An offer, as the term is used in the law of contracts, is a proposal to enter into a contract.[35]

b. Forms of Offer — (I) *In General.* The process of offer may take place in four ways: namely, where there is an offer of (1) a promise for assent; (2) an act for a promise; (3) a promise for an act; or (4) a promise for a promise.[36]

(II) *Offer of Promise For Assent.* One may offer to make a promise if the offeree will assent to it. But this kind of an offer, to result in a binding contract, can be made only under seal, as no promise without a consideration is binding upon the promisor.[37] Where a deed containing provisions is offered to another, the acceptance of that deed is an agreement to all the conditions contained therein.[38]

(III) *Offer of Act For Promise.* The offer of an act for a promise takes place where a man offers goods or services to those who will promise to pay him for them; as for example, by the exposure of goods for sale; the sending of goods to another; the running of public conveyances, as omnibuses and street-cars; the doing of work for another with his knowledge, etc.[39]

Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869. See also *infra*, II, C, 3, e, (III).

32. Pendill *v.* Neuberger, 67 Mich. 562, 35 N. W. 249. And see Pittsburg, etc., R. Co. *v.* Racer, 10 Ind. App. 503, 37 N. E. 280, 38 N. E. 186.

33. Whaley *v.* Hinchman, 22 Mo. App. 483; College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. 382 (where it was said: "It is now well-settled law that binding contracts for the sale and delivery of property may be entered into by letters sent through the mail, or by correspondence by means of the telegraph, or by the conjoint use of both these agencies. Almost an unlimited number of adjudicated cases could be cited in support of the proposition. It is also supported by all the standard text-books treating the subject"); Duble *v.* Batts, 38 Tex. 312; Short *v.* Treadgill, 3 Tex. App. Civ. Cas. § 267; The Palo Alto, 2 Ware (U. S.) 344, 18 Fed. Cas. No. 10,700.

Offer and acceptance by mail or telegraph see *infra*, II, C, 7.

34. Anson Contr. 11. Pollock says that agreement arises from (1) the concurrence of the parties in a spoken or written form of words as expressing their common intention; or, (2) a proposal made by one or some of them and accepted by the others or other of them. When the parties execute a deed or sign a written instrument the offer and acceptance is not as clear as when a buyer and seller meet face to face and make an oral bargain. Pollock Contr. 1. But the view of Anson that the idea of offer and acceptance will practically cover both cases seems to be correct, and is admitted by Pollock, where he says that "notwithstanding the difficulties that arise in making proposal and acceptance necessary parts of the general conception of contract, there is no doubt that in practice they are the normal and most important elements." Pollock Contr. 9.

35. Black L. Dict.; Bouvier L. Dict.

36. Anson Contr. 12.

37. Williams *v.* Forbes, 114 Ill. 167, 28 N. E. 463; O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602; Krell *v.* Codman, 154 Mass. 454, 28 N. E. 578, 26 Am. St. Rep. 260, 14 L. R. A. 860; McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612.

Necessity for consideration see *infra*, IV.

Contracts under seal see Bonds, 5 Cyc. 721; Deeds; Seal.

38. Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289.

39. Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Cicotte *v.* St. Anne's Church Corp., 60 Mich. 552, 27 N. W. 682; Painter *v.* Ritchey, 43 Mo. App. 111; Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61. And see *infra*, II, C, 3, c, (II).

(iv) *Offer of Promise For Act.* The offer of a promise for an act takes place in the case of advertised rewards for the recovery of property or the apprehension or detection of a criminal; in the sending of an order for goods to a merchant or manufacturer; in the request of one to another to do work for him; and similar cases.[40]

(v) *Offer of Promise For Promise.* The offer of a promise for a promise is the common case of an offer of one to another to do something, if the other will promise to do something for him, or in consideration of his promise.[41]

c. Certainty of Offer — (i) *In General.* To result in a contract, an offer must be certain. The parties must make their own agreement and not leave it for the court to construct one for them. If an agreement is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, the court cannot enforce it, and since there is no obligation this is no contract.[42] If an agreement is uncertain it is because the offer was uncertain or ambiguous to begin with — for the acceptance is always required to be identical with the offer or there is no meeting of minds and no agreement. If the person to whom

40. Vigo Agricultural Soc. *v.* Brumfield, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657 (where an agricultural society advertised for exhibitors to send their goods for exhibition, and stated that it would have a sufficient police force to protect goods sent); Ahern *v.* Standard L. Ins. Co., 2 Sweeny (N. Y.) 441 (where a person sent an advertisement to a newspaper, and the offer to pay for it was accepted by publishing the advertisement); Babcock *v.* Raymond, 2 Hilt. (N. Y.) 61. And see *infra*, II, C, 3, c, (III).

Implied request.— "It seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request." Crears *v.* Hunter, 19 Q. B. D. 341, 345, 56 L. J. Q. B. 518, 57 L. T. Rep. N. S. 554, 35 Wkly. Rep. 821. And see Oldershaw *v.* King, 2 H. & N. 517, 3 Jur. N. S. 1152, 27 L. J. Exch. 120, 5 Wkly. Rep. 753.

41. See *infra*, IV, D, 10.

42. *Alabama.*— Pulliam *v.* Schimpf, 109 Ala. 179, 19 So. 428; Adams *v.* Adams, 26 Ala. 272; Erwin *v.* Erwin, 25 Ala. 236; Moore *v.* Smith, 19 Ala. 774.

Arkansas. — Lyle *v.* Jackson County, 23 Ark. 63.

Delaware. — Truitt *v.* Fahey, 3 Pennew. 573, 52 Atl. 339.

Illinois.— Woods *v.* Evans, 113 Ill. 186, 55 Am. Rep. 409; Wallace *v.* Rappelye, 103 Ill. 665.

Indiana.— Fairplay School Tp. *v.* O'Neal, 127 Ind. 96, 26 N. E. 686; Freed *v.* Mills, 120 Ind. 27, 22 N. E. 86; First *v.* Bonewitz, 3 Ind. 546.

Iowa.— Faulkner *v.* Des Moines Drug Co., (1902) 90 N. W. 585; Furst *v.* Tweed, 93 Iowa 300, 61 N. W. 857; Palmer *v.* Albee, 50 Iowa 429.

Maryland.— Blakistone *v.* German Bank, 87 Md. 302, 39 Atl. 855; Thomson *v.* Gortner, 73 Md. 474, 21 Atl. 371; Delashmutt *v.* Thomas, 45 Md. 140; Myers *v.* Forbes, 24 Md. 598; Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Massachusetts.— Marble *v.* Standard Oil Co., 169 Mass. 553, 48 N. E. 783.

Michigan.— Leslie *v.* Smith, 32 Mich. 64; Fowler *v.* Hoffman, 31 Mich. 215; Peek *v.* Detroit Novelty Works, 29 Mich. 313.

Mississippi.— Garnett *v.* Kirkman, 33 Miss. 389.

Missouri.— Wesson *v.* Horner, 25 Mo. 81; Burks *v.* Stam, 65 Mo. App. 455; Jones *v.* Durgin, 16 Mo. App. 370.

Montana.— Ahlstrom *v.* Fitzpatrick, 17 Mont. 295, 42 Pac. 757.

Nebraska.— Omaha L. & T. Co. *v.* Goodman, 62 Nebr. 197, 86 N. W. 1082.

New Jersey.— Buckley *v.* Wood, 67 N. J. L. 583, 52 Atl. 564; Culver *v.* Culver, 39 N. J. L. 574; Rue *v.* Rue, 21 N. J. L. 369; Case *v.* Lennington, 3 N. J. L. 853.

New York.— Flaherty *v.* Cary, 62 N. Y. App. Div. 116, 70 N. Y. Suppl. 951; Van Schaick *v.* Van Buren, 70 Hun 575, 24 N. Y. Suppl. 306, 53 N. Y. St. 827; Snow *v.* Russell Coe Fertilizer Co., 58 Hun 134, 11 N. Y. Suppl. 492, 33 N. Y. St. 959; Barnes *v.* Brown, 11 Hun 315; Baurman *v.* Binzen, 16 N. Y. Suppl. 342; Abeel *v.* Radcliff, 13 Johns. 297, 7 Am. Dec. 377.

North Carolina.— Pace *v.* Pace, 73 N. C. 119.

Ohio.— State *v.* Baum, 6 Ohio 383.

Pennsylvania.— Purve's Estate, 196 Pa. St. 438, 46 Atl. 369; Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288; Eldred *v.* Hazlett, 38 Pa. St. 16; Graham *v.* Graham, 34 Pa. St. 475.

Utah.— Reed *v.* Lowe, 8 Utah 39, 29 Pac. 740.

Washington.— Barton *v.* Spinning, 8 Wash. 458, 36 Pac. 439.

Wisconsin.— Leonard *v.* Carter, 16 Wis. 607; Cole *v.* Clark, 3 Pinn. 303, 4 Chandl. 29.

England.— Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 104; Coles *v.* Hulme, 8 B. & C. 568, 7 L. J. K. B. O. S. 29, 3 M. & R. 86, 32 Rev. Rep. 486, 15 E. C. L. 282; Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86; *In re* Clarke, 36 Ch. D. 348; White *v.* Bluett, 2 C. L. R. 301, 23 L. J. Exch. 36, 2 Wkly.

the offer is made sees the uncertainty and proposes a change which shall make the agreement certain, this puts an end to the offer, and the agreement which he has suggested is the result of his new offer and the acceptance of the original proposer. Therefore if the offer is in any case so indefinite as to make it impossible for a court to decide just what it means, and to fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement.[43] A written agreement may be void for uncertainty because of blanks left therein,[44] or failure to name the parties,[45] or because it is so misspelled or ungrammatical, etc., that it has no meaning at all.[46]

Rep. 75; Taylor *v.* Brewer, 1 M. & S. 290, 21 Rev. Rep. 831; Figes *v.* Cutler, 3 Stark. 139, 3 E. C. L. 627.

See 11 Cent. Dig. tit. "Contracts," § 10 *et seq.*

Particular agreements void for uncertainty. — The following agreements and promises have been held void for uncertainty:

An agreement to renew a lease at the end of the term, without saying for what time or at what rent. Baurman *v.* Binzen, 16 N. Y. Suppl. 342; Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377.

A promise by the purchaser of a horse that, "if the horse was lucky [he] would give the defendant 5*l.* more, or the buying of another horse." Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 104. See also Burks *v.* Stam, 65 Mo. App. 455.

An agreement to perform certain services for such remuneration as should be deemed right. Parker *v.* Ibbetson, 4 C. B. N. S. 346, 4 Jur. N. S. 536, 27 L. J. C. P. 236, 6 Wkly. Rep. 519, 93 E. C. L. 346; Roberts *v.* Smith, 4 H. & N. 315, 28 L. J. Exch. 164; Taylor *v.* Brewer, 1 M. & S. 290, 21 Rev. Rep. 831.

A promise to pay "good wages." Fairplay School Tp. *v.* O'Neal, 127 Ind. 95, 26 N. E. 686.

A promise by a man to a woman to give her one hundred acres of land if she would live with him until his marriage. Sherman *v.* Kitsmiller, 17 Serg. & R. (Pa.) 45.

A promise by a man to leave a girl at his death a "child's part" of his estate (Woods *v.* Evans, 113 Ill. 186, 55 Am. Rep. 409); or make her "his heir" (Wallace *v.* Rappelye, 103 Ill. 229).

A promise to give a child a "full share" of property. Adams *v.* Adams, 26 Ala. 272.

A man's promise to a woman, if she would live with him as his wife, to give her a good home as long as he lived and provide for her at his death. Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288.

Promises to "aid and assist" another to get an order of court (Case *v.* Lennington, 3 N. J. L. 853); to use one's "best efforts" to advance the value of land (Barton *v.* Spinning, 8 Wash. 458, 36 Pac. 439); to pay a note "if the corn market should advance sufficiently to justify" it (Thomson *v.* Gortner, 73 Md. 474, 21 Atl. 371); to assist persons by indorsing their paper and advancing them the money to carry on the mercantile business advantageously (Erwin *v.* Erwin, 25 Ala. 236); to carry on a business as long as it should be profitable (Pulliam *v.* Schimpf, 109 Ala. 179, 19 So. 428); to work a mine as long as it could be made to pay (Davie *v.* Lumberman's Min. Co., 92 Mich. 491, 53 N. W. 625, 24 L. R. A. 357).

An agreement that a contract might be canceled for "good cause." Cummer *v.* Butts, 40 Mich. 322, 29 Am. Rep. 530.

Promises to "pay more if he could afford it" (Clark *v.* Pearson, 53 Ill. App. 310); to make "advances" without specifying any sum (Gafford *v.* Proskauer, 59 Ala. 264); to take a house "if put into thorough repair, and the drawing-rooms handsomely decorated according to the present style" (Taylor *v.* Portington, 7 De G. M. & G. 328, 3 Eq. Rep. 781, 1 Jur. N. S. 1057, 56 Eng. Ch. 328); to give the preference in renting property as long as it should be rented as a store (Delashmutt *v.* Thomas, 45 Md. 140); to sell land "reserving the necessary land for making a railway" (Pearce *v.* Watts, L. R. 20 Eq. 492, 23 Wkly. Rep. 771); to rent land to another on his paying the same rent that the promisor might be able to obtain from other parties (Gelston *v.* Sigmund, 27 Md. 334); to employ an actor from a certain day and "as long as the same may be mutually agreed upon" (McIntosh *v.* Miner, 37 N. Y. App. Div. 483, 55 N. Y. Suppl. 1074); to sell oil on such reasonable terms as to enable the purchaser to compete successfully with other parties selling in the same territory (Marble *v.* Standard Oil Co., 169 Mass. 553, 48 N. E. 783); to pay a party for ice to be delivered at a price which should "afford the company a net profit not to exceed one dollar per ton" (Buckmaster *v.* Consumers' Ice Co., 5 Daly (N. Y.) 313); and to reduce rent (Smith *v.* Ankrim, 13 Serg. & R. (Pa.) 39).

Uncertainty in particular contracts see SALES; VENDOR AND PURCHASER; and other special titles.

43. See the cases cited in the preceding note.

44. Chumasero *v.* Gilbert, 24 Ill. 293; Atkins *v.* Van Buren School Tp., 77 Ind. 447; Shepard *v.* Carpenter, 54 Minn. 153, 55 N. W. 906; Rollin *v.* Pickett, 2 Hill (N. Y.) 552. But see Marion School Tp. *v.* Carpenter, 12 Ind. App. 191, 39 N. E. 878.

45. Webster *v.* Ela, 5 N. H. 540; Marshall *v.* White's Creek Tp. Co., 7 Coldw. (Tenn.) 252.

46. Cheney Bigelow Wire Works *v.* Sorrell, 142 Mass. 442, 8 N. E. 332. See Gilpatrick *v.* Foster, 12 Ill. 335, where a credit of "50" was indorsed on a note.

(II) *No Uncertainty if Intention Can Be Ascertained.* An agreement cannot be held uncertain if the court can see what the parties intended and enforce the same.[47] An agreement drawn up by illiterate persons will not be held uncertain, if it is possible for the court to ascertain their meaning.[48] Absolute certainty is not required. That is certain which may be rendered certain, according to the maxim, *id certum est quod certum reddi potest.*[49] A promise not in itself certain may be rendered certain by a reference to something certain.[50]

47. *Alabama.*— Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712.

Florida.— Booske *v.* Gulf Ice Co., 24 Fla. 550, 5 So. 247.

Georgia.— Smith *v.* Bell, 30 Ga. 919; Hart *v.* Conner, 21 Ga. 385.

Illinois.— Grier *v.* Puterbaugh, 108 Ill. 602; Wolf *v.* Willitts, 35 Ill. 88.

Indiana.— Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118; Lafollett *v.* Kyle, 51 Ind. 446.

Iowa.— Cole *v.* Edwards, 93 Iowa 477, 61 N. W. 940.

Massachusetts.— Raymond *v.* Rhodes, 135 Mass. 337; Crawford *v.* Weston, 131 Mass. 283; Gilman *v.* Dwight, 13 Gray 356, 74 Am. Dec. 634; Phelps *v.* Sheldon, 14 Pick. 50, 23 Am. Dec. 659.

Minnesota.— National Protective Assoc. *v.* Prentice Brown Stone Co., 49 Minn. 220, 51 N. W. 916.

Missouri.— Huse, etc., Ice., etc., Co. *v.* Heinze, 102 Mo. 241, 14 S. W. 756.

Nebraska.— Kaufman *v.* U. S. National Bank, 31 Nebr. 661, 48 N. W. 738.

Nevada.— Hyman *v.* Kelly, 1 Nev. 179.

New Mexico.— Bates *v.* Childers, 4 N. M. 347, 20 Pac. 164.

Tennessee.— Levering *v.* Memphis, 7 Humphr. 553.

Virginia.— Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531.

See 11 Cent. Dig. tit. "Contracts," §§ 10–20.

Particular agreements not void for uncertainty.— A promise to give a party the sole right to sell goods in a certain place "and the territory tributary thereto." Kaufman *v.* Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462.

An agreement to sell a stock of merchandise "all soiled or damaged goods at valuation." Sergeant *v.* Dwyer, 44 Minn. 309, 46 N. W. 444.

A promise to give a person "steady and permanent employment." Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802.

A promise to erect a "good steam sawmill" (Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506), a "good bridge" (Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384), or a "neat and tasteful" station (Lawrence *v.* Saratoga Lake R. Co., 3 N. Y. St. 743).

An agreement to employ a person "so long as the works of the first are kept running, or until the other shall see fit to quit." Carter White Lead Co. *v.* Kinlin, 47 Nebr. 409, 66 N. W. 536.

An agreement to pay a person wages "while he was disabled." Pierce *v.* Tennessee Coal, etc., R. Co., 110 Ala. 533, 19 So. 22.

An agreement to give a "good and sufficient" note. Armstrong *v.* Andrews, 109 Mich. 537, 67 N. W. 567.

48. Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657.

49. *Alabama.*— Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712; Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

Arkansas.— McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559.

Illinois.— Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Indiana.— Sutton *v.* Sears, 10 Ind. 223; Marion School Tp. *v.* Carpenter, 12 Ind. App. 191, 39 N. E. 878; Indianapolis Cabinet Co. *v.* Herrmann, 7 Ind. App. 462, 34 N. E. 579.

Iowa.— Miller *v.* Kendig, 55 Iowa 174, 7 N. W. 500.

Massachusetts.— Carnig *v.* Carr, 167 Mass. 544, 46 N. E. 117, 57 Am. St. Rep. 488, 35 L. R. A. 512.

Michigan.— Brigham *v.* Martin, 103 Mich. 150, 61 N. W. 276.

Missouri.— Belch *v.* Miller, 32 Mo. App. 387.

New Hampshire.— Wills *v.* Cutler, 61 N. H. 405.

New Jersey.— Parker *v.* Pettit, 43 N. J. L. 512.

New York.— Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 1111, 30 N. Y. St. 195; Warren *v.* Winne, 2 Lans. 209; Brady *v.* Smith, 8 Misc. 465, 28 N. Y. Suppl. 776, 60 N. Y. St. 58.

North Carolina.— Carpenter *v.* Medford, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535.

Ohio.— Sterling Wrench Co. *v.* Amstutz, 50 Ohio St. 484, 34 N. E. 794.

Pennsylvania.— Thompson *v.* Stevens, 71 Pa. St. 161; Richardson *v.* Gosser, 26 Pa. St. 335.

Tennessee.— Lee *v.* Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800.

Texas.— Shortridge *v.* Allen, 2 Tex. Civ. App. 193, 21 S. W. 419.

Vermont.— Hakes *v.* Hotchkiss, 23 Vt. 231.

United States.— Hitchcock *v.* Galveston, 3 Woods 287, 12 Fed. Cas. No. 6,534.

See 11 Cent. Dig. tit. "Contracts," § 10 *et seq.*

50. As a promise to convey a certain number of acres of land out of a large tract, the location and the method of the ascertainment being pointed out (Carpenter *v.* Lockhart, 1 Ind. 434; Ernshwiller *v.* Tyner, 54 Ohio St. 214, 44 N. E. 811; Washburn *v.* Fletcher, 42 Wis. 152; Cheney *v.* Cook, 7 Wis. 413), or where a surveyor could locate them (White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543); a promise to pay a teacher the same salary "as was established at the date of the con-

An offer to sell goods need not specify the price, for if no price is stated it will be presumed that the reasonable or market-price was intended. And in other like cases, when the terms are not absolutely certain, it is held that the parties have in effect referred the matter to a court or jury in case they disagree about it themselves.[51] Although a contract may be too uncertain in its terms to be

tract for like services by the board of directors of the school district within which the city of Portland is situated" (Caldwell *v.* School Dist. No. 7, 55 Fed. 372); making the promisor's liability that which may be imposed by a certain statute (Hamden *v.* Merwin, 54 Conn. 418, 8 Atl. 670); a promise to sell all the rye straw the promisor "had to spare," not exceeding three tons, the court saying, "If there was no other satisfactory evidence on that subject, the quantity of straw the defendant had sold to Hendrickson after the contract with the plaintiff was made, was competent evidence of the quantity he had to spare" (Parker *v.* Pettit, 43 N. J. L. 512); a promise to pay a certain percentage of the cost of a church site when such cost is ascertained (First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235); a promise to pay an attorney for his services an amount equal to that paid another attorney in the action (Lungerhausen *v.* Crittenden, 103 Mich. 173, 61 N. W. 270); a promise to "the heirs of Jonathan Jesup," a living person (Lockwood *v.* Jesup, 9 Conn. 272); an agreement to deliver so many "car loads" of a certain commodity (Schreiber *v.* Butler, 84 Ind. 576; Indianapolis Cabinet Co. *v.* Herrman, 7 Ind. App. 462, 34 N. E. 579); a promise to give a nurse "plenty after he was gone, so that she need not work" (Thompson *v.* Stevens, 71 Pa. St. 161); an agreement that if the holder of a policy canceled it "a fair proportion of the premiums will be returned" (Hayward *v.* Knickerbocker L. Ins. Co., 12 Daly (N. Y.) 42); a promise to supply all the goods of a certain kind the buyer might "need" or "require" in his business (see *infra*, IV, D, 10, h, (I); an offer by letter to sell land at "ten per acre" and two years' taxes, and an acceptance, naming amount (Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557).

Old English cases.— In an old case A in consideration that B would marry his daughter, promised that he would give her a child's portion, and that at the time of his death he would give to her as much as any of his other children, except his eldest son. This was held to be a good promise, since, although a child's portion was altogether uncertain, yet what the rest of the children except the eldest got reduced it to a sufficient certainty. Silvester's Case, Popham 148; Anonymous, 2 Rolle 104. But if a citizen of London promises a child's portion, that of itself is sufficiently certain; for by the custom there it is certain how much each child shall have. Anonymous, 2 Rolle 104, 1 Lev. 87, 88.

51. Worthington *v.* Beeman, 91 Fed. 232, 33 C. C. A. 475, holding that where by contract defendant gave plaintiff the exclusive sale of a manufactured article in a certain territory during a specified term, and the contract provided that in case plaintiff succeeded in doing such a business as defendant might "reasonably expect" it should be renewed for a further term, the contract was not too indefinite or uncertain in its terms, but that it would support an action for damages for a refusal of defendant to renew at the expiration of the first term, the amount of business which defendant could reasonably expect being a matter which might be determined by a jury. And see Miller *v.* Kendig, 55 Iowa 174, 7 N. W. 500.

Contract for joint use of railroad.— In a suit to compel specific performance of a contract with this clause, "Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies," the court said that although the "statement is that the compensation is to be such 'as may be agreed upon by such companies,' yet the statement that it is to be 'fair and equitable' plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well, but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a 'fair and equitable' compensation therefor is to determine it by a court of equity. Such is, in substance, the agreement of the parties." Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843.

Work or things "satisfactory to promisor." — There are a few anomalous cases holding that where a person has agreed to do work or furnish a thing which shall be satisfactory to the promisor he will be intended to have left the question of satisfaction to the judgment of a court or jury. Hawkins *v.* Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Mullally *v.* Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 618; Duplex Safety Boiler, etc., Co. *v.* Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; Folliard *v.* Wallace, 2 Johns. (N. Y.) 395. The weight of authority, however, is strongly against this view. See *infra*, IX, C, 5, i.

Time of performance.— A contract need not state the time of performance as it will be intended that the parties meant a reasonable time. Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Van Woert *v.* Albany, etc., R. Co., 67 N. Y. 538. See IX, C, 4, b.

Construction of written contracts see *infra*, VIII.

specifically enforced by a court of equity,[52] it may yet be the basis of a remedy at law in favor of a party who has either wholly or partially performed it.[53]

d. Terms of Offer — (i) *In General.* One who makes an offer to enter into a contract may do so of course upon any terms he may see fit, so long as they are not illegal, and if the offer is accepted they are binding on both parties.[54] If the terms are expressed and are legal, the only difficulty is in ascertaining the intention of the parties.[55]

(ii) *Unexpressed Terms* — (a) *In General.* There are many terms not actually expressed in the offer which are implied by law and are as binding on both parties after acceptance as though actually spoken or written into the contract. A contract, it may be truly said, includes not only what the parties actually wrote down or said, but all those things which the law implies as part of it, and likewise all matters which both the parties intended to express, but did not.[56]

(b) *Usages and Customs of Trade.* Every trade, business, or calling has its usages, and persons who make offers relating thereto assume that all the customary incidents of such callings shall be part of the agreement and hence do not expressly refer to them. Although unexpressed, they are implied terms of the contract; and this is as true in the case of written as of oral contracts.[57]

(iii) *Terms Not Appearing on Face of Offer.* An offer may consist of various terms, some of which are not expressed on its face, but are contained in a document which is delivered to the other party. The person accepting the offer may or may not be bound by such terms according to the circumstances.[58]

e. Communication of Offer — (i) *In General.* To constitute an agreement, it is obvious that the intention of the parties must be communicated.[59] One cannot accept an offer which has not been communicated to him, and therefore as a general rule an uncommunicated offer, whether by words or acts, cannot result in a contract.[60]

(ii) *Performance of Services and Other Acts Without Request or Knowledge.* It follows from this principle that where services are rendered for another without his request or knowledge he cannot be held liable to pay for them. This has repeatedly been held.[61] The principle which these cases estab-

52. A greater degree of certainty is required in the case of specific performance of a contract in equity than in an action upon it at law. Foster *v.* Kimmons, 54 Mo. 488; Belch *v.* Miller, 32 Mo. App. 387. See Specific Performance.

53. Alabama, etc., R. Co. *v.* South, etc., R. Co., 84 Ala. 570, 3 So. 286; Lanford *v.* U. S. Wooden Ware Co., 127 Mich. 614, 86 N. W. 1033; Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384; Walsh *v.* Myers, 92 Wis. 397, 66 N. W. 250; Worthington *v.* Beeman, 91 Fed. 232, 33 C. C. A. 475.

54. As to illegality see *infra*, VII.

Imposing terms and conditions as to acceptance see *infra*, II, C, 3, d, (i).

55. Construction of contracts see *infra*, VIII.

56. Terms implied by law.— Thus on a sale of chattels all the warranties as to title or quality which the law implies are a part of it, although unexpressed. See Sales.

Contracts for services.— On an offer to do work or service of any kind for another, it is a part of the offer implied by law that the offerer has the skill to do the service he offers to do and that he will use that skill, etc. See Master and Servant.

Parol evidence to vary contract.— Where a contract is in writing and there was no fraud or mistake parol evidence is not admissible to add terms not expressed therein and not implied by law. See *infra*, VIII; and, generally, Evidence. But if terms are omitted through fraud or mistake the contract may be reformed in equity and enforced according to the intention. See Reformation of Instruments.

57. Sumner *v.* Stewart, 69 Pa. St. 321. See Customs and Usages.

58. See *infra*, II, C, 3, c, (vi).

59. Communication of intention see *supra*, II, B, c.

60. James *v.* Marion Fruit Jar, etc., Co., 69 Mo. App. 207, and other cases cited in the notes following.

Uncommunicated terms.— Whether or not a person who accepts an offer is bound by terms not communicated to him is elsewhere considered. See *infra*, II, C, 3, c, (vi).

61. *Alabama.*— Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51.

Arizona.— Davis *v.* Breon, 1 Ariz. 240, 25 Pac. 537.

California.— Nagle *v.* McMurray, 84 Cal. 539, 24 Pac. 107.

Colorado.— Mann *v.* Farnum, 17 Colo. 427, 30 Pac. 332.

Illinois.— Alton *v.* Mulledy, 21 Ill. 76; Tascott *v.* Grace, 12 Ill. App. 639.

lish is that a man cannot be forced to pay for what he has had no opportunity to reject. As the offer has not been communicated to the party to whom it is

Kansas.— Muscott *v.* Stubbs, 24 Kan. 520.

Louisiana.— Board of Levee Com'rs *v.* Harris, 20 La. Ann. 201; White *v.* Jones, 14 La. Ann. 681; Watson *v.* Ledoux, 8 La. Ann. 68.

Massachusetts.— Doane *v.* Badger, 12 Mass. 65 (where the plaintiff without the request of the defendant repaired a well and pump situated on the land of the defendant which the plaintiff claimed the privilege of using); Loring *v.* Bacon, 4 Mass. 575 (where the plaintiff owning the upper, and the defendant the lower, floor of a house, repaired the roof, after requesting the defendant to join him in it, which the latter refused to do).

Michigan.— Woods *v.* Ayres, 39 Mich. 345, 33 Am. Dec. 396; Thornton *v.* Sturgis, 38 Mich. 639 (where a newspaper had published the ordinances of a village without authority, and sought recovery therefor).

Mississippi.— Hazlip *v.* Leggett, 6 Sm. & M. 326.

Missouri.— Holmes *v.* Kansas City, 81 Mo. 137; Yeats *v.* Ballentine, 56 Mo. 530; Watkins *v.* Richmond College Trustees, 41 Mo. 302; Morris *v.* Barnes, 35 Mo. 412; Bailey *v.* Gibbs, 9 Mo. 45; Hartnett *v.* Christopher, 61 Mo. App. 64; Heimenz *v.* Goerger, 51 Mo. App. 586.

New Hampshire.— Chadwick *v.* Knox, 31 N. H. 226, 44 Am. Dec. 329, where one without request endeavored to obtain a pardon for the defendant.

New Jersey.— Force *v.* Haines, 17 N. J. L. 385.

New York.— Manhattan F. Alarm Co. *v.* Weber, 22 Misc. 729, 50 N. Y. Suppl. 42; Brennan *v.* Chapin, 19 N. Y. Suppl. 237, 46 N. Y. St. 768 (where one shod another's horses without his knowledge or request); Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440 (where the plaintiff and defendant were tenants in common of a building, and the plaintiff made repairs, but not at the request of the defendant); Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237 (where a farmer, seeing his neighbor's stack of wheat in danger of fire, removed it to a safe place and then sued for his services); Brooks *v.* Read, 13 Johns. 380 (where the overseers of the poor of one town assisted a pauper belonging to another town, he being so sick that he could not be removed to such other town); Everts *v.* Adams, 12 Johns. 352 (where a physician furnished medicine to a pauper, but not at the request of the overseers of the poor, and then sued them for payment); Beach *v.* Vanderburg, 10 Johns. 361; Dunbar *v.* Williams, 10 Johns. 249 (where the plaintiff, a physician, administered medicine to the defendant's slave, in a case not of pressing necessity); Jones *v.* Wilson, 3 Johns. 434.

South Carolina.— Caldwell *v.* Eneas, 2 Mill 348, 12 Am. Dec. 681; James *v.* O'Driscoll, 2 Bay 101, 1 Am. Dec. 632.

Washington.— Williams *v.* Miller, 1 Wash. Terr. 88.

United States.— Coleman *v.* U. S., 152 U. S. 96, 14 S. Ct. 473, 38 L. ed. 368; Boston *v.* District of Columbia, 19 Ct. Cl. 31 (where a person without authority from a city dumped earth into an old canal, although it benefited the city to have the canal filled).

England.— Newby *v.* Witshire, 3 B. & P. 247, Cald. 527, 4 Dougl. 284, 2 Esp. 739, 5 Rev. Rep. 772, 26 E. C. L. 477 (where the parish officer furnished surgical assistance to the defendant's servant who had sustained an accident); Taylor *v.* Laird, 1 H. & N. 266, 25 L. J. Exch. 329 (where the plaintiff, who had been engaged to command the defendant's ship, threw up the command in the course of the voyage, but helped to work the vessel home, and then sued for the services thus rendered).

"Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?" Pollock, C. B., in the leading case of Taylor *v.* Laird, 1 H. & N. 266, 25 L. J. Exch. 329.

Where one pays another's debt without his request, he cannot recover the amount from the other, unless the circumstances bring the case within the doctrine allowing a recovery in assumpsit for money paid to the use of another. Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162; Baltimore *v.* Hughes, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243; Meier *v.* Meier, 88 Mo. 566 [*affirming* 15 Mo. App. 68]; Johnson *v.* Royal Mail-Steam Packet Co., L. R. 3 C. P. 38, 37 L. J. C. P. 33, 17 L. T. Rep. N. S. 445; *In re* Winchelsea's Policy Trusts, 39 Ch. D. 168, 58 L. J. Ch. 20, 59 L. T. Rep. N. S. 167, 37 Wkly. Rep. 77; Falcke *v.* Scottish Imperial Ins. Co., 34 Ch. D. 234, 56 L. J. Ch. 707, 56 L. T. Rep. N. S. 220, 35 Wkly. Rep. 143; *In re* Leslie, 23 Ch. D. 552; *Ex p.* Bishop, 15 Ch. D. 400, 50 L. J. Ch. 18, 43 L. T. Rep. N. S. 165, 29 Wkly. Rep. 144; Sleigh *v.* Sleigh, 5 Exch. 514, 19 L. J. Exch. 345; Bates *v.* Townley, 2 Exch. 152, 12 Jur. 606, 19 L. J. Exch. 399; Cumming *v.* Bedborough, 15 M. & W. 438. See also *infra*, IV, D, 9, c, note 93; and MONEY PAID.

One paying the funeral expenses of another cannot recover from his estate in some jurisdictions. Foley *v.* Bushway, 71 Ill. 386; Lerch *v.* Emmett, 44 Ind. 331; Ward *v.* Jones, 44 N. C. 127; Gregory *v.* Hooker, 8 N. C. 394, 9 Am. Dec. 646. *Contra.* Rappelyea *v.* Russell, 1 Daly (N. Y.) 214; Matter of Miller, 4 Redf. Surr. (N. Y.) 302; Frances' Estate, 75 Pa. St. 220; Samuel *v.* Thomas, 51 Wis. 549, 8 N. W. 361. See EXECUTORS AND ADMINISTRATORS; MONEY PAID.

intended to be made there is no opportunity to reject it and no presumption of acquiescence.[62]

(III) *Performance of Services and Other Acts Without Knowledge of Offer.* It would also seem clear that where one performs services by which another is benefited he cannot recover on the other's offer to pay for them, of which he had no knowledge when the services were rendered.[63] Where a person does an act for which a reward has been offered, not knowing at the time he does the act that the offer has been made, there can be no meeting of minds between the parties nor can his act be said to have been affected by the unknown offer. Hence it has been properly held that a reward cannot be claimed by one who did not know that it had been offered.[64] In some states the contrary has been held,[65] although it would seem not on logical grounds.[66]

3. Acceptance of Offer — a. Necessity For. Before an offer can become a binding promise and result in a contract it must be accepted, either by word or act, for without this there cannot be agreement.[67]

62. See the cases cited in the preceding note.

63. Ball *v.* Newton, 7 Cush. (Mass.) 599, holding that one who promises in writing "to pay the master's, clerk's, messenger's and assignee's fees, respectively," in certain proceedings in insolvency about to be commenced, which promise is delivered to the clerk at the first meeting of creditors, is not liable to the assignee for his services in the case, if it does not appear that the assignee knew of the promise until after he had performed the services. And see the cases in the note following.

64. Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95; Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296.

65. *Delaware.*— Eagle *v.* Smith, 4 Houst. 293.

Indiana.— Monroe County *v.* Wood, 39 Ind. 345; Dawkins *v.* Sappington, 26 Ind. 199; Everman *v.* Hyman, 3 Ind. App. 459, 29 N. E. 1140.

Kentucky.— Auditor *v.* Ballard, 9 Bush 572, 15 Am. Rep. 728.

Vermont.— Russell *v.* Stewart, 44 Vt. 170.

England.— See Gibbons *v.* Proctor, 55 J. P. 616, 64 L. T. Rep. N. S. 594.

66. Some of the cases recognize such a conclusion as anomalous and contrary to principle, but sustain it on grounds of public policy. Others appear to be the result of a misunderstanding of the old English case of Williams *v.* Carwardine, 4 B. & Ad. 621, 625, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418, where the plaintiff gave information as to a murder "believing that she had not long to live, and to ease her conscience." Afterward she recovered and sued for the reward and was held entitled to recover. It was not objected to the recovery that she did not know of the offer (for the report is silent as to her knowledge of it) when she gave the information, but that the reward was not the motive for her act. The court held that the motive was immaterial. See *contra*, Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65 (where the intention to claim the reward was held essential); Burke *v.* Wells, 50 Cal. 218.

67. *Alabama.*— Chambliss *v.* Smith, 30 Ala. 366.

Florida.— Etheredge *v.* Barkley, 25 Fla. 814, 6 So. 861.

Illinois.— Esmay *v.* Gorton, 18 Ill. 483; McKinley *v.* Watkins, 13 Ill. 140; Payne *v.* Newby, 49 Ill. App. 141.

Indiana.— Ritenour *v.* Mathews, 34 Ind. 279.

Iowa.— Scribner *v.* Rutherford, 65 Iowa 551, 22 N. W. 670.

Kansas.— Smith *v.* School Dist. No. 2, 17 Kan. 313.

Kentucky.— Baldwin *v.* Com., 11 Bush 417; Moxley *v.* Moxley, 2 Metc. 309; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Eagle Distilling Co. *v.* McFarland, 14 Ky. L. Rep. 860; Tunnel's Mill, etc., Turnpike Road Co. *v.* Selectmen, 14 Ky. L. Rep. 174.

Louisiana.— Stockton *v.* Firemen's Ins. Co., 33 La. Ann. 577, 39 Am. Rep. 271; Holtzman *v.* Millaudon, 18 La. Ann. 29; Vicksburg, etc., R. Co. *v.* Hamilton, 15 La. Ann. 521; Erwin *v.* Kentucky Bank, 5 La. Ann. 1; MaCarty *v.* Lepaullard, 4 Rob. 425; Williams *v.* Duer, 14 La. 523; Cavelier *v.* Germain, 6 La. 215; McDonough *v.* Winchester, 1 La. 188.

Maine.— Belfast, etc., R. Co. *v.* Unity, 62 Me. 148; Weston *v.* Davis, 24 Me. 374.

Maryland.— King *v.* Warfield, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384.

Massachusetts.— Thruston *v.* Thornton, 1 Cush. 89.

Michigan.— Bronson *v.* Herbert, 95 Mich. 478, 55 N. W. 359; McDonald *v.* Bewick, 51 Mich. 79, 16 N. W. 240; Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84; Ahearn *v.* Ayres, 38 Mich. 692; Weiden *v.* Woodruff, 38 Mich. 130.

Minnesota.— Graff *v.* Buchanan, 46 Minn. 254, 48 N. W. 915.

Missouri.— Lungstraus *v.* German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100; Watkins *v.* Richmond College Trustees, 41 Mo. 302;

b. Who May Accept — (I) *PARTICULAR OFFERS.* When an offer is made to a particular person it can be accepted by him alone[68] and is not assignable to another.[69]

(II) *GENERAL OFFERS.* A general offer made to the public, or to a particular class of persons, may be accepted by any one, or by any one coming within the description of the class,[70] as for example in case of an offer of a prize for a design for a public building[71] or a bonus to any one who will make a certain improvement,[72] or a reward for the recovery of property or the apprehension of a criminal,[73]

Brown *v.* Rice, 29 Mo. 322; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297; Taylor *v.* Fox, 16 Mo. App. 527.

New Jersey.— Heller *v.* Groves, (1887) 8 Atl. 652; Isham *v.* Therasson, 53 N. J. Eq. 10, 30 Atl. 969.

New York.— Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358; Sutton *v.* Cronin, 3 Rob. 493; Butterfield *v.* Spencer, 1 Bosw. 1; Britton *v.* Phillips, 24 How. Pr. 111; Corning *v.* Colt, 5 Wend. 253; Tucker *v.* Woods, 12 Johns. 190, 7 Am. Dec. 305; Tuttle *v.* Love, 7 Johns. 470; Bruce *v.* Pearson, 3 Johns. 534.

Pennsylvania.— Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31; Ueberroth *v.* Riegel, 71 Pa. St. 280; Collins *v.* Baumgardner, 52 Pa. St. 461; Shupe *v.* Galbraith, 32 Pa. St. 10; Hester *v.* McNeille, 6 Phila. 234, 24 Leg. Int. 237; Lehigh Valley R. Co. *v.* Gray, 3 Walk. 224.

South Carolina.— Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19.

Texas.— Smith *v.* Lightner, (Tex. Civ. App. 1894) 26 S. W. 779; Turner *v.* Brooks, 2 Tex. Civ. App. 451; Kraft *v.* Sims, 1 Tex. App. Civ. Cas. § 404.

Vermont.— Bruce *v.* Bishop, 43 Vt. 161.

Virginia.— Stuart *v.* Valley R. Co., 32 Gratt. 146.

Wisconsin.— Hall *v.* Wilson, 6 Wis. 433.

England.— Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

See 11 Cent. Dig. tit. "Contracts," § 61.

Actual acceptance.— To convert an offer into an agreement it is not sufficient to show strong probability that it was accepted or would have been accepted under certain circumstances, but actual acceptance must be proved either directly or indirectly. Stockton *v.* Firemen's Ins. Co., 33 La. Ann. 577, 37 Am. Rep. 277.

68. Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Quincy First Nat. Bank *v.* Hall, 101 U. S. 43, 25 L. ed. 822; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; Cooke *v.* Hemming, L. R. 3 C. P. 334, 37 L. J. C. P. 179, 18 L. T. Rep. N. S. 772, 16 Wkly. Rep. 903; Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Robson *v.* Drummond, 2 B. & Ad. 303, 9 L. J. K. B. O. S. 187, 22 E. C. L. 132; Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107; Meynell *v.* Surtees, 3 Sm. & G. 101.

An offer by A to sell to B cannot be accepted by C, so as to establish a contract with A. Meynell *v.* Surtees, 3 Sm. & G. 101.

An offer of employment made to one cannot be accepted by another without the offerer's consent. Schmaling *v.* Thomlinson, 1 Marsh. 500, 6 Taunt. 147, 1 E. C. L. 549.

An offer to buy of one manufacturer cannot be accepted by another who has succeeded to his business. Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; British Wagon Co. *v.* Lea, 5 Q. B. D. 149, 44 J. P. 440, 49 L. J. Q. B. 321, 42 L. T. Rep. N. S. 437, 28 Wkly. Rep. 349; Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107.

A proposal sent by mail to the offerer's agent or a third party with a request that he will communicate it to A may, after such communication, be accepted by the latter mailing a letter to the offerer himself. Bryant *v.* Booze, 55 Ga. 438.

69. Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107, and other cases cited in the preceding note.

70. Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612; Patton *v.* Hassinger, 69 Pa. St. 311; Smith *v.* Wheatcroft, 9 Ch. D. 223, 47 L. J. Ch. 745, 39 L. T. Rep. N. S. 103, 27 Wkly. Rep. 42; Weidner *v.* Hoggett, 1 C. P. D. 533, 35 L. T. Rep. N. S. 368; Fellowes *v.* Gwy-dyr, 1 Russ. & M. 83, 5 Eng. Ch. 83.

71. Walsh *v.* St. Louis Exposition, etc., Assoc., 90 Mo. 459, 2 S. W. 842 [*affirming* 16 Mo. App. 502].

72. Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62.

73. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

California.— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Illinois.— Montgomery County *v.* Robinson, 85 Ill. 174; Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Harson *v.* Pike, 16 Ind. 140.

Massachusetts.—Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747; Loring *v.* Boston, 7 Metc. 409; Wentworth *v.* Day, 3 Metc. 352, 37 Am. Dec. 145.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New York.— Pierson *v.* Morch, 82 N. Y. 503.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

England.— Tarner *v.* Walker, L. R. 2 Q. B. 301, 8 B. & S. 314, 36 L. J. Q. B. 112, 16 L. T. Rep. N. S. 234, 15 Wkly. Rep. 407;

or any other act,[74] and other like cases.[75] Such offers, although made to an unascertained person or persons, cannot of course be turned into an agreement until they have been accepted by an ascertained person, but as soon as there is an acceptance by a person within the offer there is a binding contract.[76] No one can accept unless he falls within the class to whom the offer is made.[77]

c. Forms of Acceptance — (I) *Acceptance by Assent.* The process of acceptance, like the process of offer, may take place in several ways. In the first place, it may be by simple assent, but in this case, as we have seen, the acceptance is of no legal effect, unless the offer has been made under seal.[78] What is a sufficient consideration for a parol promise depends on the terms prescribed by the promisor and may be as various as the human mind; but it must in general be some act done or forbearance to act, or some engagement made at his request, and beneficial to him or detrimental to the promisee.[79]

(II) *Acceptance by Promise.* An offer of a promise or an act may be accepted by giving a promise, as where a person offers to pay another a certain sum if he will do something for him on a future day, and the other accepts by promising to do so according to the conditions of the offer. Whenever the offerer (the promisor) requires that the promisee shall enter into a mutual engagement, the condition must be fulfilled, and performance will not suffice without a promise to perform.[80] The promise need not be by words but may be inferred from the acts of the parties, as by one or both acting upon it as though it were a completed agreement.[81] If a person sends goods to another, and the latter uses the goods, keeps them, or deals with them as his, he will be liable on an implied promise to pay what the goods are worth, unless he had a right to suppose, and did suppose, that a gift was intended. The acceptance by their use

Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 1 N. & M. 418; Thatcher *v.* England, 3 C. B. 254, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254; Bent *v.* Wakefield, etc., Union Bank, 14 Cox C. C. 208, 4 C. P. D. 1, 39 L. T. Rep. N. S. 576, 27 Wkly. Rep. 168.

And see Rewards.

74. McClure *v.* Wilson, 43 Ill. 356; Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; Carlill *v.* Carbolic Smoke Ball Co., [1892] 2 Q. B. 484, 56 J. P. 665, 61 L. J. Q. B. 696 [*affirmed* in [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210].

75. As where a bank advertises that it will redeem all bills of a certain class presented to it (Tarbell *v.* Stevens, 7 Iowa 163); where one gives an open letter of credit (*In re* Agra, etc., Bank, L. R. 2 Ch. 391; Maitland *v.* Chartered Mercantile Bank, 2 Hem. & M. 440, 38 L. J. Ch. 363, 12 L. T. Rep. N. S. 372; Canada Union Bank *v.* Cole, 47 L. J. C. P. 100); where carriers advertise the arrival and departure of trains, boats, and other public conveyances (*infra*, II, C, 4, h); where bounties are offered by municipal bodies to persons who shall enlist into the military service of the United States (Crowell *v.* Hopkinton, 45 N. H. 9); where premiums are offered on horse-races (Alvord *v.* Smith, 63 Ind. 58); and where persons purchasing a railroad on foreclosure and organizing a new company offer to exchange new stock for old (Schorestene *v.* Iselin, 69 Hun (N. Y.) 250, 23 N. Y. Suppl. 557, 53 N. Y. St. 347).

76. See the cases above cited.

77. Indianapolis, etc., R. Co. *v.* Miller, 71 Ill. 463, where, after laborers employed by contractors and subcontractors to build a railroad stopped work and were creating a disturbance, fearing they would not be paid, the president of the railroad came out and said to them: "Go back to your work, and I will see that you are paid," and one of the subcontractors who was present and heard the offer brought action for his pay. It was held that the offer was not made to him, and that there was no agreement with him.

78. See *supra*, II, C, 2, b, (II).

79. **Consideration** see *infra*, IV, D.

80. Hare Contr. 304.

81. *Iowa.*— Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. Rep. 284.

Louisiana.— Woodworth *v.* Wilson, 11 La. Ann. 402; Bell *v.* Lawson, 12 Rob. 152; Twichel *v.* Andry, 6 Rob. 407; Frazier *v.* Dick, 5 Rob. 249; Amory *v.* Black, 13 La. 264.

Massachusetts.— Barber *v.* Coburn, 165 Mass. 323, 43 N. E. 95.

Michigan.— Snow *v.* Weber, 39 Mich. 143.

Minnesota.— Ellsworth *v.* Southern Minnesota R. Extension Co., 31 Minn. 543, 18 N. W. 822.

Missouri.— Botkin *v.* McIntyre, 81 Mo. 557.

Nevada.— Hillyer *v.* Overman Silver Min. Co., 6 Nev. 51.

New York.— Allis *v.* Read, 45 N. Y. 142; New York, etc., R. Co. *v.* Pixley, 19 Barb. 428.

Pennsylvania.— Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564;

raises an implied promise to pay their price.[82] The principle also applies where a person takes up wares from a tradesman without any agreement as to price, the law implying that he contracts to pay their value,[83] where a person proposes to another to work for him and the other goes to work,[84] and where a man allows another to work for him under such circumstances that no reasonable man would suppose that he meant to do the work for nothing, the law in such cases, from the permission to do the work, or acquiescence in its being done, implying a promise to pay for it.[85]

(III) *ACCEPTANCE BY ACT.* An acceptance of an offer may be by act, as where an offer is made that the offerer will pay or do something else, if the

Mercer Min., etc., Co. *v.* McKee, 77 Pa. St. 170.

Wisconsin.— Watters *v.* Glendenning, 87 Wis. 250, 58 N. W. 404.

United States.— U. S. *v.* Carlisle, 25 Fed. Cas. No. 14,742.

Lease.— Where a person offered to rent a store to another, and the latter telephoned asking if it would be right for him to move in, and moved in on receiving an affirmative reply, it was held an acceptance of the offer. Smith *v.* Ingram, 90 Ala. 529, 8 So. 144.

Renewal of lease.— Where a landlord offered his tenant a renewal of the lease on certain terms and the tenant proceeded to break the ground and put in crops, it was held an acceptance of the offer of renewal. Springer *v.* Cooper, 11 Ill. App. 267; Lawrence *v.* Saratoga Lake R. Co., 3 N. Y. St. 743. See LANDLORD AND TENANT.

82. *Alabama.*— Davis *v.* Badders, 95 Ala. 348, 10 So. 422; Kinney *v.* South, etc., R. Co., 82 Ala. 368, 3 So. 113.

Indiana.— Orme *v.* Cooper, 1 Ind. App. 449, 27 N. E. 655.

Louisiana.— Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714; Bradford *v.* Brown, 11 Mart. 217.

Massachusetts.— Hobbs *v.* Massasoit Mfg. Co., 158 Mass. 194, 33 N. E. 495.

Michigan.— McClary *v.* Michigan Cent. R. Co., 102 Mich. 312, 60 N. W. 695; Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904.

Minnesota.— Rosenfeld *v.* Swenson, 45 Minn. 190, 47 N. W. 718; Dean *v.* Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321.

New York.— Empire Steam Pump Co. *v.* Inman, 59 Hun 230, 12 N. Y. Suppl. 948, 36 N. Y. St. 111; Doerr *v.* Woolsey, 15 Daly 284, 7 N. Y. Suppl. 662, 28 N. Y. St. 401.

Oregon.— Kiser *v.* Holladay, 29 Oreg. 338, 45 Pac. 759.

Pennsylvania.— Indian Mfg. Co. *v.* Hayes, 155 Pa. St. 160, 26 Atl. 6.

United States.— U. S. *v.* Berdan Firearms Mfg. Co., 156 U. S. 552, 15 S. Ct. 420, 39 L. ed. 530; Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411.

England.— Mavor *v.* Pyne, 3 Bing. 285, 11 E. C. L. 144, 2 C. & P. 91, 12 E. C. L. 467, 11 Moore C. P. 2, 28 Rev. Rep. 625; Hart *v.* Mills, 15 L. J. Exch. 200, 15 M. & W. 85.

Where in response to an advertisement soliciting articles for a newspaper, with a promise of payment, a person sent an article, which the proprietor of the newspaper printed, it was held that the latter was liable for the price. Babcock *v.* Raymond, 2 Hilt. (N. Y.) 61.

83. Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231. See also Mavor *v.* Pyne, 3 Bing. 285, 11 E. C. L. 144, 2 C. & P. 91, 12 E. C. L. 467, 11 Moore C. P. 2, 28 Rev. Rep. 625, where a person subscribed for a work in parts, received eight parts, and then refused to receive any more, but no action could be brought upon the original contract for want of writing in compliance with the statute of frauds. It was held that there was an acceptance of each of the eight numbers received, creating a promise to pay for them.

84. Seal *v.* Erwin, 2 Mart. N. S. (La.) 245; Patton *v.* Hassinger, 69 Pa. St. 311; Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

Sale of goods on commission.— Where a person notified another that his charges for selling goods on commission were so much, and the other shipped goods to him for sale, it was held an acceptance of the former's offer. Beardsley *v.* Davis, 52 Barb. (N. Y.) 159.

85. *Alabama.*— Joseph *v.* Southwark Foundry, etc., Co., 99 Ala. 47, 10 So. 327.

Colorado.— Mann *v.* Farnum, 17 Colo. 427, 30 So. 332.

Illinois.— Huck *v.* Flentye, 80 Ill. 258; De Wolf *v.* Chicago, 26 Ill. 443.

Indiana.— Lockwood *v.* Robbins, 125 Ind. 398, 25 N. E. 455.

Massachusetts.— Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347.

Missouri.— Thomas *v.* Walnut Land, etc., Co., 43 Mo. App. 653.

North Carolina.— Blount *v.* Guthrie, 99 N. C. 93, 5 S. E. 890.

Pennsylvania.— Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61; Hartupee *v.* Pittsburg, 97 Pa. St. 107.

Vermont.— Tucker *v.* Preston, 60 Vt. 473, 11 Atl. 726.

England.— Paynter *v.* Williams, 1 Cr. & M. 810, 2 L. J. M. C. 105, 3 Tyrw. 894.

If a party voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable and his exercise of the option to avail himself of them justify the

offeree shall do a particular thing. In such a case performance is the only thing needful to complete the agreement and create a binding promise.[86] But when the offeree expressly states that he will not agree to the terms of the offer no agreement can be inferred from his acts.[87] The acts relied on may not preclude the party from showing no acceptance, or an acceptance varying from the terms of the offer.[88]

(IV) *ACCEPTANCE BY SILENCE.* Acceptance of an offer may often be inferred from silence. If a person sends goods to another without request, we have seen that if he uses them or deals with them as his own his acceptance of them will be implied.[89] He is not bound, however, to return them, and from his mere failure to do so he cannot be charged with accepting them.[90] Silence alone does not give consent, even by estoppel, for there must not only be the right, but the duty, to speak before the failure to do so can estop a person from afterward setting up the truth.[91] Certainly one person cannot impose a duty upon another and make him a purchaser in spite of himself by sending goods to him, unless he will take the trouble and bear the expense of notifying the sender that he will not buy.[92] It is otherwise of course if the relation of the parties, their previous dealings, or other circumstances are such as to impose a duty to speak.[93] It has been held

inference. Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Emery *v.* Cobbey, 27 Nebr. 621, 43 N. W. 410. See WORK AND LABOR.

Acceptance by silence see *infra*, II, C, 3, c, (IV).

86. *Iowa.*— Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99, 1 Am. Rep. 256.

Massachusetts.— Springfield *v.* Harris, 107 Mass. 532; Davis *v.* Second Universalist Meeting-house, 8 Metc. 321.

Missouri.—Botkin *v.* McIntyre, 81 Mo. 557; Lungstrass *v.* German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

New York.— Dent *v.* North American Steamship Co., 49 N. Y. 390; Coston *v.* Morris, 4 N. Y. Suppl. 89, 21 N. Y. St. 967.

North Carolina.—Horner *v.* Baker, 74 N. C. 65.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

See 11 Cent. Dig. tit. "Contracts," § 75.

87. Lamson Consolidated Store-Service Co. *v.* Weil, 15 Daly (N. Y.) 498, 8 N. Y. Suppl. 336, 29 N. Y. St. 307, where a person notified another by letter that an apparatus would be removed unless the other agreed to hire it at twenty dollars per annum, and the other replied that he would not pay more than ten dollars per annum. It was held that his continued use of the apparatus was not an acceptance of the offer.

88. McClure *v.* Times Pub. Co., 169 Pa. St. 213, 32 Atl. 293. In this case plaintiff offered defendant's manager to supply it with certain writings of certain authors for publication for a year in weekly instalments on certain terms; the manager declined to make a contract for a year, but offered to contract on other terms suggested by him. The parties separated without agreement. Subsequently defendant published in its newspaper an announcement that certain authors named, nearly all of whom were those whose writings were embraced in plaintiff's offer and with whom defendant had no contracts, would contribute to its pages during the ensuing year. It was held that such publication did not in law constitute an acceptance of plaintiff's proposal, but was at most an item of evidence to be considered in determining that question, and further that such publication did not operate as an estoppel, so as to prevent defendant from showing that plaintiff's offer was not accepted.

89. See *supra*, II, C, 3, c, (II).

As where he permits third persons to deal with the goods. Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015; Bartholomae *v.* Paull, 18 W. Va. 771.

90. Pollock Contr. 11. *Compare* Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015.

91. New York Rubber Co. *v.* Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822, where a riparian owner saw the owner on the opposite side of the stream erecting a factory upon his premises and digging a race which she knew would return the water, diverted from the stream, to it at a point below her land. It was held that her omission to object in any way to the proposed diversion of the water did not constitute an estoppel barring an action to recover for such diversion.

92. Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622; Orcutt *v.* Roxbury, 17 Vt. 524.

When one sends an advertisement to a newspaper for a specific time, and the paper continues to publish it after the time has expired, no promise to pay for the continued publication can be inferred from the fact that the advertiser saw the advertisement, continued to take the paper, and did not countermand it. Dake *v.* Patterson, 5 Hun (N. Y.) 558; Wasilewski *v.* Wendell, 9 N. Y. St. 508.

93. Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495, where, in an action to recover for skins shipped defendant, and retained by him several months without notifying plaintiff whether he had accepted them,

that although one has not ordered a newspaper or periodical to be sent to him, or his subscription has expired, yet if the paper is sent to him through the post and he takes it out and uses it, an acceptance by conduct of the offer would be inferred.[94] An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply,[95] even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance.[96] In like manner mere delay in accepting or

it appeared that plaintiff had made several prior shipments to defendant, which it had accepted and paid for. It was held that an instruction that whether there was any prior contract or not, if defendant after receiving the skins saw fit to remain silent, having reason to suppose that plaintiff believed from its silence that it had accepted them, then if it failed to notify plaintiff he is entitled to recover, was proper. See also Gallup *v.* Smith, 24 Ill. 586; Emery *v.* Cobbey, 27 Nebr. 621, 43 N. W. 410; O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. 1020; Nicholas *v.* Austin, 82 Va. 817, 1 S. E. 132. And see Day *v.* Caton, 119 Mass. 513, 516, 20 Am. Rep. 347, where the court said: "If a person saw day after day a laborer at work in his field doing services, which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, . . . might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury." See WORK AND LABOR.

Where goods are sent in response to an order, and they are not the goods ordered, the party receiving them must notify the seller within a reasonable time or he will be held to have accepted them. Couston *v.* Chapman, L. R. 2 H. L. Sc. 250; Beverley *v.* Lincoln Gas Light, etc., Co., 6 A. & E. 829, 7 L. J. Q. B. 113, 2 N. & P. 283, W. W. & D. 519, 33 E. C. L. 434; Bianchi *v.* Nash, 1 M. & W. 545, Tyrw. & G. 916.

Keeping of property by a person to whom it has been sent to be sold, after he has received a proposition from the owner to sell to him, and his failure to reply to the proposition, has been held an acceptance of it. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Orme *v.* Cooper, 1 Ind. App. 449, 27 N. E. 655.

Contract with attorney for services.— In Emery *v.* Cobbey, 27 Nebr. 621, 43 N. W. 410, C, a lawyer, wrote E that he was bringing suit to recover taxes paid by owners of land and asked to represent E, who owned some of the same land. E replied that he might do so for him for ten per cent of the amount recovered, to which C replied that he could not take the case on those terms. Subsequently he notified E that he was going on with the case for all the owners, to which E made no reply. C went on, notifying E of what he was doing, to which E made no objection. It was held that C was entitled to recover for his services.

94. Ward *v.* Powell, 3 Harr. (Del.) 379; Fogg *v.* Portsmouth Atheneum, 44 N. H. 115, 82 Am. Dec. 191; Goodland *v.* LeClair, 78 Wis. 176, 47 N. W. 268; Weatherby *v.* Banham, 5 C. & P. 228, 24 E. C. L. 539.

95. *New Hampshire.*— Prescott *v.* Jones, (1898) 41 Atl. 352.

Pennsylvania.— Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622; Bieber *v.* Beck, 6 Pa. St. 198; Snyder *v.* Leibengood, 4 Pa. St. 305; Slaymaker *v.* Irwin, 4 Whart. 369.

South Carolina.— Raysor *v.* Berkeley County R., etc., Co., 26 S. C. 610, 2 S. E. 119; Rutledge *v.* Greenwood, 2 Desauss. 389.

Texas.— O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. 1020.

United States.— Titcomb *v.* U. S., 14 Ct. Cl. 263.

England.— Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869.

Request to renew insurance.— Where a person asks an insurance company to renew a policy of insurance and the company makes no answer there is no agreement. Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622. See also Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352. And see INSURANCE.

Necessity for communication of acceptance see *infra*, II, C, 3, e.

96. In a well-known English case plaintiff offered by letter to buy his nephew's horse for a certain sum, adding: "If I hear no more about him, I consider the horse is mine at" that price. No answer was returned to this letter, but the nephew told an auctioneer to keep the horse out of a sale of his farm stock, as it was sold to plaintiff. The auctioneer sold the horse by mistake, and plaintiff sued him for conversion. It was held that there was no agreement to sell the horse, as no acceptance had been communicated to plaintiff and that an offer could not compel its recipient to give notice of his refusal at the peril of being held to have accepted. Felt-

rejecting an offer cannot make an agreement,[97] unless the circumstances are such as to impose a duty to reply.[98]

(v) *Acceptance by Signing Paper Containing Offer.* Where a person signs a document, he is not permitted to show that he did not know its terms, and in the absence of fraud will be bound by all its provisions.[99] Therefore when an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud it is wholly immaterial that he has not read the agreement and does not know its contents.[1]

(vi) *Acceptance by Accepting Paper Containing Terms* — (a) *In General.* A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of a proposed contract, and the paper is accepted, the accepter is bound by its terms; and this is true as a rule whether he reads the paper or not.[2] Where an offer consists of various terms, some of which do not appear on the face of the offer, the question whether the accepter is bound by the terms depends upon the circumstances. He is not bound as a rule by any terms which are not communicated to him.[3]

house *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869. See also Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352, where a firm of insurance agents wrote plaintiff that they would renew his policy when it expired unless notified to the contrary, and the insured did not reply, and the agents neglected to renew, it being held that they were not liable as there was no agreement to renew. And see Berchorman *v.* Munken, 2 E. D. Smith (N. Y.) 98; *In re* Empire Assur Corp., L. R. 6 Ch. 266, 40 L. J. Ch. 431, 23 L. T. Rep. N. S. 882, 19 Wkly. Rep. 453. See INSURANCE.

97. Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

98. Bluegrass Cordage Co. *v.* Luthy, 98 Ky. 583, 33 S. W. 835 17 Ky. L. Rep. 1126 (holding that where an order was given to a traveling salesman for goods, and it was a condition in the order that it was to be approved by the principal, a failure on the part of the principal to answer for twelve days after submission to him was an implied acceptance); Robertson *v.* Tapley, 48 Mo. App. 239 (holding that where A submitted for signature to B the draft of a contract between them, and B altered it and then returned it to A signed, A's retention of the paper was evidence of assent to and acceptance of its terms).

99. Gaither *v.* Dougherty, 38 S. W. 2, 18 Ky. L. Rep. 709; Barber *v.* Brooks, 18 La. 453; Phelps *v.* Clasen, Woolw. (U. S.) 204, 19 Fed. Cas. No. 11,074 (holding that persons who signed a paper reciting a contract between them, naming them as the contracting parties, and referring to their intentions in separate clauses, were bound by the obligations thereby imposed, whether they understood themselves as signing as witnesses or as parties). And see Baird *v.* Harper, (Del. 1902) 51 Atl. 141, holding that where a person signs and sends to another two written instruments purporting to be counterparts of a proposed contract, but which differ materially, and asks the other to accept and return duplicate, and the other signs but one and returns this, there is a contract between them.

1. Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564.

2. Sellers *v.* Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Short *v.* Kieffer, 142 Ill. 258, 31 N. E. 427; Johnson *v.* Dodge, 17 Ill. 433; McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Watkins *v.* Rymill, 10 Q. B. D. 178, 188, 47 J. P. 357, 52 L. J. Q. B. 121, 48 L. T. Rep. N. S. 426, 31 Wkly. Rep. 337 (where it is said: "A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not").

A written offer may be accepted orally or by acts. Springer *v.* Cooper, 11 Ill. App. 267; Graves *v.* Smedes, 7 Dana (Ky.) 344; Woodlock *v.* Meyerstein, 5 Mo. App. 591.

Signing by one party only. — A contract signed by one of the parties only is mutual and binding on both parties, if it is accepted and assented to by the other party. Sellers *v.* Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589. And see *infra*, IV, D, 10, h, (VII).

3. Tichnor *v.* Hart, 52 Minn. 407, 54 N. W. 369; Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564.

In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be pub-

But he is bound by all the legal terms which are communicated.[4] This question arises where a person accepts a railroad or steamboat ticket, bill of lading, warehouse receipt, or other document containing conditions.[5] He is bound by all the conditions, whether he reads them or not, if he knows that the document contains conditions.[6] But he is not bound by terms of which he is ignorant, even though he may know that the ticket or document contains writing, unless he knows that the writing contains terms,[7] or unless he ought to know that it contains terms, by reason of previous dealings or experience, or by reason of the form, size, or character of the document.[8]

(B) *Paper Not Purporting to Be Contract.* An offeree is not bound by the unknown terms of a document by his acceptance of the same without objection,

lished, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby. Tichnor *v.* Hart, 52 Minn. 407, 54 N. W. 369.

4. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709; Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564.

Building contracts.—Specifications in writing for the erection of a building are a part of the building contract. Evans *v.* Graden, 125 Mo. 72, 28 S. W. 439.

Rules of association.—Where parties agree in regard to a matter governed by the rules of an association of which they are members such rules become part of the agreement. Bassett *v.* Irons, 8 Mo. App. 127.

5. See CARRIERS, 6 Cyc. 404, 405, 574, 664.

6. *Maryland.*— Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106; McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

Michigan.— McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

New Hampshire.— Durgin *v.* American Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

Vermont.— Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

United States.— Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. ed 290.

England.— Watkins *v.* Rymill, 10 Q. B. D. 178, 47 J. P. 357, 52 L. J. Q. B. 121, 48 L. T. Rep. N. S. 426, 31 Wkly. Rep. 337; Harris *v.* Great Western R. Co., 1 Q. B. D. 515, 45 L. J. Q. B. 729, 34 L. T. Rep. N. S. 647, 25 Wkly. Rep. 63 (holding that where a railroad ticket had written on its face, "Subject to the conditions on the other side," and the person to whom it was issued admitted knowledge that there were conditions but said that he had not read them, the conditions contained on the back of the ticket were binding, notwithstanding they were not read); Burke *v.* Southeastern R. Co., 5 C. P. D. 1, 44 J. P. 283, 49 L. J. C. P. 107, 41 L. T. Rep. N. S. 554, 28 Wkly. Rep. 306.

Telegraph companies.— It is generally held that where the sender of a telegram uses, without dissent, a blank furnished by the company on which to write it, he is presumed to assent to the conditions which are printed on its face, and that he will not be permitted to show that he neither read, understood, nor assented to them.

Colorado.— Western Union Tel. Co. *v.* Dunfield, 11 Colo. 335, 18 Pac. 34.

Indiana.— Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

Maryland.— U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts.— Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Redpath *v.* Western Union Tel. Co., 112 Mass. 71, 17 Am. Rep. 69.

Michigan.—Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

New York.— Young *v.* Western Union Tel. Co., 65 N. Y. 163; Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526 [*affirming* 45 Barb. 274]; De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

Pennsylvania.— Wolf *v.* Western Union Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387.

Texas.— Womack *v.* Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614.

And see TELEGRAPH AND TELEPHONES.

7. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564; Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709.

Telegraph companies.—A person who sends a telegram is not bound by regulations of the telegraph company limiting its liability, where they do not appear on the blank upon which the message is written and it is not shown that he had knowledge of them. De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. (N. Y.) 403; Pearsall *v.* Western Union Tel. Co., 44 Hun (N. Y.) 532 [*affirmed* in 124 N. Y. 256, 26 N. E. 534, 35 N. Y. St. 307, 21 Am. St. Rep. 662]; Western Union Tel. Co. *v.* O'Keefe, (Tex. Civ. App. 1895) 29 S. W. 1137; Beasley *v.* Western Union Tel. Co., 39 Fed. 181. *Compare* U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Birney *v.* New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607. See TELEGRAPH AND TELEPHONES.

8. *Alabama.*— Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

Arkansas.— St. Louis, etc., R. Co. *v.*

where the document delivered to him purports to be, and would by a reasonable man be understood to be, merely a check or voucher, and not a contract,[9] as in the case of a baggage receipt or check,[10] an ordinary railroad ticket,[11] and other receipts or papers of a similar character.[12]

(c) *Terms Not Readily Discernible.* Where the paper on its face contains the terms of a complete contract, but there are other terms not thereby readily discernible by the offeree, as for example where the face of the document does

Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Massachusetts.—Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 25 Am. St. Rep. 660, 12 L. R. A. 340, where an ocean steamship ticket was a large document of two quarto pages, was covered with printing and writing, and contained elaborate provisions in regard to the rights of the passenger, and it was held that the purchaser was bound by its provisions, since no one who could read could glance at it without seeing that it undertook expressly to provide the particulars which should govern the conduct of the parties until the passenger reached the point of destination, and in that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads.

Michigan.— McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

New York.— Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163.

Tennessee. — Dillard *v.* Louisville, etc., R. Co., 2 Lea 288.

England.—Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564, where it was said of a ticket given for articles deposited in the cloak room at a railroad station: "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivery to him of the ticket in such a manner that he could see that there was writing on it was in the opinion of the jury reasonable notice that the writing contained conditions."

A bill of lading fixes the rights and liabilities of the parties when its terms have been agreed upon, and its acceptance by the consignor, without objection, is an implied assent to its terms. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208. See CARRIERS, 6 Cyc. 405.

The reason why the accepter of a bill of lading is bound by its terms is because shippers generally know that the bill of lading, an ancient commercial document, contains the terms of the contract of carriage, and the ship-owner or the railroad company as the case may be is entitled to assume that the person shipping the goods has that knowledge. As pointed out by Mellish, L. J., "it is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was." Parker *v.* Southeastern R. Co., 2 C. P. D. 416, 422, 46 L. J. C. P. 768, 36 L. T. Rep. N. S. 540, 25 Wkly. Rep. 564.

9. Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153 [*affirming* 42 N. Y. Super. Ct. 353]. And see Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640.

10. See CARRIERS, 6 Cyc. 664, note 19.

11. Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709. See CARRIERS, 6 Cyc. 570, 574.

12. Neuman *v.* National Shoe, etc., Exch., 26 Misc. (N. Y.) 388, 391, 56 N. Y. Suppl. 193 [*affirming* 25 Misc. (N. Y.) 412, 54 N. Y. Suppl. 942], where a collecting agency which plaintiff had employed on several occasions received a claim from him to collect and sent a receipt therefor, on the back of which was printed a clause stating that they did not guarantee clients against loss from the dishonesty of an attorney or the suspension of a bank. There was nothing on the face of the receipt to call attention to such rules. Plaintiff testified that the conditions indorsed on the receipt were never brought to his attention, and it was held that he was not bound by the conditions. "The appellant," said the court, "calls our attention to a class of cases clearly distinguishable from the one under review. They relate to the construction placed upon conditions in telegraph blanks, bills of lading, shipping and express receipts and other commercial instruments of like description. In such, it has been held that the uniform character of those instruments and the nature of the business to which they relate create a presumption of knowledge of the attendant conditions and limitations, or that by using certain blank forms upon which the terms and restrictions confront the subscribing party, he is deemed to have assented to them. No such presumption exists respecting a paper purporting to be an ordinary receipt, hence the necessity of proof to establish notice to the plaintiff of the undisclosed clause of exemption from liability, which the defendant inserted in a manner not calculated to attract attention."

not contain the disputed conditions, but they are printed on the back,[13] where the conditions are printed in smaller type than the rest of the document,[14] where abbreviations are used which are not generally understood or the conditions are couched in ambiguous or conflicting language,[15] where the receipt containing conditions is delivered in a dimly lighted car,[16] or where the conditions are so obscure as to be unintelligible by the pasting of a revenue stamp over them,[17] the party receiving the paper is not bound by the conditions unless they are brought to his notice.

(D) *Terms Unreasonable.* A person accepting a ticket, bill of lading, or similar paper is not bound by conditions in the paper not known to him, which are unreasonable or irrelevant to the purpose of the contract, or which no reasonable man would have reason to suppose it would contain.[18]

(E) *Where Case Is One of General Notice.* If the person making an offer is a common carrier, innkeeper, or other person exercising a public calling and obliged by law to serve all who apply, a general notice limiting liability will not be presumed to be assented to by one who has seen the notice, although it might be in the case of an ordinary bailee.[19]

13. *Illinois.*—Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Indiana.— Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640.

Michigan.— Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

Vermont.— Newell *v.* Smith, 49 Vt. 255.

United States.— Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. 318, 21 L. ed. 297; Ayres *v.* Western R. Corp., 14 Blatchf. (U. S.) 9, 2 Fed. Cas. No. 689.

England.— Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709, where the plaintiff purchased of the defendant a ticket by steamer from Dublin to Whitehaven, on the face of which were the words, "Dublin to Whitehaven," and on the back a provision that the defendant incurred no liability for loss, injury, or delay to the passenger or his luggage. The vessel was wrecked by the fault of the company's servants and the plaintiff's luggage lost. The house of lords decided that the company was liable to make good the loss, since the plaintiff could not be held to have assented to a term which he had not seen, of which he knew nothing, and which was not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him.

14. *Massachusetts.*— Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Missouri.— Snider *v.* Adams Express Co., 63 Mo. 376.

New York.— Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701.

Pennsylvania.— Verner *v.* Sweitzer, 32 Pa. St. 208.

England.— Butler *v.* Heane, 2 Campb. 415.

15. Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Barney *v.* Prentiss, 4 Harr. & J. (Md.) 317, 7 Am. Dec. 670; Cobden *v.* Bolton, 2 Campb. 108; Munn *v.* Baker, Holt 646 note, 3 E. C. L. 253, 2 Stark. 255, 3 E. C. L. 399, 17 Rev. Rep. 686 note; Gouger *v.* Jolly, Holt 317, 3 E. C. L. 130.

16. Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153.

17. New York, etc., R. Co. *v.* Sayles, 87 Fed. 444, 32 C. C. A. 485, where a receipt in the form of a bill of lading delivered to the shipper of some horses over a railroad contained a clause limiting the liability of the carrier to one hundred dollars on each horse, but the shipper denied having read it. This clause was described in the report as printed over the clauses of the receipt which were in black ink, and at right angles to them. It was itself in red ink, and looked as if it might have been impressed upon the receipt after the latter was printed by some hand or power stamp. The coloring was far from bright, and parts of it, by reason of the size of type, and by reason of its being printed across the black lines of the receipt, could not be read without the most careful inspection. It was held that the shipper was not bound by the conditions in this clause.

18. Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564. See Simpson *v.* Vaughan, 2 Atk. 31, 26 Eng. Reprint 415.

19. *Connecticut.*— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Illinois.— Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Massachusetts.— Judson *v.* Western R. Corp., 6 Allen 486, 83 Am. Dec. 646.

Michigan.— McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

New York.— Hollister *v.* Nowlen, 19 Wend. 234, 247, 32 Am. Dec. 455, where it is said by way of illustration: "If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication could arise."

(F) *Notice Received After Agreement.* Terms brought to the accepter's notice after the agreement is complete will not affect the agreement. If a party therefore cannot be charged with notice of the conditions contained in a paper which he accepts as containing the actual offer at the very instant it is delivered to him, even actual notice afterward will have no effect.[20] Upon receipt by a carrier of a parcel to be conveyed to its destination, the charges being paid or to be collected on delivery by the consignee, the contract is complete and the carrier's responsibility at once attaches, and it cannot be changed by the subsequent delivery to the customer of a bill of lading or other writing containing conditions limiting the carrier's liability, unless it appears that the intention of the parties was that the oral negotiations were simply preliminary to the formal contract which was to be contained in a bill of lading or other written instrument.[21]

Pennsylvania.— Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481.

Texas.— Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

West Virginia.— Brown *v.* Adams Express Co., 15 W. Va. 812.

Wisconsin.— Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

United States.— Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. 318, 21 L. ed. 297; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. 344, 383, 12 L. ed. 465 (where it is said of a general notice by a carrier of goods limiting liability: "If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment").

England.— Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709.

See CARRIERS, 6 Cyc. 403, 546, 663; WAREHOUSEMEN.

20. Dale *v.* See, 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583. In this case the plaintiff delivered to the defendant a quantity of silk to be dyed, and when it was returned it was found to be badly and unskilfully done. Plaintiff brought an action for the defective workmanship. The defense was that when the silk was delivered back to the plaintiff it was accompanied by a bill of charges on which was printed the notice "all claims for damage or deficiency must be made within three days from date otherwise not allowed"; that the plaintiff knew of such notice but made no claim within the time, and that by accepting the goods knowing of the notice a contract was created on the terms of the notice. But the court held that there was no consideration to support such an agreement, saying in substance: Upon a bailment of goods for work and labor upon them, the contract between the parties arises immediately upon the delivery of the goods to the bailee. That contract is that the work shall be performed with reasonable skill and care and that the work being completed they shall be returned to the owner. The bailee cannot prescribe terms on which he will return them, and an agreement of the bailee that he will make a claim for damages within a certain time lacks a consideration, for the bailee is bound to return them unconditionally. See also Brittain Dry Goods Co. *v.* Birkenfeld, 20 Mont. 347, 350, 51 Pac. 263, where a wholesale dry-goods dealer sold through its traveling salesman a quantity of goods at certain prices and on certain terms contained in a written memorandum signed by the salesman, and the goods were shipped, and with them the invoice on which was printed the words, "All bills become due when parties suspend payment, assign, or sell out. All goods dated ahead are merely consigned and subject to replevin until said dating has expired. Retention of goods will be considered acceptance of all the terms hereon." The customer received and held the goods without objection, and prior to the expiration of the dating he assigned. The notice, it was held, was not binding on him, as the principal had no right to modify the terms of the agreement made with the agent. That agreement fixed the rights and liabilities of both parties and could not be changed by any notice one might give to the other.

The reason is that assent before the completion of the contract is essential, and if there be not assent then to the special terms, knowledge of them later and even assent to them would not make them a part of the contract. If it were attempted to interpret it as a new agreement changing the terms of the former one this would fail because it would amount to nothing without a new consideration. See Nelson *v.* Hudson River R. Co., 48 N. Y. 498; Bissell *v.* New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53.

21. *Colorado.*— Merchants' Dispatch, etc., Co. *v.* Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

Illinois.— Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268; American Express Co. *v.* Spellman, 90 Ill. 455.

Massachusetts.— Gott *v.* Dinsmore, 111 Mass. 45.

Michigan.— Cleveland, etc., R. Co. *v.* Perkins, 17 Mich. 296; Detroit, etc., R. Co. *v.* Adams, 15 Mich. 458.

d. Sufficiency of Acceptance — (I) *Conditions Prescribed by Offer* — (A) *In General.* The offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters which it may please him to insert in and make a part thereof, and the acceptance, to conclude the agreement, must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.[22]

(B) *Conditions as to Time of Acceptance.* Where the offer specifies a time of acceptance, an acceptance after that time will be nugatory as an acceptance.[23] An offer which calls for a reply "by return mail," "in course of post," or the

New York.— Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583; Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Coffin *v.* New York Cent. R. Co., 64 Barb. 379; Hastings *v.* New York, etc., R. Co., 3 Silv. Supreme 422, 6 N. Y. Suppl. 836, 25 N. Y. St. 249.

North Carolina.— Hamilton *v.* Western North Carolina R. Co., 96 N. C. 398, 3 S. E. 164.

Wisconsin.— Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564.

United States.— Mehrback *v.* Liverpool, etc., Co., 12 Fed. 77.

England.— Simons *v.* Great Western R. Co., 2 C. B. N. S. 620, 89 E. C. L. 620.

And see Carriers, 6 Cyc. 407.

Carriers of passengers.— The same would be true of conditions printed on a passenger's ticket which he did not discover until after the contract of carriage was complete by his payment of fare and the delivery to him of his voucher or ticket.

Kansas.— Kansas City, etc., R. Co. *v.* Rodenbaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715.

Massachusetts.— Malone *v.* Boston, etc., R. Co., 12 Gray 388, 74 Am. Dec. 598.

Ohio.— Kent *v.* Baltimore, etc., R. Co., 45 Ohio St. 284, 12 N. E. 798, 4 Am. St. Rep. 539; Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617.

United States.— Mauritz *v.* New York, etc., R. Co., 23 Fed. 765.

England.— Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709.

22. *Alabama.*— Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

Arkansas.— Amis *v.* Conner, 43 Ark. 337.

California.— Burke *v.* Wells, 50 Cal. 218.

Connecticut.— Gardner *v.* Hartford, 14 Conn. 195.

Illinois.— Corcoran *v.* White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858.

Iowa.— Siebold *v.* Davis, 67 Iowa 560, 25 N. E. 778; Baker *v.* Johnson County, 37 Iowa 186.

Kentucky.— Hutcheson *v.* Blakeman, 3 Metc. 80; Moxley *v.* Moxley, 2 Metc. 309.

Louisiana.— Cornelson *v.* Sun Mut. Ins. Co., 7 La. Ann. 345.

Maine.— Jenness *v.* Mt. Hope Iron Co., 53 Me. 20.

Massachusetts.— Kincaid *v.* Eaton, 98 Mass. 139, 93 Am. Dec. 142.

Michigan.— Wilkin Mfg. Co. *v.* H. M. Loud, etc., Lumber Co., 94 Mich. 158, 53 N. W. 1045.

Missouri.— Taylor *v.* Van Schraeder, 107 Mo. 206, 16 S. W. 675; Strange *v.* Crowley, 91 Mo. 287, 2 S. W. 421; Continental Nat. Bank *v.* Farris, 77 Mo. App. 186; McLean *v.* Pastime Gymnasium Assoc., 64 Mo. App. 55; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297.

New Hampshire.— Beckwith *v.* Cheever, 21 N. H. 41.

New Jersey.— Potts *v.* Whitehead, 23 N. J. Eq. 512.

New York.— Fitch *v.* Snedeker, 38 N. Y. 248, 97 Am. Dec. 791; Jones *v.* Phœnix Bank, 8 N. Y. 228; Mahar *v.* Compton, 18 N. Y. App. Div. 536, 45 N. Y. Suppl. 426; Myers *v.* Smith, 48 Barb. 614; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

Pennsylvania.— Borland *v.* Guffey, 1 Grant 394.

South Carolina.— Clanton *v.* Young, 11 Rich. 546.

Texas.— Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.

Wisconsin.— Baker *v.* Holt, 56 Wis. 100; Austin *v.* Milwaukee County, 24 Wis. 278; Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

United States.— Minnesota, etc., R. Co. *v.* Columbus Rolling-Mill Co., 119 U. S. 149, 7 S. Ct. 168, 31 L. ed. 376; Carr *v.* Duvall, 14 Pet. 77, 10 L. ed. 361; Martin *v.* Northwestern Fuel Co., 22 Fed. 596; Franklin *v.* Heiser, 6 Blatchf. 426, 9 Fed. Cas. No. 5,054.

Conditional or varying acceptance see *infra*, II, C, 3, d, (II).

Where an offer is made containing conditions, an unqualified acceptance is an acceptance of the conditions and makes a binding contract. Burton *v.* Wells, 30 Miss. 688; Grinnan *v.* Platt, 31 Barb. (N. Y.) 328; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797.

23. *Illinois.*— Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35; Larmon *v.* Jordan, 56 Ill. 204.

Massachusetts.— Horne *v.* Niver, 168 Mass. 4, 46 N. E. 393, holding that where defendants wrote plaintiff offering to sell coal at a certain price and asking plaintiff to wire them at their expense on receipt of the offer a letter written two days thereafter ordering a certain amount came too late.

Minnesota.— Cannon River Mfg. Assoc. *v.* Rogers, 42 Minn. 127, 43 N. W. 792, 18 Am. St. Rep. 497.

like, must be accepted by mailing an answer either by the next mail after it is received or during the same day the offer is received.[24] When no time for acceptance is specified a reasonable time is implied.[25] An offer to carry all goods that may be presented to the offerer for carriage during the year[26] or an offer to supply goods at certain prices during twelve months[27] may be accepted by delivering goods to be carried or ordering goods from time to time during the twelve months, provided the offer is not previously withdrawn. So a guaranty of the payment of goods supplied or money advanced during a certain time is a continuing offer of this character.[28]

(c) *Conditions as to Place of Acceptance.* An offer which prescribes acceptance at a particular place cannot be turned into a binding contract by sending an acceptance to another place, unless the condition is waived.[29]

(d) *Conditions as to Mode of Acceptance.* Where the acceptance actually reaches the person who has made the offer it is immaterial by what mode it is sent, unless a particular mode of acceptance is prescribed by the offer;[30] but as a general rule if a particular mode of acceptance is prescribed by the offer the condition must be complied with, unless it is waived.[31] An offer may prescribe for

New Jersey.— Potts *v.* Whitehead, 20 N. J. Eq. 55; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Taylor *v.* Rennie, 35 Barb. 272; Howells *v.* Stroock, 30 Misc. 569, 62 N. Y. Suppl. 870; Britton *v.* Phillips, 24 How. Pr. 111; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

North Carolina.—Union Nat. Bank *v.* Mills, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538.

Ohio.— Longworth *v.* Mitchell, 26 Ohio St. 334.

West Virginia.—Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Wisconsin.— Cummings *v.* Lake Realty, 86 Wis. 382, 57 N. W. 43.

United States.— Richardson *v.* Hardwick, 106 U. S. 252, 1 S. Ct. 213, 27 L. ed. 341; Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; McConkey *v.* Peach Bottom Slate Co., 68 Fed. 830, 16 C. C. A. 8.

Lapse of offer in case of delay in acceptance see *infra*, II, C, 6, b.

Conditions as to time of performance see *infra*, II, C, 3, d, (II), note 34.

24. *Illinois.*— Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35, where defendant, by letter sent through the mail, offered to engage plaintiff in his employment, stating terms, and asking for a reply by return mail, and plaintiff on the day after receipt of the letter gave a postal card accepting the offer to a boy to be mailed, but he neglected to mail it until two days later. It was held that defendant was not bound by his offer, and that he was not bound after receiving the postal card to notify plaintiff that it was not in time.

Maryland.— Bernard *v.* Torrance, 5 Gill & J. 383.

New York.— Taylor *v.* Rennie, 35 Barb. 272. See Palmer *v.* Phœnix Mut. L. Ins. Co., 84 N. Y. 63, 71, where an insurance company requested payment of an insurance premium by the insured "by return of mail or by express," and the insured mailed the money on the day he received the letter in time to leave by the evening outgoing mail, instead of by a mail which left earlier in the day. It was held that the acceptance was in time, the court saying: "The request in Skinner's letter was not that the money should be sent by the first return mail, and no one receiving such a letter residing in a city where there were several mails every day, would so understand it."

United States.— Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; Ortman *v.* Weaver, 11 Fed. 358.

England.— Dunlop *v.* Higgins, 1 H. L. Cas. 381, 12 Jur. 295.

25. Reasonable time see *infra*, II, C, 6, b.

26. Burton *v.* Great Northern R. Co., 9 Exch. 507, 23 L. J. Exch. 184, 2 Wkly. Rep. 257.

27. Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16, 43 L. J. C. P. 1, 29 L. T. Rep. N. S. 471, 22 Wkly. Rep. 48.

28. Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 19 Wkly. Rep. 758, 104 E. C. L. 748; Clarke *v.* Birley, 41 Ch. D. 422, 58 L. J. Ch. 616, 60 L. T. Rep. N. S. 948, 37 Wkly. Rep. 746; Merrell *v.* Cowan, 7 Ch. D. 151, 47 L. J. Ch. 73, 37 L. T. Rep. N. S. 586, 26 Wkly. Rep. 90. See GUARANTY.

29. Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225, 4 L. ed. 556.

Conditions as to place of performance see *infra*, II, C, 3, d, (II), note 35.

30. Wilcox *v.* Cline, 70 Mich. 517, 38 N. W. 555; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

31. In a leading case in the United States supreme court, the defendant, by letter sent by the wagoner, offered to purchase flour from plaintiffs, the letter stating that the answer should be sent by the return of the wagon which brought their offer. The plaintiffs, however, mailed their acceptance to a place other than the destination of the wagon. It was held that the acceptance was not sufficient, as it was not sent to the place described. Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225, 4

its acceptance in writing, in which case a verbal acceptance will be insufficient unless it is assented to by the offerer.[32]

(II) *Acceptance Conditionally or on Terms Varying From Offer.* An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement.[33] This is true for example where an acceptance varies from the offer

L. ed. 556. *Compare*, however, Tinn *v.* Hoffmann, 29 L. T. Rep. N. S. 271, where it was said that a request in the offer to reply "by return of post" did not mean that the reply should be exclusively by mail, and that a reply by telegraph, by verbal message, or by any means not later than a letter sent by mail would reach its destination would be sufficient.

32. Briggs *v.* Sizer, 30 N. Y. 647; Bosshardt, etc., Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120.

33. *Alabama.*— Hammond *v.* Winchester, 82 Ala. 470, 2 So. 892; Derrick *v.* Monette, 73 Ala. 75.

Colorado.— Salomon *v.* Webster, 4 Colo. 353.

Connecticut.—Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Georgia.—Harris *v.* Amoskeag Lumber Co., 97 Ga. 465, 25 S. E. 519.

Illinois.— Biederman *v.* O'Conner, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Corcoran *v.* White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35; Darling *v.* McDonald, 77 Ill. 520; Cornwells *v.* Krengel, 41 Ill. 394; Esmay *v.* Gorton, 18 Ill. 483; Rugg *v.* Davis, 15 Ill. App. 647; Smith *v.* Wetherell, 4 Ill. App. 655; Fox *v.* Turner, 1 Ill. App. 153. And see Middaugh *v.* Stough, 161 Ill. 312, 43 N. E. 1061.

Indiana.— Stagg *v.* Compton, 81 Ind. 171; Rodman *v.* Rodman, 64 Ind. 65.

Iowa.— Coad *v.* Rogers, 115 Iowa 478, 88 N. W. 947; Naylor *v.* Butcher, 93 Iowa 340, 61 N. W. 989; Batie *v.* Allison, 77 Iowa 313, 42 N. W. 306; Sawyer *v.* Brossart, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371; Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778; Clay *v.* Ricketts, 66 Iowa 362, 23 N. W. 755; Baxter *v.* Bishop, 65 Iowa 582, 22 N. W. 685; Steel *v.* Miller, 40 Iowa 402; Baker *v.* Johnson County, 37 Iowa 186.

Kansas.— Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612; Plant Seed Co. *v.* Hall, 14 Kan. 553; Heiland *v.* Ertel, 4 Kan. App. 516, 44 Pac. 1005.

Kentucky.— Hutcheson *v.* Blakeman, 3 Metc. 80; Moxley *v.* Moxley, 2 Metc. 309.

Louisiana.— Bethel *v.* Hawkins, 21 La. Ann. 520; Barrow *v.* Ker, 10 La. Ann. 120; McDonough *v.* Winchester, 1 La. 188.

Maine.— Jenness *v.* Mt. Hope Iron Co., 53 Me. 20.

Massachusetts.— Shady Hill Nursery Co. *v.* Waterer, 179 Mass. 318, 60 N. E. 789; Putnam *v.* Grace, 161 Mass. 237, 37 N. E. 166; Harlow *v.* Curtis, 121 Mass. 320; Palmer *v.* Williams, 13 Gray 338.

Michigan.— Michigan Bolt, etc., Works *v.* Steel, 111 Mich. 153, 69 N. W. 241; Hubbell *v.* Palmer, 76 Mich. 441, 43 N. W. 442; Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195; Eggleston *v.* Wagner, 46 Mich. 610, 10 N. W. 37; Van Valkenburg *v.* Rogers, 18 Mich. 180; People *v.* Auditor-Gen., 17 Mich. 161.

Missouri.— Scott *v.* Davis, 141 Mo. 213, 42 S. W. 714; Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Strange *v.* Crowley, 91 Mo. 287, 2 S. W. 421; Robinson *v.* St. Louis, etc., R. Co., 75 Mo. 494; Bruner *v.* Wheaton, 46 Mo. 363; Eads *v.* Carondelet, 42 Mo. 113; Eagle Mill Co. *v.* Caven, 76 Mo. App. 458; McLean *v.* Pastime Gymnasium Assoc., 64 Mo. App. 55; Randolph *v.* Frick, 57 Mo. App. 400; Duke *v.* Compton, 49 Mo. App. 304; Robertson *v.* Tapley, 48 Mo. App. 239; Tufts *v.* Sams, 47 Mo. App. 487; Lancaster *v.* Elliot, 42 Mo. App. 503; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297; Brecheisen *v.* Coffey, 15 Mo. App. 80; Stotesburg *v.* Massengale, 13 Mo. App. 221; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378; Shickle *v.* Chouteau, etc., Iron Co., 10 Mo. App. 241.

New Hampshire.— Harris *v.* Scott, 67 N. H. 437, 32 Atl. 770; Beckwith *v.* Cheever, 21 N. H. 41.

New Jersey.— Runyon *v.* Wilkinson, 57 N. J. L. 420, 31 Atl. 390.

New York.— Brown *v.* New York Cent. R. Co., 44 N. Y. 79; McCotter *v.* New York, 37 N. Y. 325; Briggs *v.* Sizer, 30 N. Y. 647; Hough *v.* Brown, 19 N. Y. 111; Sidney Glass Works *v.* Barnes, 86 Hun 374, 33 N. Y. Suppl. 508, 67 N. Y. St. 221; Nundy *v.* Matthews, 34 Hun 74; Myers *v.* Smith, 48 Barb. 614; Sanders *v.* Pottlitzer Bros. Fruit Co., 25 N. Y. Suppl. 257, 53 N. Y. St. 645; Saltus *v.* Pruyn, 18 How. Pr. 512; Bruce *v.* Pearson, 3 Johns. 534.

North Carolina.— Spruill *v.* Trader, 50 N. C. 39.

Pennsylvania.— Sparks *v.* Pittsburgh Co., 159 Pa. St. 295, 28 Atl. 152; Powers *v.* Curtis, 147 Pa. St. 340, 23 Atl. 450; Slaymaker *v.* Irwin, 4 Whart. 369; Johnston *v.* Fessler, 7 Watts 48, 32 Am. Dec. 738.

Tennessee.— Olds *v.* East Tennessee Stone, etc., Co., (Tenn. Ch. 1898) 48 S. W. 333.

Texas.— Flomerfelt *v.* Hume, 11 Tex. Civ. App. 30, 31 S. W. 679; Foster *v.* New York, etc., Land Co., 2 Tex. Civ. App. 505, 22 S. W. 260.

as to time of performance,[34] place of performance,[35] price,[36] quantity,[37] quality,[38]

Vermont.— Drew *v.* Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; Bruce *v.* Bishop, 43 Vt. 161; Sprague *v.* Train, 34 Vt. 150.

Virginia.— Virginia Hot Springs Co. *v.* Harrison, 93 Va. 569, 25 S. E. 888.

West Virginia.— Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Wisconsin.— Mygatt *v.* Tarbell, 85 Wis. 457, 55 N. W. 1031; Baker *v.* Holt, 56 Wis. 100, 14 N. W. 8; Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

United States.— Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; James *v.* Darby, 100 Fed. 224, 40 C. C. A. 341; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; Kleinhans *v.* Jones, 68 Fed. 742, 15 C. C. A. 644; Hargadine-McKittrick Dry-Goods Co. *v.* Reynolds, 64 Fed. 560; Crabtree *v.* St. Paul Opera-House Co., 39 Fed. 746; Martin *v.* Northwestern Fuel Co., 22 Fed. 596; Ortman *v.* Weaver, 11 Fed. 358; Snow *v.* Miles, 3 Cliff. 608, 22 Fed. Cas. No. 13,146; Merriam *v.* Lapsley, 2 McCrary 606, 12 Fed. 457.

England.— Sievewright *v.* Archibald, 17 Q. B. 103, 15 Jur. 947, 20 L. J. Q. B. 529, 79 E. C. L. 103; *In re* United Ports, etc., Ins. Co., L. R. 9 Ch. 392, 43 L. J. Ch. 531, 30 L. T. Rep. N. S. 346, 22 Wkly. Rep. 460; *In re* United Ports, etc., Ins. Co., L. R. 8 Ch. 1002, 43 L. J. Ch. 138, 29 L. T. Rep. N. S. 381, 21 Wkly. Rep. 895; *In re* Aldborough Hotel Co., L. R. 4 Ch. 184, 39 L. J. Ch. 121, 17 Wkly. Rep. 424; *In re* Richmond Hill Hotel Co., L. R. 2 Ch. 527, 36 L. J. Ch. 613, 16 L. T. Rep. N. S. 442, 15 Wkly. Rep. 726; *In re* Ireland Rolling Stock Co., L. R. 1 Ch. 567, 12 Jur. N. S. 695, 35 L. J. Ch. 818, 14 L. T. Rep. N. S. 129, 14 Wkly. Rep. 1001; Crossley *v.* Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Wkly. Rep. 387; *In re* Leeds Banking Co., L. R. 1 Eq. 225; Jackson *v.* Turquand, L. R. 4 H. L. 305, 39 L. J. Ch. 11; Grant *v.* Fletcher, 5 B. & C. 436, 8 D. & R. 59, 29 Rev. Rep. 286, 11 E. C. L. 530; Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404; Bristol, etc., Aërated Bread Co. *v.* Maggs, 44 Ch. D. 616, 59 L. J. Ch. 472, 62 L. T. Rep. N. S. 416, 38 Wkly. Rep. 393; Moore *v.* Campbell, 2 C. L. R. 1084, 10 Exch. 323, 23 L. J. Exch. 310; Chaplin *v.* Clarke, 4 Exch. 403; Duke *v.* Andrews, 2 Exch. 290, 17 L. J. Exch. 231, 5 R. & Can. Cas. 496; Vollans *v.* Fletcher, 1 Exch. 20, 16 L. J. Exch. 173; Hutchison *v.* Bowker, 5 M. & W. 535; Jordan *v.* Norton, 1 H. & H. 234, 7 L. J. Exch. 281, 4 M. & W. 155; Oriental Inland Steam Co. *v.* Briggs, 2 Johns. & H. 625; Thornton *v.* Kempster, 1 Marsh. 355, 5 Taunt. 786, 15 Rev. Rep. 658, 1 E. C. L. 402; Kennedy *v.* Lee, 3 Meriv. 441.

Canada.— McIntyre *v.* Hood, 9 Can. Supreme Ct. 556; McFarrien *v.* Johnson, 6 Ont. 161; Fulton *v.* Upper Canada Furniture Co., 9 Ont. App. 211.

See 11 Cent. Dig. tit. "Contracts," §§ 96–103.

34. U. S. Heater Co. *v.* Applebaum, 126 Mich. 296, 85 N. W. 743 (holding that an order to deliver iron to plaintiff as he should require, iron to be delivered "before April 1st," was not accepted by a letter requiring the iron to be delivered "between April 1st, 1899, and April 1st, 1900"); Wilkin Mfg. Co. *v.* H. M. Loud, etc., Lumber Co., 94 Mich. 158, 53 N. W. 1045; Johnson *v.* Stephenson, 26 Mich. 63; Routledge *v.* Grant, 4 Bing. 653, 13 E. C. L. 678, 3 C. & P. 267, 14 E. C. L. 560, 6 L. J. C. P. O. S. 166, 1 M. & P. 717, 29 Rev. Rep. 672 (holding that an offer to purchase a house with possession on the twenty-eighth of July is not accepted by promising to give possession on the first of August).

35. Sawyer *v.* Brossart, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371; Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557 (holding that an offer to deliver property at one place is not accepted when another place is named or proposed); Hargadine-McKittrick Dry-Goods Co. *v.* Reynolds, 64 Fed. 560.

Where the offer of property for sale says nothing about the place of payment and the accepter specifies that it shall be made at his residence there is no agreement, for the offer entitles the seller to payment at his place of residence.

Georgia.— Robinson *v.* Weller, 81 Ga. 704, 8 S. E. 447.

Iowa.— Gilbert *v.* Baxter, 71 Iowa 327, 32 N. W. 364; Sawyer *v.* Brossart, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371.

Kansas.— Greenawalt *v.* Este, 40 Kan. 418, 19 Pac. 803; Heiland *v.* Ertel, 4 Kan. App. 516, 44 Pac. 1005.

Maine.— Maynard *v.* Tabor, 53 Me. 511.

Michigan.— De Jonge *v.* Hunt, 103 Mich. 94, 61 N. W. 341.

Minnesota.— Langellier *v.* Schaefer, 36 Minn. 361, 31 N. W. 690.

Missouri.— Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596.

Wisconsin.— Baker *v.* Holt, 56 Wis. 100, 14 N. W. 8; Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

Place of delivery.— When the offer is to buy a horse, and the offeree accepts "if he will come for it," there is no agreement. Fenno *v.* Weston, 31 Vt. 345; Baker *v.* Holt, 56 Wis. 100, 14 N. W. 8.

36. Minneapolis, etc., R. Co. *v.* Columbus Rolling-Mill Co., 119 U. S. 149, 7 S. Ct. 168, 30 L. ed. 376; Arthur *v.* Gordon, 37 Fed. 558; Hyde *v.* Wrench, 3 Beav. 334, 4 Jur. 1106, 43 Eng. Ch. 334.

37. As where one offers to sell a certain quantity of goods and the offeree accepts for a less quantity (Jenness *v.* Mt. Hope Iron Co., 53 Me. 20); where an offer is to sell certain land which the offerer at the time owned or controls, and the offeree replies by offering to purchase, not only the lands offered, but other lands in addition thereto (McCotter *v.* New York, 37 N. Y. 325).

38. As where an offer is to sell "good barley" and the acceptance is of "fine barley." Hutchison *v.* Bowker, 5 M. & W. 535.

etc.; where a person proposes to sell property to another, and the latter accepts "subject to the terms of a contract being arranged" between his solicitor and the offerer's;[39] where a person offers to buys a horse from another if he will warrant it quiet in harness, and he replies that he will warrant it quiet in double harness;[40] where a person offers his farm for sale to another, and the latter accepts except as to the security for proposed payments;[41] where a person offers to make a quitclaim deed to certain land, and the offeree accepts on condition that he turns over to him certain other deeds;[42] where an offer is to purchase a lease and the acceptance proposes an underlease;[43] where an offer prescribes payment on delivery and the acceptance prescribes payment by note;[44] where an offer is to purchase property, provided a guaranty to keep a certain street open shall be executed, and the accepter does not provide for the guaranty;[45] where an offer it to sell land, and it is accepted "provided the title is perfect";[46] and in other like cases.[47] Where, in answer to an order to a wholesale merchant of eight hundred pairs of shoes, the latter acknowledged by postal card the receipt of the order and said, "The same shall have prompt attention," the court said that this was not an absolute acceptance, but merely a courteous promise to give it consideration.[48] And the same view was taken of a letter reading, "I am prepared to make the arrangements with you on the terms you name."[49] If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope, or suggestions, etc.[50]

(III) *Offerer's Acceptance of Conditional or Varying Acceptance.* Where one makes an offer with certain terms or conditions, and accepts an acceptance which is not responsive to the proposal, he is bound by the contract thus made, and cannot fall back on his proposal in case of subsequent disagree-

39. Winn *v.* Bull, 7 Ch. D. 29, 47 L. J. Ch. 139, 26 Wkly. Rep. 230; Honeyman *v.* Marryatt, 6 H. L. Cas. 112, 4 Jur. N. S. 17, 26 L. J. Ch. 619.

40. Jordan *v.* Norton, 1 H. & H. 234, 7 L. J. Exch. 281, 4 M. & W. 155.

41. Barrow *v.* Ker, 10 La. Ann. 120.

42. Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596.

43. Holland *v.* Eyre, 2 Sim. & St. 194.

44. Gregson *v.* Ruck, 4 Q. B. 737, 45 E. C. L. 737.

45. Connor *v.* Buhl, 115 Mich. 531, 73 N. W. 821.

46. Corcoran *v.* White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858.

47. It has been held that there was no agreement where a person offered to refrain from attaching another's property for a debt if the offeree would guarantee the debt, and the offeree replied that he would if the offerer would not attach and would "keep quiet" (Borland *v.* Guffey, 1 Grant (Pa.) 394); where an offer was of the unexpired term of a lease, and the acceptance was "subject to obtaining the assent of [the lessor]" (Putnam *v.* Grace, 161 Mass. 237, 37 N. E. 166); where an offer was to sell coke tins at a certain price and the acceptance was by a telegram stating, "We accept your offer, if full weight plates" (Kirwan *v.* Byrne, 6 Misc. (N. Y.) 528, 27 N. Y. Suppl. 143, 57 N. Y. St. 863 [*affirmed* in 9 Misc. (N. Y.) 76, 29 N. Y. Suppl. 287, 59 N. Y. St. 746]); where a person made an offer of a certain sum for property, and the offeree on accepting the offer sent for signature a contract containing among other terms a requirement that the purchaser should pay a certain deposit, and should complete the purchase on a certain day, and a conditiou as to the title to the property (Jones *v.* Daniel, [1894] 2 Ch. 332, 63 L. J. Ch. 562, 70 L. T. Rep. N. S. 588, 8 Reports 579, 42 Wkly. Rep. 687); where defendant wrote plaintiff that she desired to sell certain stock and that she would give him the first right to purchase twenty shares at eight hundred dollars each, and plaintiff replied, "If you have a *bona fide* offer of $800 for the whole twenty shares, I will pay you the same provided you send me the names of those who will pay you this amount," and inclosed a check for one hundred dollars (Harris *v.* Scott, 67 N. H. 437, 32 Atl. 770); and where a person offered to conduct litigation to protect property for all persons who should register their names in a certain book kept by him, and another assented to the proposal, and received the benefit of it, but did not register as required (Northam *v.* Gordon, 46 Cal. 582).

48. Manier *v.* Appling, 112 Ala. 663, 20 So. 978.

49. Havens *v.* American Fire Ins. Co., 11 Ind. App. 315, 39 N. E. 40.

50. Culton *v.* Gilchrist, 92 Iowa 718, 61 N. W. 384; Brown *v.* Cairns, 63 Kan. 693, 66 Pac. 1033; Phillips *v.* Moor, 71 Me. 78; Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916. And see *infra*, II, C, 6, a, notes 34–36.

ment. This acceptance has made a new agreement on the terms of the new offer.[51] So although a party to an agreement may insist on the performance of a condition that it shall be reduced to writing, it is competent for him to waive the condition by recognizing his liability on the contract.[52] But of course if the answer to an offer by letter proposes modifications, the party making the original offer must communicate his acceptance of the modifications if he proposes to hold the other as on a counter offer accepted by him.[53]

e. Communication of Acceptance — (I) *In General.* Since communication of intention is essential to an agreement,[54] an acceptance, like an offer,[55] must as a rule be communicated to the offerer or put in the course of communication by act.[56] There is a radical distinction in regard to communication between offers which ask that the offeree shall do something and offers which ask that the offeree shall promise something. In offers of the former kind communication of the acceptance is ordinarily not required; in offers of the latter kind communication of the acceptance is always essential.

(II) *Acceptance by Act.* Where the offer is to do something if the offeree will not merely promise to do but do something, compliance with the condition of the offer by doing the act in the way prescribed is ordinarily sufficient evidence of the accepter's assent, and it is not necessary to show that he notified the offerer that he accepted the offer and would perform the condition.[57] The reason is that the person making the offer has a right if he pleases to dispense with

51. Iron-Works *v.* Douglas, 49 Ark. 355, 5 S. W. 585; Baldwin *v.* Com., 11 Bush (Ky.) 417; Underhill *v.* North American Kerosene Gas Light Co., 36 Barb. (N. Y.) 354; Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19 (where a contract for the sale of goods by A to B deliverable at specified times was signed by B in duplicate and left with A for signature and A added to the contract a clause materially altering the time for delivery and then signed it and sent it to B who returned it without objection and afterward accepted and paid for a portion of the goods contracted for, which were delivered after the time specified in the contract but in accordance with the clause added by A — it being held that there was acceptance of the changed offer); Treat *v.* Ullman, 34 Misc. (N. Y.) 553, 69 N. Y. Suppl. 974; Gray *v.* Foster, 10 Watts (Pa.) 280 (where A prepared a memorandum of an agreement and submitted it to B for his signature, and after B had made a material alteration and then signed it, took it and acted on it — it being held that A was bound by the agreement as altered).

52. Stover *v.* Flack, 30 N. Y. 64.

53. Nundy *v.* Matthews, 34 Hun (N. Y.) 74.

54. See *supra*, II, B, c.

55. See *supra*, II, C, e.

56. See the cases in the notes following.

57. *Louisiana.*—Ryder *v.* Frost, 3 La. Ann. 523.

Missouri.— Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869 (where a person wrote another offering to reimburse him if he would pay the taxes on certain land, and it was held that payment as requested was a sufficient acceptance); Niedermeyer *v.* State University, 61 Mo. App. 654.

Nebraska.— Atchison, etc., R. Co. *v.* Miller, 16 Nebr. 661, 21 N. W. 451, where an agent of a railroad company wrote a person offering to carry freight at a certain rate, and it was held that shipment of freight in accordance with the offer was a sufficient acceptance.

New Hampshire.— Woodbury *v.* Jones, 44 N. H. 206; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Cutting *v.* Dana, 25 N. J. Eq. 265.

New York.—Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

Ohio.— Fry *v.* Franklin Ins. Co., 40 Ohio St. 108.

Pennsylvania.— Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564; Weaver *v.* Wood, 9 Pa. St. 220.

Texas.— Fort *v.* Barnett, 23 Tex. 460.

Wisconsin.— Watters *v.* Glendenning, 87 Wis. 250, 58 N. W. 404; State *v.* Hastings, 12 Wis. 596.

England.— Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210 [*affirming* [1892] 2 Q. B. 484, 56 J. P. 665, 61 L. J. Q. B. 696] (where the defendants, proprietors of a medical preparation, issued an advertisement in which they offered to pay a certain sum to any person who should contract a certain disease after having used their preparation in a specified manner and for a specified period, and it was held that the plaintiff accepted the offer contained in the advertisement and rendered the defendants' promise binding by purchasing the preparation and using it as specified in the advertisement); Morton *v.* Burn, 7 A. & E. 19, 34 E. C. L. 36; Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666; London Fishmongers *v.* Robertson, 12

notice of acceptance, and if the form of the offer shows that this was not to be required then it is not necessary.[58] Offers of rewards addressed to the public by newspaper advertisement or placard are a common illustration of this class of cases.[59] So an order to ship goods becomes an agreement when the goods are shipped according to its terms without any other communication of the acceptance.[60] In like manner a binding contract is formed by the sending of an advertisement to a newspaper and its being printed therein;[61] and by the signing a guaranty upon the condition that a counter agreement will be executed, and the execution of such agreement, without any notice of its execution.[62] Where an offer, however, is made to a particular person, and is capable of acceptance by performance, the nature of the offer may be such as to imply a condition that acceptance is to be communicated.[63] There are many decisions to the effect that where a person offers to guaranty the payment of goods supplied by the offeree to a third person supplying the goods without giving notice to the guarantor that his offer is accepted does not in all cases create an enforceable agreement.[64]

(III) *Acceptance by Promise.* Where the offerer, instead of offering to do something if the other party will perform and leaving the latter free to perform or not as he pleases, requires a reciprocal promise from the offeree, the latter must communicate his acceptance of the offer and thereby bind himself by an engagement from which he cannot recede or there will be no agreement; even a compliance with the terms of the offer will not suffice.[65] Communication

L. J. C. P. 185, 5 M. & G. 131, 6 Scott N. R. 56, 44 E. C. L. 78; Kennaway *v.* Treleavan, 5 M. & W. 498.

58. Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210 [*affirming* [1892] 2 Q. B. 484, 56 J. P. 665, 61 L. J. Q. B. 696], where it was said by Bowen, L. J.: "As notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."

59. See *supra*, II, C, 3, b, (II).

60. *Massachusetts.*—Mauger *v.* Crosby, 117 Mass. 330.

New York.— Briggs *v.* Sizer, 30 N. Y. 647.

North Carolina.— Crook *v.* Cowan, 64 N. C. 743.

Pennsylvania.— Cooper *v.* Altimus, 62 Pa. St. 486.

England.—Harvey *v.* Johnston, 6 C. B. 295, 6 D. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295.

61. Ahern *v.* Standard L. Ins. Co., 2 Sweeny (N. Y.) 441.

62. Lennox *v.* Murphy, 171 Mass. 370, 50 N. E. 644. See GUARANTY.

63. Morrill *v.* Tehema Consol. Mill, etc., Co., 10 Nev. 125.

Offer by telegraph.— It has been held that an offer by telegraph with payment for a reply does not import that the sending of a reply is a condition of acting upon the offer. Read *v.* Anderson, 10 Q. B. D. 100.

64. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

Maryland.— Caton *v.* Shaw, 2 Harr. & G. 13.

Missouri.— Davis Sewing Mach. Co. *v.* Jones, 61 Mo. 409.

Pennsylvania.— Clark *v.* Russel, 3 Watts 213, 27 Am. Dec. 348.

United States.— Douglass *v.* Reynolds, 7 Pet. 113, 8 L. ed. 626; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271.

England.— Mozley *v.* Tinkler, 1 C. M. & R. 692, 1 Gale 11, 4 L. J. Exch. 84, 5 Tyrw. 416; Cope *v.* Albinson, 8 Exch. 185, 22 L. J. Exch. 37; Morten *v.* Marshall, 2 H. & C. 305, 9 Jur. N. S. 651, 33 L. J. Exch. 54, 8 L. T. Rep. N. S. 462; McIver *v.* Richardson, 1 M. & S. 557. See GUARANTY.

65. *California.*— Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897.

Iowa.— Demoss *v.* Noble, 6 Iowa 530.

Kansas.— Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

Louisiana.— Peet *v.* Meyer, 42 La. Ann. 1034, 8 So. 534.

Massachusetts.— Black *v.* Batchelder, 120 Mass. 171.

Michigan.— Bronson *v.* Herbert, 95 Mich. 478, 55 N. W. 359; Wagner *v.* Egleston, 49 Mich. 218, 13 N. W. 522; McDonald *v.* Bœing, 43 Mich. 394, 5 N. W. 439, 38 Am. Rep. 199; Weiden *v.* Woodruff, 38 Mich. 130; Van Valkenburg *v.* Rogers, 18 Mich. 180.

Minnesota.— Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; John-

of acceptance in such a case is not only necessary to bind the offerer, but it is also necessary to bind the offeree, and the offerer cannot make silence on the offeree's part an acceptance by a stipulation to that effect in the offer.[66] Communication of acceptance to a third person, not the offerer's agent, is of no more effect than noting it in one's memorandum book, which is no more than though it existed solely in one's mind.[67]

son *v.* Jacobs, 42 Minn. 168, 44 N. W. 6; Ellsworth *v.* Southern Minnesota R. Extension Co., 31 Minn. 543, 18 N. W. 822.

Missouri.— Ford *v.* Gebhardt, 114 Mo. 298, 21 S. W. 818; Robinson *v.* St. Louis, etc., R. Co., 75 Mo. 494; Coleman *v.* Roberts, 1 Mo. 97; Haubelt *v.* Rea, etc., Mill Co., 77 Mo. App. 672; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297; Lancaster *v.* Elliott, 28 Mo. App. 86; Conklin *v.* Cabanne, 9 Mo. App. 579.

New Hampshire.— Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352; Beckwith *v.* Cheever, 21 N. H. 41.

New York.— Quick *v.* Wheeler, 78 N. Y. 300; White *v.* Corlies, 46 N. Y. 467; Hough *v.* Brown, 19 N. Y. 111; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262; Frith *v.* Lawrence, 1 Paige 434.

North Carolina.— Cozart *v.* Herndon, 114 N. C. 252, 19 S. E. 158.

Pennsylvania.— Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622; Ueberroth *v.* Riegel, 71 Pa. St. 280; Emerson *v.* Graff, 29 Pa. St. 358; Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49; Borland *v.* Guffey, 1 Grant 394; Johnson *v.* Fessler, 7 Watts 48, 32 Am. Dec. 738.

Tennessee.— Gilman *v.* Kibler, 5 Humphr. 19.

Texas.— Willis *v.* Tumley, 1 Tex. App. Civ. Cas. § 789.

Vermont.— Richardson *v.* Westminster School Dist. No. 10, 38 Vt. 602.

Virginia.— Stuart *v.* Valley R. Co., 32 Gratt. 146.

United States.— Stitt *v.* Huidekoper, 17 Wall. 384, 21 L. ed. 644.

England.— *In re* National Sav. Bank Assoc., L. R. 4 Eq. 9, 36 L. J. Ch. 748, 16 L. T. Rep. N. S. 308, 15 Wkly. Rep. 754; Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666; Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869; Mozley *v.* Tinkler, 1 C. M. & R. 692, 1 Gale 11, 4 L. J. Exch. 84, 5 Tyrw. 416.

See 11 Cent. Dig. tit. "Contracts," § 85.

In the leading case of White *v.* Corlies, 46 N. Y. 467, C wrote to W: "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once." On receipt of this letter W at once purchased lumber and began to prepare it. The next day the proposition was countermanded by C. It was held that there was no agreement, for no notice of W's acceptance had been given to C. W had made up his mind to accept but his intention had not been communicated.

In an old case, where it was argued that where property was offered to a man at a certain price if he was pleased with it on inspection, the property passed when he had seen and approved of it, Brian, C. J., said: "It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact." Y. B. 17 Edw. IV, 1.

66. In a leading English case plaintiff offered by letter to buy his nephew's horse for a certain sum, adding, "If I hear no more about him, I consider the horse mine" at that price. No answer was returned to this letter, but the nephew told an auctioneer to keep the horse out of a sale of his farm stock as it was sold to plaintiff. The auctioneer sold the horse by mistake and plaintiff sued him for conversion. It was held that there was no agreement to sell the horse, as no acceptance had been communicated to plaintiff, and that an offer could not compel its recipient to give notice of his refusal at the peril of being held to have accepted. Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869. And see *In re* Empire Assur. Corp., L. R. 6 Ch. 266, 40 L. J. Ch. 431, 23 L. T. Rep. N. S. 882, 19 Wkly. Rep. 453, where letters were sent to stock-holders of a company stating that new shares were allotted and certificates inclosed, with a receipt to be signed and returned, and it was held that a stock-holder who took no notice of the letter could not be held on the shares sent him. See also Berchorman *v.* Murken, 2 E. D. Smith (N. Y.) 98.

Renewal of insurance.— See Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352, where a firm of insurance agents wrote plaintiff that they would renew his policy when it expired unless notified to the contrary, and the insured did not reply, and the agents neglected to renew, it was held that they were not liable, as there was no agreement to renew.

67. Bramwell, B., in Browne *v.* Hare, 3 H. & N. 484, 27 L. J. Exch. 372. And see Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897; Horton *v.* New York L. Ins. Co., 151 Mo. 604, 52 S. W. 356; Fiedler *v.* Tucker, 13 How. Pr. (N. Y.) 9; *In re* National Sav. Bank Assoc., L. R. 4 Eq. 9, 36 L. J. Ch. 748, 16 L. T. Rep. N. S. 308, 15 Wkly. Rep. 754; Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 103 E. C. L. 869.

Allotment of shares.— Where H applied to the agent of a company for shares, and the

(iv) *Meaning of "Communicated."* When it is said that the acceptance must be "communicated" to the offerer, this does not necessarily mean that he shall have actual personal notice of it. If a person sends an offer by an agent notice of the acceptance given to that agent is sufficient, and in a variety of other ways an acceptance may be communicated without the offerer actually receiving notice of it. It is always sufficient that the offer be accepted in the mode either expressly or impliedly required by the offerer; and if the offerer requires or suggests a mode of acceptance which turns out, so far as giving actual notice to the offerer, to be insufficient or entirely nugatory it is the fault of the offerer, and the agreement is complete.[68]

4. Intention to Affect Legal Relations — a. In General. The agreement must be of a nature to produce a binding result upon the mutual relations of the parties, therein differing from the agreement of a bench of judges or of a board of directors, which has no reference to the relations of the judges or directors one to another.[69] And the agreement must purport to produce a legally binding result, or to put it in another form the intention of the parties must refer to legal relations; it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character.[70] If services are rendered or goods delivered without any intention or expectation of payment, there can be no recovery therefor.[71] Where one person renders services for another, or supports another, the relationship of the parties is of great weight in determining their

directors allotted shares to him, but sent the allotment letter to their own agent, and before the agent delivered the letter H withdrew his offer, it was held that if H had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but as he gave no such authority, there was no contract, communication by the directors to their own agent being no communication to H. *In re* National Sav. Bank Assoc., L. R. 4 Eq. 9, 36 L. J. Ch. 748, 16 L. T. Rep. N. S. 308, 15 Wkly. Rep. 754.

An application for an insurance policy was made by A in Missouri, and was mailed by the company's agent in Missouri to the office in New York. The policy was made out in New York and mailed not to A but to the Missouri agent of the company. It was held that the posting of the letter was not a communication of the acceptance to A. Horton *v.* New York L. Ins. Co., 151 Mo. 604, 52 S. W. 356.

The understanding of a common agent of the parties, not communicated to either, is not binding on them. Fiedler *v.* Tucker, 13 How. Pr. (N. Y.) 9.

Vote of directors of corporation accepting offer.— Where a corporation wrote to a person offering to buy land for a certain amount of its stock and such person replied offering to sell for a larger amount and reserving certain rights in the land, and the directors voted to accept his proposition and directed the treasurer to deliver the stock on receipt of a deed, but the acceptance was not communicated to the other party before he withdrew his proposition, it was held that he was not a stock-holder. Cozart *v.* Herndon, 114 N. C. 252, 19 S. E. 158.

68. See Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285, where the plaintiff, an actress, received from the defendant, the manager of a theater, an offer to engage her for a year, and wrote a note accepting the offer, which she placed in a letter-box on the door of his office. It was proven that this box was used for depositing contracts between the management and the actors. The defendant denied that he had ever received the letter. "This," said the court, "is immaterial." The minds of the parties met when the plaintiff complied with the usual or even occasional practice and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. The principle governing these cases is that there is a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act. The deposit in the box is such an act.

Acceptance by mail or telegraph see *infra*, II, C, 7, 8.

69. Holland Jurisp. 243. "The consequences of agreement must affect the parties themselves. Otherwise, the verdict of a jury or the decision of a court sitting *in banco* would satisfy the foregoing requisites of agreement." Anson Contr. 3.

70. Holland Jurisp. 243; Anson Contr. 3.

71. *Massachusetts.*— Thurston *v.* Perry, 130 Mass. 240; Shepherd *v.* Young, 8 Gray 152, 69 Am. Dec. 242.

Missouri.— Whaley *v.* Peak, 49 Mo. 80.

North Carolina.— University Trustees *v.* McNair, 37 N. C. 605.

Ohio.— Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 61 N. E. 152.

Pennsylvania.—Hartman's Appeal, 3 Grant 271; Brown's Estate, 6 Pa. Co. Ct. 428.

South Carolina.— Johnson *v.* Lewis, 2 Strobh. Eq. 157.

Tennessee.—Taylor *v.* Lincumfelter, 1 Lea 83.

Wisconsin.— Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939.

intention for the purpose of saying whether a contract to pay is to be implied. The question in all cases is one of intention, but relationship or membership in the family may rebut the ordinary presumption of contractual intention.[72]

And see ASSUMPSIT, ACTION OF, 4 Cyc. 325, 326; MASTER AND SERVANT; SALES; WORK AND LABOR.

72. Parent and child.— In the case of parent and child, even though the child may have attained majority, it is presumed that support furnished or services rendered were intended to be gratuitous, and there can be no recovery therefor without proof of an express contract to pay or of circumstances showing that compensation was expected and intended.

District of Columbia.— Cohen *v.* Cohen, 2 Mackey 227.

Georgia.— Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

Iowa.— Cowan *v.* Musgrave, 73 Iowa 384, 35 N. W. 496; McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Kentucky.—Wells *v.* Weaver, 6 Ky. L. Rep. 665.

Maine.— Segars *v.* Segars, 71 Me. 530.

Maryland.— Bantz *v.* Bantz, 52 Md. 686.

Michigan.— Howe *v.* North, 69 Mich. 272, 37 N. W. 213; Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702.

New Hampshire.— Heywood *v.* Brooks, 47 N. H. 231.

North Carolina.—Grant *v.* Grant, 109 N. C. 710, 14 S. E. 90; Young *v.* Herman, 97 N. C. 280, 1 S. E. 792; Dodson *v.* McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408.

Oregon.— Wilkes *v.* Cornelius, 21 Oreg. 341, 23 Pac. 473.

Pennsylvania.— Young's Estate, 148 Pa. St. 575, 24 Atl. 124; Ulrich *v.* Arnold, 120 Pa. St. 170, 13 Atl. 831; Hertzog *v.* Hertzog, 29 Pa. St. 465.

Wisconsin.— Tyler *v.* Burrington, 39 Wis. 376; Pellage *v.* Pellage, 32 Wis. 136; Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559.

See PARENT AND CHILD.

Loco parentis.— The same rule applies where one of the parties, whether a relative or not related at all, stands toward the other in *loco parentis*, as in the case of grandfather and grandchild (Dodson *v.* McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408; Hudson *v.* Lutz, 50 N. C. 217 [with which, however, *compare* Hauser *v.* Sain, 74 N. C. 552]; Barhites' Appeal, 126 Pa. St. 404, 17 Atl. 617; Duffey *v.* Duffey, 44 Pa. St. 399; Kneass' Estate, 6 Phila. (Pa.) 353, 24 Leg. Int. (Pa.) 245); grandmother and grandchild (Shepherd *v.* Young, 8 Gray (Mass.) 152, 69 Am. Dec. 242); stepfather and stepson (Lowe *v.* Webster, 43 S. W. 217, 19 Ky. L. Rep. 1208); stepfather and stepdaughter (Harris *v.* Smith, 79 Mich. 54, 44 N. W. 169, 5 L. R. A. 702; Gillett *v.* Camp, 27 Mo. 541); uncle and nephew (Puterbaugh *v.* Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611; Ormsby *v.* Rhoades, 59 Vt. 505, 10 Atl. 722); uncle and niece (Starkie *v.* Perry, 71 Cal. 495, 12 Pac. 508; Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288); where there was no relationship at all (Wyley *v.* Bull, 41 Kan. 206, 20 Pac. 855; Lippman *v.* Tittmann, 31 Mo. App. 69); orphan taken into family (Schrimpf *v.* Settegast, 36 Tex. 296; Tyler *v.* Burrington, 39 Wis. 376); foster parent and child after the latter's majority (Finch *v.* Finch, 7 Ohio Dec. (Reprint) 673, 4 Cinc. L. Bul. 908). And see PARENT AND CHILD.

Relatives and others being members of family.— Most of the courts go even further than this and hold that the principle applies whenever the parties are nearly related, or where, though distantly related or not related at all, they are members of the same family, and the services consist either in household or other family duties by one party, or support and maintenance by the other. Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678. The rule has been applied, for example, in the case of grandfather and grandchild (Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78); brothers (State *v.* Connoway, 2 Houst. (Del.) 206); sisters (Van Kuren *v.* Saxton, 3 Hun (N. Y.) 547, 5 Thomps. & C. (N. Y.) 566); brother and sister (Price *v.* Price, 101 Ky. 28, 39 S. W. 429, 19 Ky. L. Rep. 211; Cone *v.* Cross, 72 Md. 102, 19 Atl. 391; Tumilty *v.* Tumilty, 13 Mo. App. 444; Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545; Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114, 22 N. Y. St. 723; Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61; Porter *v.* Philadelphia Trust, etc., Co., 3 Wkly. Notes Cas. (Pa.) 260; Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559); stepfather and stepchildren (Clark *v.* Casler, Smith (Ind.) 150); stepmother and stepdaughter (Feiertag *v.* Feiertag, 73 Mich. 297, 41 N. W. 414); father-in-law and daughter-in-law (Boughton *v.* Boughton, 111 Mich. 26, 69 N. W. 94); father-in-law and son-in-law (Daubenspeck *v.* Powers, 32 Ind. 42; Oxford *v.* McFarland, 3 Ind. 156; Royal *v.* Bryan, 1 J. J. Marsh. (Ky.) 432; Wilcox *v.* Wilcox, 48 Barb. (N. Y.) 327); son-in-law and mother-in-law (Mariner *v.* Collins, 5 Harr. (Del.) 290; King *v.* Kelly, 28 Ind. 89; Gerz *v.* Weber, 151 Pa. St. 396, 25 Atl. 82); brothers-in-law (Hill *v.* Hill, 121 Ind. 255, 23 N. E. 87); brother-in-law and sister-in-law (Huffman *v.* Wyrick, 5 Ind. App. 183, 31 N. E. 823); uncle and nephew (Neeley *v.* Rich, 7 Ill. App. 116; Puterbaugh *v.* Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611); uncle and niece (Brown *v.* Yaryan, 74 Ind. 305); any near relatives in same family (Matter of Perry, 5 Misc. (N. Y.) 149, 25 N. Y. Suppl. 716; Ackerman *v.* Ackerman, 2 N. Y. St. 181; Wilkes *v.* Cornelius, 21 Oreg. 341, 23 Pac. 473); distant cousins (Reeves *v.* Moore, 4 Ind. App. 492, 31 N. E. 44); persons not related at all (Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604; Stock *v.* Stoltz, 137 Ill.

b. Social Engagements. An appointment between friends to dine, take a

349, 27 N. E. 604; Medsker *v.* Richardson, 72 Ind. 323; Ryan *v.* Lynch, 9 Mo. App. 18; Schaedel *v.* Reibolt, 33 N. J. Eq. 534).

Contrary doctrine.— In some states it is held that this doctrine does not apply except in the case of parent and child or a person in *loco parentis*, the presumption in other cases, unless rebutted by the special circumstances, being that compensation was intended. It has been so held in the case of brother and sister (Shubart's Estate, 154 Pa. St. 230, 26 Atl. 202; Mayfaith's Appeal, (Pa. 1885) 2 Atl. 28); aunt and nephew (Thurston *v.* Perry, 130 Mass. 240; Brown's Estate, 6 Pa. Co. Ct. 428); uncle and nephew (Fox's Estate, 3 Pa. Co. Ct. 258); granduncle and grandnephew (Michael's Estate, 5 Pa. Co. Ct. 321); father-in-law and son-in-law (Smith *v.* Milligan, 43 Pa. St. 107); mother-in-law and son-in-law (Gerz *v.* Demarra, 162 Pa. St. 530, 29 Atl. 761, 42 Am. St. Rep. 842).

A contractual intention may be shown in all cases, notwithstanding the relationship of the parties, and it may be shown by circumstances. A contract will be implied notwithstanding the relationship where it appears that there was hope of compensation on one side and expectation to award it on the other. Huffman *v.* Wyrick, 5 Ind. App. 183, 31 N. E. 823. As to the sufficiency of the evidence to show contractual intention see the following cases: Grandfather and grandchild (McNab *v.* Stewart, 12 Minn. 407, holding that where the grandfather of a child, at the request of her father, took her into his own family to care for her, when of tender years, a contract on the part of the father to pay for such care would be implied, in the absence of an understanding to the contrary; Hauser *v.* Sain, 74 N. C. 552; *In re* Kneass' Estate, 6 Phila. (Pa.) 353, 24 Leg. Int. (Pa.) 245; Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78); brother and sister (Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114, 22 N. Y. St. 723; Woodward *v.* Bugsbee, 2 Hun (N. Y.) 128, 4 Thomps. & C. (N. Y.) 393; Briggs *v.* Briggs, 46 Vt. 571); uncle and nephew (Morton *v.* Rainey, 82 Ill. 215, 25 Am. Rep. 311, holding that the presumption that a nephew's services, while living in the family of his uncle after attaining his majority, were intended to be gratuitous, was rebutted by proof that he furnished his own clothes and paid his own medical bills; Puterbaugh *v.* Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611; Moist's Appeal, 74 Pa. St. 166); uncle and niece (Quigly *v.* Harold, 22 Ill. App. 269; Brown *v.* Yaryan, 74 Ind. 305; Shane *v.* Smith, 37 Kan. 55, 14 Pac. 477; Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288); aunt and nephew (Fox's Estate, 3 Pa. Co. Ct. 258); stepfather and stepson (Davis *v.* Gallagher, 55 Hun (N. Y.) 593, 9 N. Y. Suppl. 11, 29 N. Y. St. 882); stepfather and stepdaughter (Ellis *v.* Carey, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55); father-in-law and daughter-in-law (Boughton *v.* Boughton, 111 Mich. 26, 69 N. W. 94); mother-in-law and son-in-law (Ament *v.* Wheat, 7 Ky. L. Rep. 663; Reid *v.* Farrar, 6 N. Y. St. 199); brother-in-law and sister-in-law (Lindsey's Appeal, (Pa. 1888) 15 Atl. 434); persons not related (Hogg *v.* Laster, 56 Ark. 382, 19 S. W. 975; Stock *v.* Stoltz, 137 Ill. 349, 27 N. E. 604; Henzler *v.* Bossard, 6 Ind. App. 701, 33 N. E. 217; Schaedel *v.* Reibolt, 33 N. J. Eq. 534; Doremus *v.* Lott, 49 Hun (N. Y.) 284, 1 N. Y. Suppl. 793, 17 N. Y. St. 681; McMillan *v.* Page, 71 Wis. 655, 38 N. W. 173).

As to parent and child see the following cases:

Georgia.— O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Indiana.—McCormick *v.* McCormick, 1 Ind. App. 594, 28 N. E. 122; Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573.

Iowa.— Spitzmiller *v.* Fisher, 77 Iowa 289, 42 N. W. 197.

Kentucky.— Wayman *v.* Wayman, 22 S. W. 557, 15 Ky. L. Rep. 374.

Maine.— Segars *v.* Segars, 71 Me. 530.

New Jersey.— Petty *v.* Young, 43 N. J. Eq. 654, 12 Atl. 392.

New York.— Havens *v.* Havens, 3 N. Y. Suppl. 219, 21 N. Y. St. 942; Markey *v.* Brewster, 10 Hun 16.

Pennsylvania.— Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720; Ulrich *v.* Arnold, 120 Pa. St. 170, 13 Atl. 831; Hertzog *v.* Hertzog, 29 Pa. St. 465, holding that it was error to allow a jury to infer a promise by a father to pay his son wages from declarations made by the father when living that he intended to pay the son for his work.

South Carolina.— Kirkpatrick *v.* Gallagher, 34 S. C. 255, 13 S. E. 450.

Wisconsin.— Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506; Pellage *v.* Pellage, 32 Wis. 136.

See also PARENT AND CHILD.

Compare Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324, holding that the fact that a decedent had boarded with plaintiff for a number of years under contract did not make him a member of the plaintiff's family, so as to rebut the presumption of liability for services performed by plaintiff in nursing him, there being no relationship whatever between the parties.

If there is no contractual intention when the services are rendered or support furnished there can be no recovery. See the cases cited *supra*, note 71.

Charitable motives.— One who has boarded and lodged another from charitable motives cannot afterward recover therefor. University Trustees *v.* McNair, 37 N. C. 605.

Where one goes to live with another apparently as a friend, and so continues to live during his life, although sufficient as a consideration for an express promise, such a

walk, or read a book together is not an agreement in a legal sense, "for it is not meant to produce nor does it produce any new legal duty or right or any change in existing ones." [73]

c. Jokes or Jests. An offer, although formal and complete, cannot be the foundation of an agreement where it is made and accepted, not with the intention to contract, but as a mere jest or joke.[74] But a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.[75]

d. Statements of Intention and Promissory Expressions. A mere statement of intention, or as it is sometimes called a "promissory expression," made without intention to contract, is not such an offer as may be turned into an agreement by acceptance.[76] The statement must import a willingness to be bound, which does not arise, it is clear, where a man says, "I mean to sell this property if I can get one hundred dollars for it." [77] Hence it is clear that all statements made by a person in the form of an offer are not such offers as in the eye of the law admit of being turned into binding promises by acceptance. The limits of this principle are not easy to define; but one must in all cases inquire whether the terms of the offer and the circumstances under which it was made were such as to give the person a right to act on it as a real and intentional offer.[78] Statements of inten-

promise must be direct, clear, and positive, in order to sustain an action on it. Hartman's Appeal, 3 Grant (Pa.) 271.

73. Pollock Contr. 3.

74. Keller *v.* Holderman, 11 Mich. 248, 83 Am. Dec. 737 (where a party gave a three-hundred-dollar check for a fifteen-dollar watch by way of mere frolic and banter, not expecting to buy the watch and the other not expecting to sell it, and it was held that there was no contract); McClung *v.* Terry, 21 N. J. Eq. 225 (where parties went through the marriage ceremony before a person authorized to celebrate marriages without really intending to marry, and it was held that there was no marriage); Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63; Armstrong *v.* McGhee, Add. (Pa.) 261; Bruce *v.* Bishop, 43 Vt. 161.

75. McKinzie *r.* Stretch, 53 Ill. App. 184.

76. *Alabama.*— Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444; Erwin *v.* Erwin, 25 Ala. 236; Kirksey *v.* Kirksey, 8 Ala. 131.

Colorado.— Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Illinois.— Higgins *v.* Lessig, 49 Ill. App. 459.

Indiana.— Stagg *v.* Compton, 81 Ind. 171; Harmon *v.* James, 7 Ind. 263.

Iowa.— Phillips *v.* Van Schaick, 37 Iowa 229.

Kentucky.— Carson *v.* Lucas, 13 B. Mon. 213; Bright *v.* Bright, 8 B. Mon. 194.

Massachusetts.— Tucker *v.* Haughton, 9 Cush. 350; Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58; Thruston *v.* Thornton, 1 Cush. 89.

Michigan.— Marsh *v.* Tunis, 39 Mich. 100.

Mississippi.— Lombard *r.* Martin, 39 Miss. 147; Harper *v.* Calhoun, 7 How. 203.

New York.— Bolles *v.* Walton, 2 E. D. Smith 164.

Pennsylvania.— Ulrich *v.* Arnold, 120 Pa. St. 170, 13 Atl. 831; Tucker *v.* Bitting, 32 Pa. St. 428; Hartman's Appeal, 3 Grant 271.

Tennessee.—Stamper *v.* Temple, 6 Humphr. 113, 44 Am. Dec. 296.

Texas.— McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

United States.— See Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934; Nutt *v.* Minor, 14 How. 464, 14 L. ed. 500.

England.— Weeks *v.* Tybald, Noy 11, Rolle Abr. 6; Randall *v.* Morgan, 12 Ves. Jr. 67, 8 Rev. Rep. 289.

77. Stagg *v.* Compton, 81 Ind. 171.

78. Cases in which the statement was held not an offer.— Where defendant, while he and his family were in deep affliction over the murder of his son, and he himself was laboring under the effect of severe wounds received from the same persons who had killed his son, said, when the arresting of the persons who had perpetrated the outrage was spoken of, that he would give two hundred dollars to have them arrested, and plaintiff, who was present, made the arrest and claimed the reward, it was held that there was no offer. "What is called an offered reward," said the court, "was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind and that of his family; as we frequently hear persons exclaim, 'Oh! I would give a thousand dollars if such an event were to happen,' or, *vice versa*. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention." Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 116, 44 Am. Dec. 296. See also Kirksey *v.* Kirksey, 8 Ala. 131 (where A wrote to the widow of his brother, living sixty miles distant, that if she would come and see him he would let her have a place to raise her family, and shortly after she removed to A's residence, and he for two years furnished her with a comfortable residence, and then required her to give it up);

tion made to third persons cannot generally be considered as offers.[79] It is in such cases for the jury to decide whether what was said was a mere loose statement of intention or was intended as a legal offer.[80] Representations made during the negotiation of a contract which are not included in the final agreement are not a part of it and are not binding.[81] So a mere request, where there is no legal liability in the party to have the service performed or the thing done, and it is not for his benefit, is not an offer to pay for what is done in pursuance of the request.[82]

Higgins *v.* Lessig, 49 Ill. App. 459 (where defendant, from whom an old harness worth fifteen dollars had been stolen, on discovering his loss, excitedly exclaimed: "I will give $100 to any man who will find out who the thief is"); Topliff *v.* McKendree, 88 Mich. 148, 55 N. W. 109 (holding that to say "I guess I can ship it to you," cannot be construed as an offer to ship); Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400 (where the directors of a bank published in a newspaper, "Directors and stockholders are personally responsible for all its debts," and it was held not to create a contract with depositors); Weeks *v.* Tybald, Noy 11, Rolle Abr. 6 (where defendant told plaintiff that he would give one hundred dollars to him who married his daughter with his consent, and plaintiff did so and brought an action for the one hundred dollars, and it was held not to be reasonable that a man should be bound by general words spoken to excite suitors); Randall *v.* Morgan, 12 Ves. Jr. 67, 8 Rev. Rep. 289 (where a person, in answer to a suitor for his daughter, wrote: "Whether Mary remains single or marries I shall allow her the interest of 2000*l.* If the latter I may bind myself to do it and pay the principal at my decease to her and her heirs").

Cases in which the statement was held an offer.— On the other hand where a man standing in front of a burning building shouted to the crowd: "I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive," it was held that there was a binding contract with one of the firemen who entered the building and brought out the woman. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. And see McClure *v.* Wilson, 43 Ill. 356, 363 (Wilson *v.* McClure, 50 Ill. 366), where, at a public meeting during the war, a man declared that he would give four hundred dollars to get his sons relieved from the draft, and it was held that there was a binding promise to pay that amount to any one who should accomplish that object. "If," said Breeze, J., "I have valuable property in imminent danger, and I make proclamation that I will give fifty dollars to save it, and a stranger undertakes the labor and does save it, on what principle of law or justice is it that I should not pay? So, here, the defendant declared he would give four hundred dollars to save his sons from the draft, and put the declaration in writing. The plaintiff incurred the expense and trouble necessary to save his sons, and did save them; why then should he not be paid the amount promised?" See also Patton *v.* Hassinger, 69 Pa. St. 311; Holt *v.* Wood, 24 Pittsb. Leg. J. (Pa.) 443; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210 [*affirming* [1892] 2 Q. B. 484, 56 J. P. 665, 61 L. J. Q. B. 696].

79. *Alabama.*— Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162.

California.— Canney *v.* South Pac., etc., R. Co., 63 Cal. 501.

Colorado.— Dunning *v.* Thomas, 10 Colo. 84, 14 Pac. 49; Perkins *v.* Westcoat, 3 Colo. App. 338, 33 Pac. 139.

Iowa.— Crane *v.* Gritton, 54 Iowa 738, 6 N. W. 79, 7 N. W. 138.

Massachusetts.— Morris *v.* Brightman, 143 Mass. 149, 9 N. E. 512.

New Jersey.— Green *v.* Hathaway, 36 N. J. Eq. 471.

New York.— Merchants' Bank *v.* Spalding, 9 N. Y. 53.

Pennsylvania.— Ulrich *v.* Arnold, 120 Pa. St. 170, 13 Atl. 831.

Texas.— Hopson *v.* Brunwankel, 24 Tex. 607, 76 Am. Dec. 124.

Vermont.— Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88.

80. Thruston *v.* Thornton, 1 Cush. (Mass.) 89; Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934.

81. Inglis *v.* Buttery, 3 App. Cas. 552; Freeman *v.* Baker, 5 B. & Ad. 797, 27 E. C. L. 336, 5 C. & P. 475, 24 E. C. L. 663, 3 L. J. K. B. 17, 2 N. & M. 446; Kain *v.* Old, 2 B. & C. 627, 4 D. & R. 52, 2 L. J. K. B. O. S. 102, 26 Rev. Rep. 497, 9 E. C. L. 274; Meyer *v.* Everth, 4 Campb. 22, 15 Rev. Rep. 722; Tye *v.* Fynmore, 3 Campb. 462, 14 Rev. Rep. 809; Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 80 E. C. L. 130; Aris *v.* Orchard, 6 H. & N. 160, 30 L. J. Exch. 21, 3 L. T. Rep. N. S. 443, 9 Wkly. Rep. 106; Conley *v.* Watts, 17 Jur. 172, 22 L. J. Ch. 591, 1 Wkly. Rep. 218; Pickering *v.* Dowson, 4 Taunt. 779.

82. *Indiana.*— Norris *v.* Dodge, 23 Ind. 190.

Maine.— Batchelder *v.* McKenney, 36 Me. 555.

Mississippi.— Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88, where the keeper of a watering-place telegraphed: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail," and it was held not an offer to pay for the service.

Missouri.—Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232, where it was said,

e. Proposals to Deal. If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases.[82]

f. Advertisements of Goods For Sale. Similarly business advertisements published in newspapers and circulars sent out by mail or distributed by hand, stating that the advertiser has a certain quantity or quality of goods which he wants to dispose of at certain prices, are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them; but they are simply invitations to all persons who may read them that the advertiser is ready to receive offers for the goods at the price stated.[84] It must be remembered, however, that

in substance, that, if one calls in a physician and requests him to perform services for another, no implied promise to pay for them arises, unless his relation to the patient is such as to make a legal obligation on his part to provide a physician — as where a husband calls in a physician to attend a wife or a father his minor child.

Pennsylvania.— Boyd *v.* Sappington, 4 Watts 247.

South Carolina.— Wilie *v.* Price, 5 Rich. Eq. 91.

Vermont.— Smith *v.* Watson, 14 Vt. 332.

See PHYSICIANS AND SURGEONS.

83. *Dakota.*— Talbot *v.* Pettigrew, 3 Dak. 141, 13 N. W. 576.

Illinois.— Smith *v.* Weaver, 90 Ill. 392.

Iowa.— Patton *v.* Arney, 95 Iowa 664, 64 N. W. 635; Knight *v.* Cooley, 34 Iowa 218.

Massachusetts.— Ashcroft *v.* Butterworth, 136 Mass. 511; Lincoln *v.* Erie Preserving Co., 132 Mass. 129; Smith *v.* Gowdy, 8 Allen 566.

Michigan.— Ahearn *v.* Ayres, 38 Mich. 692.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Missouri.— Hunt *v.* Johnston, 24 Mo. 509; James *v.* Marion Fruit Jar, etc., Co., 69 Mo. App. 207.

New York.— Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4.

Pennsylvania.— Allen *v.* Kirwin, 159 Pa. St. 612, 28 Atl. 495; Slaymaker *v.* Irwin, 4 Whart. 369.

Wisconsin.— Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 712, 48 Am. Rep. 516.

United States.— Martin *v.* Northwestern Fuel Co., 22 Fed. 596.

England.— Harvey *v.* Facey, [1893] A. C. 552, 62 L. J. P. C. 127, 69 L. T. Rep. N. S. 504, 1 Reports 428, 42 Wkly. Rep. 129.

Canada.— Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60.

Illustrations.— In an Iowa case plaintiff wrote defendant inquiring whether he was the owner of certain lots of land and asking the price, and the defendant replied: "The lots are so incumbered it would be difficult to make title at once. Price, $1,700 and $1,500, net, and cheap." Plaintiff replied: "I will take the lots on the terms proposed by you in it [your letter] and herewith send you draft for $100 on account of the bargain. The balance of the money is ready, and will be paid immediately on good, clear title being made." Defendant returned the draft and plaintiff brought suit on an alleged contract to sell the lots. It was held that there was no agreement, the court saying: "We do not understand the letter to contain a proposition to sell the lots. The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser, and may not be willing to part with his property to any one who offers his price. We regard the correspondence, . . . as amounting, on defendant's part, simply to a negotiation, and not to a binding offer. It required the acceptance by him of the offer contained in plaintiff's last letter to create a binding contract." Knight *v.* Cooley, 34 Iowa 218, 221. See also Lincoln *v.* Erie Preserving Co., 132 Mass. 129 (where A, who had acted as a broker for B, and also dealt with him on his own account, telegraphed him as follows: "Telegraph how much corn you will sell with lowest cash price," to which B replied: "Three thousand cases, one dollar five cents, open one week," to which A replied: "Sold corn, will see you to-morrow"); Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 712, 48 Am. Rep. 516 (where defendant wrote plaintiff: "We are authorized to offer Michigan fine salt, in full car-load lots of eighty to ninety-five bbls., delivered at your city, at 85c. per bbl.," and plaintiff thereupon telegraphed "Your letter . . . received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter," and it was held not to make an agreement, defendant's letter being simply a notice to those dealing in salt that he was in a position to consider offers for the article at the prices named).

84. Zeltner *v.* Irwin, 25 N. Y. App. Div. 228, 49 N. Y. Suppl. 337; Spencer *v.* Harding, L. R. 5 C. P. 561, 564, 39 L. J. C. P. 332,

in all these cases the question is one of intention; and that whether or not such transactions are to be construed as agreements depends on the intention of the parties as collected from the language used and the nature of the transaction.[85]

g. Invitations to Bid. In like manner, where a person or a corporation advertises for bidders for property to be sold or for work to be done, it is well settled that this is simply an invitation to make offers — to make tenders — as it is often called, and that the advertiser is not obliged to accept the highest or lowest or any of the bids.[86] So a response to a proposal for exhibitors to show their wares at a public exhibition has been held not to make an agreement.[87]

h. Railroad and Steamship Time-Tables. It has been held by some courts, but not by all, that a time-table published by a railroad or steamboat company is an offer to the public generally that if they will apply for a ticket for carriage they will be carried as stated in the table,[88] and the offer is accepted by each person who applies for a ticket.[89]

23 L. T. Rep. N. S. 237, 19 Wkly. Rep. 48 (holding that an announcement that goods would be sold by tender was "a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt").

"**A bookseller's catalogue,** with prices stated against the names of the books, would seem to contain a number of offers. But if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer." Anson Contr. 40.

85. Pollock Contr. 14. See Walsh *v.* St. Louis Exposition, etc., Assoc., 90 Mo. 459, 2 S. W. 842, 16 Mo. App. 502. See also Keller *v.* Ybarru, 3 Cal. 147 (where defendant, who had a crop of growing grapes, offered to pick from the vines and deliver to plaintiff at defendant's vineyard so many grapes then growing in said vineyard as plaintiff should wish to take during the year at ten cents per pound, and it was held that, when plaintiff while the offer was in force named the quantity there was a contract binding both parties as to the quantity named); College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. 382 (where a firm in another place wrote to a mill company stating that it could buy bran at home for eight dollars per ton, asking if they could sell at that price, and if so to wire them as they had an order to fill, and the mill company replied that it could sell bran at seven dollars per ton f.o.b. and hoped to receive the order, and the firm on receipt of this telegraphed: "Ship 50 tons as per your letter," and it was held a binding agreement, although the offer did not state the quantity proposed to be sold).

86. *California.*— Argenti *v.* San Francisco, 16 Cal. 255.

Louisiana.— Ricau *v.* Baquie, 20 La. Ann. 67.

Maine.— Howard *v.* Maine Industrial School, 78 Me. 230, 3 Atl. 657.

Missouri.—Anderson *v.* Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707; Coquard *v.* Joplin School Dist., 46 Mo. App. 6.

New York.— Smith *v.* New York, 10 N. Y. 504; Soper *v.* Buffalo, etc., R. Co., 19 Barb. 310; Topping *v.* Swords, 1 E. D. Smith 609.

Ohio.— State *v.* Ohio Penitentiary, 5 Ohio St. 234. As to the effect of acceptance of a bid for a proposed building, see Hughes *v.* Clyde, 41 Ohio St. 339.

Pennsylvania.— Leskie *v.* Haseltine, 155 Pa. St. 98, 25 Atl. 886.

United States.— People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. 38, 19 L. ed. 844; Colorado Pav. Co. *v.* Murphy, 78 Fed. 28, 49 U. S. App. 17, 23 C. C. A. 631, 37 L. R. A. 630.

England.— Spencer *v.* Harding, L. R. 5 C. P. 561, 39 L. J. C. P. 332, 23 L. T. Rep. N. S. 237, 19 Wkly. Rep. 48.

The acceptance of the bid makes the contract (Garfielde *v.* U. S., 93 U. S. 242, 23 L. ed. 779) in accordance with the terms of the proposals (Hughes *v.* Clyde, 41 Ohio St. 339); but the parties may state the exact agreement as they please in a subsequently executed written document (Taylor *v.* Fox, 16 Mo. App. 527; Megrath *v.* Gilmore, 10 Wash. 339, 39 Pac. 131).

A circular issued by the government, in connection with an advertisement for proposals, required a guaranty that the bidder would not withdraw his proposal within sixty days. It was held that the United States could not after that time, as against the bidder, accept the bid. Haldane *v.* U. S., 69 Fed. 819, 32 U. S. App. 607, 16 C. C. A. 447.

87. Demuth *v.* American Inst., 75 N. Y. 502 [*affirming* 42 N. Y. Super. Ct. 336].

88. That the company will use due care and skill to have the trains arrive and depart at the times mentioned in the table. Gordon *v.* Manchester, etc., R. Co., 52 N. H. 596, 13 Am. Rep. 97.

89. See Sears *v.* Eastern R. Co., 14 Allen (Mass.) 437, 92 Am. Dec. 780; Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Gordon *v.* Manchester, etc., R. Co., 52 N. H. 596, 13 Am. Rep. 97; Lord *v.* Midland R. Co., L. R. 2 C. P. 339, 36 L. J. C. P. 170, 15 L. T. Rep. N. S. 576, 15 Wkly. Rep. 405; Hurst *v.* Great Western R. Co., 19 C. B. N. S. 310, 11 Jur. N. S. 730, 34 L. J. C. P. 264, 12 L. T.

i. Advertisement of Auction Sales. An advertisement of a sale by auction is not an offer, so as to become a contract with persons attending at the place advertised, binding the advertiser to sell the property, or to sell on the terms advertised, but is a mere statement of intention.[90]

j. Advertisement of Theaters and Shows. The same principle would seem to apply to advertisements of public performances at theaters and other places.[91]

k. Announcement of Examination For Scholarship. A public announcement that an examination for a scholarship will be held is not an offer to award it to the competitor obtaining the most marks.[92]

l. Negotiations Looking to Formal Contract. Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus where they intend that their verbal negotiation shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed.[93] And the same is true in other cases of preliminary

Rep. N. S. 634, 13 Wkly. Rep. 950, 115 E. C. L. 310; Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808; Denton *v.* Great Northern R. Co., 5 E. & B. 860, 2 Jur. N. S. 185, 25 L. J. Q. B. 129, 4 Wkly. Rep. 240, 85 E. C. L. 860; McCartan *v.* Northeastern R. Co., 54 L. J. Q. B. 441.

90. Harris *v.* Nickerson, L. R. 8 Q. B. 286, 42 L. J. Q. B. 171, 28 L. T. Rep. N. S. 410, 21 Wkly. Rep. 635. And see the following cases:

Iowa.— Farr *v.* John, 23 Iowa 286, 92 Am. Dec. 426.

Massachusetts.—Boyd *v.* Greene, 162 Mass. 566, 39 N. E. 277; Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353.

Missouri.— Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462.

North Carolina.— Satterfield *v.* Smith, 33 N. C. 60; Rankin *v.* Matthews, 29 N. C. 286.

Pennsylvania.— Ashcom *v.* Smith, 2 Penr. & W. 211, 21 Am. Dec. 437.

Tennessee.— Davis *v.* Petway, 3 Head 667, 75 Am. Dec. 789.

England.— Richardson *v.* Silvester, L. R. 9 Q. B. 34, 43 L. J. Q. B. 1, 29 L. T. Rep. N. S. 395, 22 Wkly. Rep. 74; Warlow *v.* Harrison, 1 E. & E. 309, 102 E. C. L. 309.

Canada.— Craig *v.* Miller, 22 U. C. C. P. 348.

See also AUCTIONS AND AUCTIONEERS, 4 Cyc. 1044.

91. The only case, apparently, which touches at all upon this question is a Missouri case in which it was held that the proprietor of a theater who advertises the price of reserved seats during a certain period, and that the sale of seats will begin at a given hour, is not bound to sell any seat for the entire period to the first person who presents himself and tenders the advertised price. The court said that even if the advertisement had offered the choice of seats to the first comer, and the plaintiff had got there first, but the proprietor out of mere caprice had determined to close the house, to throw it open to the public, or to hold a prayer-meeting during the week advertised, plaintiff could only recover, if at all, for the false representation for loss of time and cabhire in reaching the place. Pearce *v.* Spalding, 12 Mo. App. 141.

See THEATERS AND SHOWS.

92. Rooke *v.* Dawson, [1895] 1 Ch. 480, 64 L. J. Ch. 301, 59 J. P. 231, 72 L. T. Rep. N. S. 248, 13 Reports 269, 43 Wkly. Rep. 313.

93. *Alabama.*— Hodges *v.* Sublett, 91 Ala. 588, 8 So. 800; Hammond *v.* Winchester, 82 Ala. 470, 2 So. 892.

California.— Spinney *v.* Downing, 108 Cal. 666, 41 Pac. 797.

Iowa.— Crittenden *v.* Armour, 80 Iowa 221, 45 N. W. 888.

Louisiana.— Ferre Canal Co. *v.* Burgin, 106 La. 309, 30 So. 863; Avendano *v.* Arthur, 30 La. Ann. 316; Fredericks *v.* Fasnacht, 30 La. Ann. 117; Bloeker *v.* Tillman, 4 La. 77; Des Boulets *v.* Gravier, 1 Mart. N. S. 420; Casson *v.* Fulton, 5 Mart. 676; Villere *v.* Brognier, 3 Mart. 326.

Maine.— Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545.

Massachusetts.— Edge Moor Bridge Works *v.* Bristol County, 170 Mass. 528, 49 N. E. 918; Sibley *v.* Felton, 156 Mass. 273, 31 N. E. 10; Morris *v.* Brightman, 143 Mass. 149, 9 N. E. 512; Dunham *v.* Boston, 12 Allen 375.

Michigan.— Whiteford *v.* Hitchcock, 74 Mich. 208, 41 N. W. 898; Gates *v.* Nelles, 62 Mich. 444, 29 N. W. 73; Wardell *v.* Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; McDonald *v.* Bewick, 51 Mich. 79, 16 N. W. 240; Crane *v.* Partland, 9 Mich. 493.

Minnesota.— Shepard *v.* Carpenter, 54 Minn. 153, 55 N. W. 906; Starkey *v.* Minneapolis, 19 Minn. 203.

Mississippi.— Gullich *v.* Alford, 61 Miss. 224.

Missouri.— Eads *v.* Carondelet, 42 Mo. 113; Methudy *v.* Ross, 10 Mo. App. 101; Bourne *v.* Shapleigh, 9 Mo. App. 64.

Nevada.— Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125.

New Jersey.— Shaw *v.* Woodbury Glass-Works, 52 N. J. L. 7, 18 Atl. 696; Jersey City Water Com'rs *v.* Brown, 32 N. J. L.

negotiation. An agreement to be finally settled must comprise all the terms which the parties intend to introduce. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled.[94] Generally speaking the circumstance that the parties

504; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

New York.— Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4; Brown *v.* New York Cent. R. Co., 44 N. Y. 79; Hough *v.* Brown, 19 N. Y. 111; Nicholls *v.* Granger, 7 N. Y. App. Div. 113, 40 N. Y. Suppl. 99; Bryant *v.* Ondrak, 87 Hun 477, 34 N. Y. Suppl. 384, 68 N. Y. St. 316; Sidney Glass Works *v.* Barnes, 86 Hun 374, 33 N. Y. Suppl. 508, 67 N. Y. St. 221; Fraser *v.* Small, 59 Hun 619, 13 N. Y. Suppl. 468, 37 N. Y. St. 900; Commercial Telegram Co. *v.* Smith, 47 Hun 494; Sourwine *v.* Truscott, 17 Hun 432; Law *v.* Pemberton, 10 Misc. 362, 31 N. Y. Suppl. 21, 63 N. Y. St. 435; Kirwan *v.* Byrne, 19 Misc. 76, 29 N. Y. Suppl. 287, 59 N. Y. St. 746; Walton *v.* Mather, 4 Misc. 261, 24 N. Y. Suppl. 307, 53 N. Y. St. 716; Templeton *v.* Wile, 3 N. Y. Suppl. 931, 22 N. Y. St. 251 [*affirming* 3 N. Y. Suppl. 9, 18 N. Y. St. 1012].

Ohio.— See Hughes *v.* Clyde, 41 Ohio St. 33), holding that the acceptance of a legally made bid for a proposed building does not in itself constitute a contract, but entitles the bidder to one in accordance with the proposals.

Pennsylvania.— Sparks *v.* Pittsburgh Co., 159 Pa. St. 295, 28 Atl. 152; MacMackin *v.* Timmins, 14 Wkly. Notes Cas. 318; Eastwick *v.* Singerly, 16 Phila. 162, 40 Leg. Int. 271.

Vermont.— Congdon *v.* Darcy, 46 Vt. 478; Mixer *v.* Williams, 17 Vt. 457.

United States.— People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. 38, 19 L. ed. 844; Strobridge Lithographing Co. *v.* Randall, 73 Fed. 619, 19 C. C. A. 611; Mt. Holly Min., etc., Co. *v.* Caraleigh Phosphate, etc., Works, 72 Fed. 244, 18 C. C. A. 535; Bean *v.* Clark, 30 Fed. 225; Darlington Iron Co. *v.* Foote, 16 Fed. 646; Riggs *v.* Magruder, 2 Cranch C. C. 143, 20 Fed. Cas. No. 11,828.

England.— Stanley *v.* Dowdeswell, L. R. 10 C. P. 102, 23 Wkly. Rep. 389; Applehy *v.* Johnson, L. R. 9 C. P. 158; Crossley *v.* Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Wkly. Rep. 387; Brien *v.* Swainson, L. R. 1 Ir. 135; Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298; Rossiter *v.* Miller, 3 App. Cas. 1124, 48 L. J. Ch. 10, 39 L. T. Rep. N. S. 173, 26 Wkly. Rep. 865; Connery *v.* Best, Cab. & E. 291; Lloyd *v.* Nowell, [1895] 2 Ch. 744, 64 L. J. Ch. 744, 73 L. T. Rep. N. S. 154, 13 Reports 712, 44 Wkly. Rep. 43; Bolton *v.* Lambert, 41 Ch. D. 295, 58 L. J. Ch. 425, 60 L. T. Rep. N. S. 687, 37 Wkly. Rep. 434; Williams *v.* Brisco, 22 Ch. D. 441; May *v.* Thomson, 20 Ch. D. 705, 51 L. J. Ch. 917, 47 L. T. Rep. N. S. 295; Bonnewell *v.* Jenkins, 8 Ch. D. 70, 47 L. J. Ch. 758, 38 L. T. Rep. N. S. 81, 26 Wkly. Rep. 294; Winn *v.* Bull, 7 Ch. D. 29, 47 L. J. Ch. 139, 26 Wkly. Rep. 230; Chinnock *v.* Ely, 4 De G. J. & S. 638, 11 Jur. N. S. 329, 12 L. T. Rep. N. S. 251, 6 New Rep. 1, 13 Wkly. Rep. 597, 69 Eng. Ch. 488; Wood *v.* Midgley, 5 De G. M. & G. 41, 23 L. J. Ch. 553, 2 Wkly. Rep. 301, 54 Eng. Ch. 41; Warner *v.* Willington, 3 Drew 523, 2 Jur. N. S. 433, 25 L. J. Ch. 662, 4 Wkly. Rep. 531; Governor, etc., of Poor *v.* Pitch, 28 Eng. L. & Eq. 470; Ridgway *v.* Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 Wkly. Rep. 804; Forster *v.* Rowland, 7 H. & N. 103, 7 Jur. N. S. 998, 30 L. J. Exch. 396; Hawkesworth *v.* Chaffey, 55 L. J. Ch. 335, 54 L. T. Rep. N. S. 72; Harvey *v.* Barnard's Inn, 59 L. J. Ch. 750, 45 L. T. Rep. N. S. 280, 29 Wkly. Rep. 922; Vale of Neath Colliery Co. *v.* Furness, 45 L. J. Ch. 276, 34 L. T. Rep. N. S. 231, 24 Wkly. Rep. 631; Boyd *v.* Hind, 25 L. J. Exch. 246; Jones *v.* Victoria Graving Dock Co., 46 L. J. Q. B. 219; Page *v.* Norfolk, 70 L. T. Rep. N. S. 781; Bushell *v.* Pocock, 53 L. T. Rep. N. S. 860; Goodall *v.* Harding, 52 L. T. Rep. N. S. 126; Donnison *v.* People's Café Co., 45 L. T. Rep. N. S. 187; Bartlett *v.* Greene, 30 L. T. Rep. N. S. 553; Ball *v.* Bridges, 30 L. T. Rep. N. S. 430, 22 Wkly. Rep. 552.

See 11 Cent. Dig. tit. "Contracts," §§ 106–108.

The following instruction held correct: "If the jury believe that all the terms of the contract were not finally arranged the first day, but that the entire contract was to be arranged and reduced to writing the next day; there was then no binding contract between the parties and no contract having been proved to have been made the next day, or any subsequent day, the plaintiff must fail in this action." Brown *v.* Finney, 53 Pa. St. 373, 375.

Oral agreement acted upon.— Although an oral agreement is not put in writing as intended, yet if it is acted upon by them it becomes conclusive upon them. Peck *v.* Miller, 39 Mich. 594; Green *v.* Cole, (Mo. 1894) 24 S. W. 1058; Riggins *v.* Missouri River, etc., R. Co., 73 Mo. 598; Paige *v.* Fullerton Woolen Co., 27 Vt. 485.

94. Ridgway *v.* Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 Wkly. Rep. 804. See also Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125; Edmondson *v.* Fort, 75 N. C. 404; Stanley *v.* Dowdeswell, L. R. 10 C. P. 102, 23 Wkly. Rep. 389; Winn *v.* Bull, 7 Ch. D. 29, 47 L. J. Ch. 139, 26 Wkly. Rep. 230; Honeyman *v.* Marryatt, 6 H. L. Cas. 112, 4 Jur. N. S. 17, 26 L. J. Ch. 619.

Contract for work.— It has been held,

did intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to an agreement.[95] The rule applies where blanks are left in a written draft, not through mistake, but because the parties are not ready to fill them.[96] And if the terms of a contract are agreed upon and a paper signed in blank by one of the parties, who leaves it to the other party to fill up, and the latter fills it up in a different manner from that agreed upon, the paper can have no force as an agreement.[97] If it is understood that a contract signed by two parties is also to be executed by a third party, there is no contract until this is done.[98] On the other hand an agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. If therefore it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed upon, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement.[99]

however, that if the terms proposed by two parties to each other constitute a complete contract by which the one party is to do for the other a definite work at a certain time and to receive a specified rate of remuneration, it is not the less a binding contract which will subject the party who is to do the work to an action for not doing it, because at the time the terms were accepted something remained to be disclosed as to the nature of the work, upon which it might depend whether there might not be a legal justification for refusing to perform it. Lara *v.* General Apothecaries' Co., 26 L. J. Exch. 225.

Contract by correspondence.— "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound?" Lyman *v.* Robinson, 14 Allen (Mass.) 242, 254. See also Strobridge Lithographing Co. *v.* Randall, 73 Fed. 619, 622, 19 C. C. A. 611, where it was said: "Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that some term which either party desires to be in the contract is not included or definitely expressed in the correspondence relied upon, no contract is made. If it is plain from the language that either party wishes or contemplates that another person, not a party to the correspondence, shall be a party to the contract, a correspondence as to the terms of such a tripartite agreement between two cannot be a completed contract between the two. It is as essential that all the parties intended shall be bound as it is that all the terms intended should be definitely agreed upon."

An agreement may be deduced from correspondence, although it does not contain an express acceptance of terms by the purchaser and agreement to pay; the seller several times averring a contract, and the purchaser never denying it, but many times tacitly and several times expressly admitting it, and merely asserting as cause of postponement of performance the lack of ready money. Haines *v.* Dearborn, 199 Pa. St. 474, 49 Atl. 319.

95. Ridgway *v.* Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 Wkly. Rep. 804. See also Rossiter *v.* Miller, 5 Ch. D. 648, 658, 46 L. J. Ch. 228, 36 L. T. Rep. N. S. 304, 25 Wkly. Rep. 890, where Lord Justice James said: "On the question of construction, different minds may differ, but, for my own part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts by letters which they wrote without the slightest idea that they were contracting." And see Smith *v.* Webster, 3 Ch. D. 49, 45 L. J. Ch. 528, 35 L. T. Rep. N. S. 44, 24 Wkly. Rep. 894.

96. Atkins *v.* Van Buren School Tp., 77 Ind. 447; Shepard *v.* Carpenter, 54 Minn. 153, 55 N. W. 906.

97. Rounsavell *v.* Pease, 45 Wis. 506.

98. Arnold *v.* Scharbauer, 116 Fed. 492. And see PRINCIPAL AND SURETY.

99. *Alabama.*— Hodges *v.* Sublett, 91 Ala. 588, 8 So. 800.

California.— Spinney *v.* Downing, 108 Cal. 660, 41 Pac. 797.

Illinois.— Harbor Point Club House Assoc. *v.* Young, 99 Ill. App. 292.

Kentucky.— Bell *v.* Offutt, 10 Bush 632.

Louisiana.— Montague *v.* Weil, 30 La. Ann. 50.

Maine.— Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545.

5. Revocation of Offer or Acceptance — a. Of Offer — (i) *After Acceptance.* An acceptance by promise or act, and communication thereof when necessary,[1] while an offer of a promise is in force, changes the character of the offer. It supplies the elements of agreement and consideration, changing the offer into a binding promise, and the offer cannot afterward be revoked without the accepter's consent.[2] Where the agreement is complete by acceptance, a new

Maryland.— Cheney *v.* Eastern Transp. Line, 59 Md. 557.

Massachusetts.— Drummond *v.* Crane, 159 Mass. 577, 35 N. E. 90, 38 Am. St. Rep. 460, 23 L. R. A. 707; Baylies *v.* Payson, 5 Allen 473.

Michigan.— Farrow *v.* Bresler, 108 Mich. 564, 66 N. W. 492.

Missouri.— Green *v.* Cole, 127 Mo. 587, 30 S. W. 135, 103 Mo. 70, 15 S. W. 317; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869; Lowrey *v.* Danforth, 95 Mo. App. 441, 69 S. W. 39; Broome *v.* Wright, 15 Mo. App. 406; Methudy *v.* Ross, 10 Mo. App. 101.

Nevada.— Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125.

New Jersey.— Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

New York.— Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N .Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431; Pratt *v.* Hudson River R. Co., 21 N. Y. 305; Vassar *v.* Camp, 11 N. Y. 441; Disken *v.* Herter, 73 N. Y. App. Div. 453, 77 N. Y. Suppl. 300; Brown *v.* Norton, 50 Hun 248, 2 N. Y. Suppl. 869, 19 N. Y. St. 220; Rowland *v.* Phalen, 1 Bosw. 43.

Ohio.— Highland County *v.* Rhoades, 26 Ohio St. 411; Blaney *v.* Hoke, 14 Ohio St. 292; Kiralfy *v.* Macauley, 9 Ohio Dec. (Reprint) 833, 17 Cinc. L. Bul. 331.

Vermont.— Paige *v.* Fullerton Woolen Co., 27 Vt. 485.

Virginia.— Mackey *v.* Mackey, 29 Gratt. 158.

Wisconsin.— Cohn *v.* Plumer, 88 Wis. 622, 60 N. W. 1000; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797.

United States.— Blight *v.* Ashley, Pet. C. C. 15, 3 Fed. Cas. No. 1,541.

England.— Lewis *v.* Brass, 3 Q. B. D. 667, 37 L. T. Rep. N. S. 738, 26 Wkly. Rep. 152; Crossley *v.* Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Wkly. Rep. 387; Latch *v.* Wedlake, 11 A. & E. 959, 9 L. J. Q. B. 201, 3 P. & D. 499, 39 E. C. L. 504; Hussey *v.* Horne-Payne, 4 App. Cas. 311, 48 L. J. Ch. 846, 41 L. T. Rep. N. S. 1, 27 Wkly. Rep. 585; Gibbons *v.* Northeastern Metropolitan Asylum Dist., 11 Beav. 1, 12 Jur. 22, 17 L. J. Ch. 5; Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298; Filby *v.* Hounsell, [1896] 2 Ch. 737, 65 L. J. Ch. 852, 75 L. T. Rep. N. S. 270, 45 Wkly. Rep. 232; Gray *v.* Smith, 43 Ch. D. 208, 59 L. J. Ch. 145, 62 L. T. Rep. N. S. 335, 38 Wkly. Rep. 310; Bolton *v.* Lambert, 41 Ch. D. 295, 58 L. J. Ch. 425, 60 L. T. Rep. N. S. 687, 37 Wkly. Rep. 434; Bonnewell *v.* Jenkins, 8 Ch. D. 70, 47 L. J. Ch. 758, 38 L. T. Rep. N. S. 81, 26 Wkly. Rep. 294; Winn *v.* Bull, 7 Ch. D. 29, 47 L. J. Ch. 139, 26 Wkly. Rep. 230; Rossiter *v.* Miller, 5 Ch. D. 648, 46 L. J. Ch. 228, 36 L. T. Rep. N. S. 304, 25 Wkly. Rep. 890 [*affirmed* in 3 App. Cas. 1124, 48 L. J. Ch. 10. 39 L. T. Rep. N. S. 173, 26 Wkly. Rep. 865]; Thomas *v.* Dering, 1 Jur. 427, 1 Keen 729, 6 L. J. Ch. 267, 15 Eng. Ch. 729; Eadie *v.* Addison, 52 L. J. Ch. 80, 47 L. T. Rep. N. S. 543, 31 Wkly. Rep. 320; Cayley *v.* Walpole, 39 L. J. Ch. 609, 22 L. T. Rep. N. S. 900, 18 Wkly. Rep. 782; Richards *v.* Hayward, 2 M. & G. 574, 10 L. J. C. P. 108, 2 Scott N. R. 670, 40 E. C. L. 750; Fowle *v.* Freeman, 9 Ves. Jr. 351, 7 Rev. Rep. 219.

Canada.—Dalrymple *v.* Scott, 19 Ont. App. 477.

See 11 Cent. Dig. tit. "Contracts," §§ 106–108.

Circumstances to be considered.— In determining which view is entertained in any particular case the following circumstances may be looked at: whether the contract is of that class which is usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract. Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545.

The burden of proof is upon the party who maintains that the agreement was completed without the necessity of the execution of a formal written instrument. Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545. See *infra*, XII, I, 2.

Acceptance of offer by act without giving notice of acceptance see *supra*, II, C, 3, c, (II).

1. Necessity for communication of acceptance see *supra*, II, C, 3, c.

2. *Colorado.*— Gordon *v.* Darnell, 5 Colo. 302.

Louisiana.— Miller *v.* Douville, 45 La. Ann. 214, 12 So. 132.

Maryland.— Equitable Endowment Assoc. *v.* Fisher, 71 Md. 430, 18 Atl. 808; Bowen *v.* Tipton, 64 Md. 275, 1 Atl. 861.

Massachusetts.— Thruston *v.* Thornton, 1 Cush. 89.

Michigan.— Cooper *v.* Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep.

proposal to modify it by either party has no effect on the agreement unless it is accepted and thus becomes a new substituted agreement.[3]

(II) *Before Acceptance.* On the other hand an offer, if not under seal,[4] may be revoked or withdrawn at any time before it is accepted, and the acceptance communicated when communication is necessary, for until then there is neither agreement nor consideration.[5] A bid at an auction, which is an offer to purchase the property put up, may be withdrawn at any time before the hammer

341; Wilcox *v.* Cline, 70 Mich. 517, 38 N. W. 555.

Missouri.— American Pub., etc., Co. *v.* Walker, 87 Mo. App. 503.

Montana.— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

New York.— White *v.* Baxter, 71 N. Y. 254; Fried *v.* Royal Ins. Co., 50 N. Y. 243.

Oregon.— House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

Rhode Island.— Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

Wisconsin.— Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367; Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28; State *v.* Hastings, 12 Wis. 596.

United States.— Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. ed. 341. And see Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 811, 37 L. ed. 790.

England.— *In re* Imperial Land Co., L. R. 7 Ch. 587, 41 L. J. Ch. 621, 26 L. T. Rep. N. S. 781, 20 Wkly. Rep. 690.

A letter containing an offer "without prejudice" means "I make an offer; if you do not accept it, this letter is not to be used against me;" but when the offer is accepted the privilege is removed. Omnium Securities Co. *v.* Richardson, 7 Ont. 182.

Acceptance by mailing letter may render an offer irrevocable. See *infra*, II, C, 7, b.

3. Linn *v.* McLean, 80 Ala. 360; Hubbell *v.* Palmer, 76 Mich. 441, 43 N. W. 442; McLean *v.* Pastime Gymnasium Assoc., 64 Mo. App. 55.

Substituted agreement, see *infra*, IX, B, 1, c.

4. Offer under seal see *infra*, II, C, 5, a, (v).

5. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Eskridge *v.* Glover, 5 Stew. & P. 264, 26 Am. Dec. 344.

California.— Martin *v.* Hudson, 81 Cal. 42, 22 Pac. 292.

Colorado.— Sherwin *v.* National Cash Register Co., 5 Colo. App. 162, 38 Pac. 392.

Connecticut.— Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Georgia.— Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193.

Illinois.— Larmon *v.* Jordan, 56 Ill. 204.

Indiana.— Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671; Harson *v.* Pike, 16 Ind. 140.

Kentucky.— Jones *v.* Higgins, 80 Ky. 409.

Louisiana.—Miller *v.* Douville, 45 La. Ann. 214, 12 So. 132; Peet *v.* Meyer, 42 La. Ann. 1034, 8 So. 534; Williams *v.* Duer, 14 La. 523; Gravier *v.* Gravier, 3 Mart. N. S. 206.

Maryland.— Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Massachusetts.— Benton *v.* Springfield Young Men's Christian Assoc., 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320; Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Boston, etc., R. Co. *v.* Bartlett, 3 Cush. 224.

Michigan.— Weiden *v.* Woodruff, 38 Mich. 130.

Missouri.— Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; Lapsley *v.* Howard, 119 Mo. 489, 24 S. W. 1020.

New Hampshire.— Beckwith *v.* Cheever, 21 N. H. 41.

New Jersey.—Isham *v.* Therasson, 53 N. J. Eq. 10, 30 Atl. 969; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4; Quick *v.* Wheeler, 78 N. Y. 300; White *v.* Corlies, 46 N. Y. 467; McCotter *v.* New York, 37 N. Y. 325 [*affirming* 35 Barb. 609]; Bouker *v.* Long Island R. Co., 89 Hun 132, 35 N. Y. Suppl. 30, 69 N. Y. St. 225; Ft. Edward *v.* Fish, 86 Hun 548, 33 N. Y. Suppl. 784, 67 N. Y. St. 529; McCotter *v.* New York, 35 Barb. 609; Stephens *v.* Buffalo, etc., R. Co., 20 Barb. 332; Frazer *v.* Small, 13 N. Y. Suppl. 468, 37 N. Y. St. 900.

Pennsylvania.— Bosshardt, etc., Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120; Fisher *v.* Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335.

Texas.— Whitaker *v.* Zeihme, (Tex. Civ. App. 1901) 61 S. W. 499.

Vermont.— Tucker *v.* Lawrence, 56 Vt. 467; Faulkner *v.* Hebard, 26 Vt. 452.

Wisconsin.— McCaffrey *v.* Wagner, 81 Wis. 633, 51 N. W. 958; Johnson *v.* Filkington, 39 Wis. 62.

United States.— Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479.

England.— *In re* Imperial Land Co., L. R. 7 Ch. 587, 41 L. J. Ch. 621, 26 L. T. Rep. N. S. 781, 20 Wkly. Rep. 690; Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16, 43 L. J. C. P. 1, 29 L. T. Rep. N. S. 471, 22 Wkly. Rep. 48; Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 19 Wkly. Rep. 758, 104 E. C. L. 748; Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

See 11 Cent. Dig. tit. "Contracts," § 57.

An offer to several may be revoked at any time before it is accepted by all. Burton *v.* Shotwell, 13 Bush (Ky.) 271.

goes down.[6] An order given to an agent who has no authority to accept it, but only to forward it to his principal for approval, is revocable at any time before it is accepted by the principal and the acceptance communicated to the offerer.[7] Where an offer is accepted before it is revoked the contract is as obligatory as if both promises were simultaneous. Here, as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury.[8]

(III) *Offer Giving Time For Acceptance.* The offerer may revoke his offer before it is accepted, even though he has expressly declared in it that he will not,[9] or has, by the very terms of the offer, allowed the offeree a certain number of days in which to accept it, as in the case of options or refusals,[10] unless

An offer made by several may be revoked by one. Foster *v.* Boston, 22 Pick. (Mass.) 33.

6. Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679. And see Ives *v.* Tregent, 29 Mich. 390; Fisher *v.* Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335. See also AUCTIONS AND AUCTIONEERS, 4 Cyc. 1044, note 35.

7. Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897; Peck *v.* Freese, 101 Mich. 321, 59 N. W. 600; Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328, 53 N. W. 555; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

8. See Martin *v.* Hudson, 81 Cal. 42, 22 Pac. 292; Quick *v.* Wheeler, 78 N. Y. 300.

9. Where an order is given to an agent who has no authority to accept, it is revocable at any time before his principal accepts it; and it is immaterial that the order recites that it is taken with the understanding that it is positive and not subject to change or countermand. National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

10. *Alabama.*— Eskridge *v.* Glover, 5 Stew. & P. 264, 26 Am. Dec. 344.

California.— Brown *v.* San Francisco Sav. Union, 134 Cal. 448, 66 Pac. 592; Abbott *v.* '76 Land, etc., Co., (Cal. 1898) 53 Pac. 445; Wristen *v.* Bowles, 82 Cal. 84, 22 Pac. 1136; McDonald *v.* Huff, (Cal. 1888) 18 Pac. 243.

Colorado.— Gordon *v.* Darnell, 5 Colo. 302: Smith *v.* Bateman, 8 Colo. App. 336, 46 Pac. 213.

Illinois.— Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755; Larmon *v.* Jordan, 56 Ill. 204; School Directors *v.* Trefethren, 10 Ill. App. 127.

Kentucky.— Litz *v.* Goosling, 93 Ky. 185, 14 Ky. L. Rep. 91, 19 S. W. 527, 21 L. R. A. 127.

Maryland.— Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417.

Michigan.— Wardell *v.* Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 875; Weiden *v.* Woodruff, 38 Mich. 130.

Minnesota.— Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

Montana.— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695.

New York.— Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Klee *v.* Grant, 4 Misc. 88, 23 N. Y. Suppl. 855, 53 N. Y. St. 77.

North Carolina.— Paddock *v.* Davenport, 107 N. C. 710, 12 S. E. 464.

Pennsylvania.— Corser *v.* Hale, 149 Pa. St. 274, 24 Atl. 285.

South Carolina.— Connor *v.* Renneker, 25 S. C. 514.

West Virginia.—Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

United States.— Minneapolis, etc., R. Co. *v.* Columbus Rolling-Mill Co., 119 U. S. 149, 7 S. Ct. 168, 30 L. ed. 376; Sault Ste. M. Land, etc., Co. *v.* Simons, 41 Fed. 835.

England.— Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916; Dickinson *v.* Dodds, 2 Ch. D. 463, 45 L. J. Ch. 777, 24 L. T. Rep. N. S. 594, 34 L. T. Rep. N. S. 607; Head *v.* Diggon, 7 L. J. K. B. O. S. 36, 3 M. & R. 97. See Routledge *v.* Grant, 4 Bing. 653, 13 E. C. L. 678, 3 C. & P. 267, 14 E. C. L. 560, 6 L. J. C. P. O. S. 166, 1 M. & P. 717, 29 Rev. Rep. 672, where a written proposal was made for purchasing a house, stating, amongst other terms and conditions, that a definite answer was to be given within six weeks. It was held that it might be revoked at any time during the six weeks and that an acceptance made after such revocation was inoperative. See also Offord *v.* Davies, 12 C. B. N. S. 748, 9 Jur. N. S. 22, 31 L. J. C. P. 319, 6 L. T. Rep. N. S. 579, 19 Wkly. Rep. 758, 104 E. C. L. 748, where D made a written offer to O that if the latter would discount bills for a firm he would guarantee the payment of such bills to the extent of six hundred pounds during a period of twelve months. Some bills were discounted by O and duly paid, but before the twelve months had expired D revoked his offer and announced that he would guarantee no more bills. O continued to discount bills, some of which were not paid, and then sued D on the guarantee. It was held that the revocation was a good defense to the action.

See 11 Cent. Dig. tit. "Contracts," § 57.

Distinction between mere option and contract.— An accepted proposal by a person to furnish another all the property of a certain kind which may be needed in the latter's factory for a certain period is not a mere option only, which may be withdrawn at any time, but is a contract binding for the stipulated

the offer is under seal,[11] or the agreement to hold it open is supported by a consideration.[12] But the offer is a continuing offer until it is withdrawn, and the withdrawal communicated, and if it is accepted, and the acceptance is communicated before the offer is withdrawn and notice thereof given, and within the time expressly or impliedly limited, the agreement is complete, and the offer is no longer revocable.[13]

(IV) *Consideration For Giving Time.* These cases of "refusals" of lands or goods for a certain time, or "options" to purchase within a certain time,[14] are offers irrevocable in their nature in two cases, viz.: (1) where the offer has become a promise by being founded on a consideration, and (2) where it has become a promise because it is made under seal.[15] Where the offer is founded on a consideration, as where something is paid or promised for the option or refusal, the offer cannot be withdrawn, but continues in force until the expiration of the time limited for its acceptance.[16] Where the offer is in a lease and gives the

period. E. G. Dailey Co. *v.* Clark Can Co., 128 Mich. 591, 87 N. W. 761. See also *infra*, IV, D, 10, h, (1).

11. Offer under seal see *infra*, II, C, 5, a, (V).

12. Consideration for option see *infra*, II, C, 5, a, (IV).

13. *Illinois.*— Seymour *v.* Howard, 51 Ill. App. 384.

Michigan.— Wilcox *v.* Cline, 70 Mich. 517, 38 N. W. 555.

Missouri.— American Pub., etc., Co. *v.* Walker, 87 Mo. App. 503.

New York.— Pettibone *v.* Moore, 75 Hun 461, 27 N. Y. Suppl. 41, 455, 57 N. Y. St. 363; Britton *v.* Phillips, 24 How. Pr. 111.

North Carolina.— Wylie *v.* Brice, 70 N. C. 422.

Rhode Island.— Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

Wisconsin.— Sherley *v.* Peehl, 84 Wis. 46, 54 N. W. 267; Cheney *v.* Cook, 7 Wis. 413.

14. Definition and nature of option.— "The obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, is what is termed in law an option, which is simply a contract by which the owner of property agrees with another person that he shall have a right to buy the property at a fixed price within a certain time. Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17. In such contract two elements exist: First, the offer to sell, which does not become a contract until accepted; second, the completed contract to leave the offer open for the specified time. These elements are wholly independent and cannot be treated together without great liability to confusion and error. Litz *v.* Goosling, 93 Ky. 185, 14 Ky. L. Rep. 91, 19 S. W. 527, 21 L. R. A. 127. Thus in an agreement for a lease, there was inserted a further agreement that the landlord would, if required within two years, sell the tenant the fee of the land at a certain price, at the tenant's option. The lease was forfeited by reason of a breach of the agreement to insure, and the court held that the agreement to sell was a separate agreement and would be specifically enforced, notwithstanding the forfeiture of the lease. Green *v.* Low, 22 Beav. 625, 2 Jur. N. S. 848, 4 Wkly. Rep. 669." Black *v.* Maddox, 104 Ga. 157, 162, 30 S. E. 723.

15. Offer under seal see *infra*, II, C, 5, a, (V).

16. *Alabama.*— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148; Linn *v.* McLean, 80 Ala. 360.

Colorado.— Gordon *v.* Darnell, 5 Colo. 302.

Illinois.— Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Indiana.— Herrman *v.* Babcock, 103 Ind. 461, 3 N. E. 142; Souffrain *v.* McDonald, 27 Ind. 269.

Kansas.— Chadsey *v.* Condley, 62 Kan. 853, 62 Pac. 663.

Maryland.— Grabenhorst *v.* Nicodemus, 42 Md. 236, 246, where plaintiffs, the owners of a distillery, and defendant signed a paper in which plaintiffs agreed that defendant might purchase the distillery during the year 1871 for five thousand dollars, defendant agreeing that he would pay plaintiffs one thousand dollars if he did not buy during the year for the privilege. The court said: "It is not a bargain and sale of the property at $5000, but a proposition and obligation on the part of the plaintiffs, to sell it to the defendant at that price with the privilege to him to make the purchase or not, as he may determine within the year. For this option, which was a valuable privilege, he agrees to pay the $1000 in the event of his declining to make the purchase. The defendant acquired the right under the contract, to purchase the property for the proposed price. The plaintiffs had obligated themselves to sell at that price; but the defendant was under no obligation to buy. He merely bound himself to pay the $1000 for the privilege of buying, and in case he did not buy. It was entirely optional with the defendant to purchase the property or let it alone; whilst the plaintiffs had abandoned the right to make sale to any one else during the year."

Oregon.— House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027.

Tennessee.— Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195, holding that a written agreement by which complainants agreed to relieve respondents from furnishing sureties on

lessee the right to purchase within a certain time for a certain price, the lease is a sufficient consideration to make the offer binding.[17] It has been suggested that there can be no meeting of minds by an acceptance after the offer has been revoked and the revocation communicated to the offeree; that there can therefore be no contract of sale which can be enforced, but that the offerer is simply liable in damages for the breach of his agreement to keep the offer open.[18] But the correct view would seem to be that where the offer is under seal or is founded on a consideration, it has become more than an offer; it has become a promise upon condition. And as a promise cannot be revoked without the consent of the promisee, although the latter may not perform the condition of accepting within the time limited, yet if he does he is entitled to demand performance.[19]

(v) *Offer Under Seal* — (a) *In General.* An offer under seal cannot be revoked, at common law. Even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence. This results from the common-law rule that a grant under seal is binding on the grantor and those who claim under him, although it has never been communicated to the grantee, if it has been duly delivered; and an obligation created by deed is on the same footing. The promisor is bound, but the promisee need not take advantage of the promise unless he chooses.[20]

(b) *Options Under Seal.* The common-law rule that where an offer is made under seal it cannot be revoked applies to options given under seal. The seal

notes given for land sold at public sale under a decree and respondents agreed to give complainants the privilege of buying the land from them at a specified price and within a specified time, if they should elect so to do, was not void, as without consideration, on the ground that complainants could not be compelled to purchase the land and therefore ought not to be compelled to sell it, as the contract was an offer to sell, standing for a given time, and supported by a consideration.

West Virginia.—Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

United States.— Stitt *v.* Huidekeper, 17 Wall. 384, 21 L. ed. 644.

17. *Illinois.*— Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Indiana.— Herrman *v.* Babcock, 103 Ind. 461, 3 N. E. 142; Souffrain *v.* McDonald, 27 Ind. 269.

Nevada.—Schroeder *v.* Gemeinder, 10 Nev. 355.

Oregon.— House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027.

United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501.

England.— Green *v.* Low, 22 Beav. 625, 2 Jur. N. S. 848, 4 Wkly. Rep. 69.

And see Grabenhorst *v.* Nicodemus, 42 Md. 236.

18. Tiedeman Sales, § 41; Pollock Contr. (Wald ed.) 24; Clark Contr. 52; Anson Contr. (Huffcut ed.) 37; Lawson Contr. § 28. And see Litz *v.* Goosling, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127; Grayhill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133.

19. Zimmerman *v.* Brown, (N. J. 1897) 36 Atl. 675.

Specific performance of the promise was on these grounds granted in Hayes *v.* O'Brien, 149 Ill. 403, 411, 37 N. E. 73, 23 L. R. A. 555; Chadsey *v.* Condley, 62 Kan. 853, 62 Pac. 663; O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602; Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195; the court in the first case saying: "The doctrine of the earlier English and American cases, in which it was held that the want of mutuality of obligation and remedy would render the contract incapable of specific enforcement, has, by the more modern cases, been so modified, that optional agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced, in equity, if made upon sufficient and valuable consideration. And so, where the agreement to convey is a part of a lease or other contract between the parties, for which the agreement to convey forms the true consideration, the want of mutuality will not avoid the contract. Hall *v.* Center, 40 Cal. 63; Estes *v.* Furlong, 59 Ill. 298; Maughlin *v.* Perry, 35 Md. 352; Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501; Backhouse *v.* Mohun, 3 Swanst. 434, 19 Rev. Rep. 252, and cases cited." And see Specific Performance.

20. Kershaw *v.* Kershaw, 102 Ill. 307; Wing *v.* Chase, 35 Me. 260; Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501; Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38; Morgan *v.* Pike, 14 C. B. 473, 2 C. L. R. 696, 23 L. J. C. P. 64, 2 Wkly. Rep. 193, 78 E. C. L. 473; Pitman *v.* Woodbury, 3 Exch. 4.

In the leading case of Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38, a policy of marine insurance which had been signed, sealed, and delivered by the insurers was never accepted by the insured until he

renders a consideration unnecessary, and if the option is exercised by acceptance of the offer within the time limited the agreement will be specifically enforced or damages may be recovered for its breach, notwithstanding an attempted revocation.[21]

b. Revocation of Acceptance. An acceptance may be revoked by a communication to that effect before the acceptance is communicated, but not after.[22]

c. Communication of Revocation — (1) *In General.* We have seen that to make an acceptance operative, it is not always necessary that it shall be actually communicated, but it is sufficient if the offeree does that which the offerer has expressly or impliedly indicated as the mode of acceptance which he will require.[23] The revocation of an offer, however, must ordinarily be communicated to prevent an acceptance from changing it into a binding contract, and it is not communicated to the offeree unless it is actually brought to his knowledge.[24] Formal

learned that the ship was lost, and he then claimed the benefit of it. It was held that he was entitled to do so.

21. *Alabama.*— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148.

Georgia.— Black *v.* Maddox, 104 Ga. 157, 30 S. E. 723; Simms *v.* Lide, 94 Ga. 553, 21 S. E. 220; Fulcher *v.* Daniel, 80 Ga. 74, 4 S. E. 259; Bagwell *v.* Bagwell, 72 Ga. 92; Gilmore *v.* Bangs, 55 Ga. 403; North Georgia Min. Co. *v.* Latimer, 51 Ga. 47; Forsyth *v.* McCauley, 48 Ga. 402; Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761; Lang *v.* Brown, 29 Ga. 628; Justices Inferior Ct. *v.* Moreland, 20 Ga. 145; Justices Inferior Ct. *v.* Smith, 13 Ga. 502; Law *v.* Nunn, 3 Ga. 90.

Illinois.— Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Larmon *v.* Jordan, 56 Ill. 204.

Kentucky.— Litz *v.* Goosling, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127.

Massachusetts.— O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602, where defendant delivered to plaintiff a sealed offer for the sale of his real estate worth twenty-nine thousand dollars for twenty-six thousand dollars, conditioned on acceptance within ten days. Two days afterward defendant in writing notified plaintiff of his withdrawal of the offer, but plaintiff afterward and within the ten days, without paying any attention to the notice of withdrawal, sent his written acceptance of the offer to defendant. It was held that the plaintiff was entitled to specific performance of the agreement.

Minnesota.— McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612.

Nevada.— Schroeder *v.* Gemeinder, 10 Nev. 355.

New Jersey.— Aller *v.* Aller, 40 N. J. L. 446; Miller *v.* Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

Pennsylvania.— Burkholder *v.* Plank, 69 Pa. St. 225.

Vermont.—Faulkner *v.* Hebard, 26 Vt. 452.

West Virginia.—Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Donnally *v.* Parker, 5 W. Va. 301.

United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501, where it was covenanted in a lease that the lessee should at any time before the expiration of the lease have the right to purchase the leased premises at a fixed price, and it was said: "The covenant in the lease, giving the right or option to purchase the premises, was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration and, therefore, one from which the defendant was not at liberty to recede." And see Johnson *v.* Trippe, 33 Fed. 530.

See also Specific Performance.

Efficacy of seal not recognized.— Some courts do not attach so much sanctity to a seal, and allow evidence to be introduced to show there was no consideration for the offer. Gordon *v.* Darnell, 5 Colo. 302; Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133; Smith *v.* Reynolds, 3 McCrary (U. S.) 157, 8 Fed. 696. See Seals.

22. Commercial Ins. Co. *v.* Hallock, 27 N. J. L. 645, 72 Am. Dec. 379; Potter *v.* Sanders, 6 Hare 1, 31 Eng. Ch. 1.

Contracts by correspondence.— In Scotland it has been held that if one who has mailed a letter of acceptance afterward mails a revocation of the acceptance which overtakes the first letter, and both are delivered at the same time, there is no agreement. Dunmore *v.* Alexander, 9 Shaw D. & B. 190. But as we shall see the law in England and in the United States, except in Massachusetts, makes the posting of the acceptance equivalent to communication, so that to post a second letter a moment after the first is mailed, or to send a telegram to the offerer, informing him that the acceptance just mailed is revoked, will be of no avail. See *infra*, II, C, 7.

23. Communication of acceptance see *supra*, II, C, 3, e.

24. *Alabama.*— Eskridge *v.* Glover, 5 Stew. & P. 264, 26 Am. Dec. 344.

Arkansas.— Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

Illinois.— Smith *v.* Weaver, 90 Ill. 392; School Directors *v.* Trefethren, 10 Ill. App. 127.

notice, however, is not always necessary. It is sufficient that the person making the offer does some act inconsistent with it, as for example selling the property, and that the person to whom the offer was made has knowledge of it.[25] This question will be further considered in treating of offer and acceptance through the post-office.[26]

(II) *General Offers.* A general offer to the public may be revoked and the revocation be effective without actual notice to the party who may afterward accept it without knowing of its revocation or withdrawal. It is only essential that the revocation be made in the same way as the offer was made, and the latter thereupon comes to an end. A published reward for the arrest of a criminal may be revoked in this way.[27] "True," said the court in this case, "it is found

Kentucky.— Burton *v.* Shotwell, 13 Bush 271.

Maryland.— Dambmann *v.* Lorentz, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364; Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Massachusetts.— Boston, etc., R. Co. *v.* Bartlett, 3 Cush. 224; Craig *v.* Harper, 3 Cush. 158.

New Jersey.— Potts *v.* Whitehead, 20 N. J. Eq. 55; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Quick *v.* Wheeler, 78 N. Y. 300.

Wisconsin.— Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367; Johnson *v.* Filkington, 39 Wis. 62; Cheney *v.* Cook, 7 Wis. 413.

United States.— Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Stitt *v.* Huidekoper, 17 Wall. 384, 21 L. ed. 644.

England.— Henthorn *v.* Frazer, [1892] 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. Rep. N. S. 439, 40 Wkly. Rep. 434.

The English case of Cooke v. Oxley, 3 T. R. 653, 1 Rev. Rep. 783, has been misunderstood by more than one court. In that case the declaration was that the defendant proposed to sell and deliver a certain number of hogsheads of tobacco to the plaintiff at a certain price, whereupon the plaintiff desired the defendant to give him time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed, and thereupon promised the plaintiff to sell and deliver the tobacco upon the terms aforesaid, if the plaintiff would agree to purchase the same and give notice to the defendant before four in the afternoon of that day. The plaintiff then averred that he agreed to purchase the tobacco and give notice thereof to the defendant before the hour of four arrived, and offered to pay the price, but that the defendant refused to comply with his promise. A verdict having been rendered for the plaintiff the judgment was arrested. Some American judges, construing the decision to be that where an offer gives a specified time for acceptance an acceptance within that time does not make a binding agreement, have ruled, citing it as authority, that notice of the revocation of an offer is not necessary. See Bean *v.* Burbank, 16 Me. 458, 33 Am. Dec. 681; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Gillespie *v.* Edmonston, 11 Humphr. (Tenn.) 553. But the decision turned on a point of pleading. The contract declared on, that the defendant would give the plaintiff until four in the afternoon to decide, was clearly not a binding contract at all, and the declaration did not show with sufficient distinctness that the defendant had not withdrawn the offer before the plaintiff notified him of the acceptance. The case is explained in a later English case, where the court says in substance: All that Cooke *v.* Oxley, 3 T. R. 653, 1 Rev. Rep. 783, affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. The offer may be revoked before acceptance. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916. And in Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224, 228, Fletcher, J., says: "The case of Cooke *v.* Oxley, 3 T. R. 653, 1 Rev. Rep. 783, . . . has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority." And see as to this case Anson Contr. 34.

25. Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28; Pomeroy Contr. § 61. See Dickinson *v.* Dodds, 2 Ch. D. 463, 45 L. J. Ch. 777, 24 L. T. Rep. N. S. 594, 34 L. T. Rep. N. S. 607, criticized in Anson Contr. 35. And see Craig *v.* Harper, 3 Cush. (Mass.) 158, for a case of retraction by conduct.

Where an offerer fixed a place of meeting at which the offeree was to accept or reject the offer, it was held that the offer was not withdrawn by the offerer's failing to be present. Omer *v.* Farlow, 46 Ill. App. 122.

26. Revocation of offer made through post-office see *infra*, II, C, 7, g.

27. Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697, holding that the offer of a reward by public proclamation for apprehension of a criminal could be withdrawn in the same manner, and that plaintiff, who performed the

that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published Proclamation, he should have known that it could be revoked in the manner in which it was made." The same rule applies to changes in the published time-table of a railroad or steamboat company and like cases.[28]

6. Lapse of Offer — a. By Rejection, Conditional or Varying Aeceptanee, or Counter Offer. If an offer is rejected, either by an absolute refusal or by an acceptance conditionally or not identical with the terms of the offer,[29] or by a counter proposal, the party making the original offer is relieved from liability on that offer, and the party who has rejected the offer cannot afterward, at his own option, convert the same offer into an agreement by a subsequent acceptance. For that purpose he must have the renewed consent of the person who made the offer.[30] Where one submits to another for signature a draft of a contract and the latter alters it and then signs and returns it, the first draft is a rejected proposal and the altered form is a counter proposition which is not a binding agreement until accepted by the party to whom it is returned.[31] Where an offer made by telephone is answered by a different proposal, the offer is rejected, although a letter subsequently arrives accepting the offer as made.[32] Where two offers are made of the same thing, one in writing and the other orally, an acceptance of the former is a rejection of the latter.[33] To constitute a rejection of the offer there must be a distinct refusal or counter proposition.[34] An immaterial condition in

services after such withdrawal, although i ignorance of the withdrawal, could not recover.

28. Sears *v.* Eastern R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780.

29. Conditional or varying acceptance see *supra*, II, C, 3, d, (II).

30. *Alabama.*— Derrick *v.* Monette, 73 Ala. 75.

Arkansas.— Sneed, etc., Iron-Works *v.* Douglas, 49 Ark. 355, 5 S. W. 585.

Illinois.—Cornwells *v.* Krengel, 41 Ill. 394; Esmay *v.* Gorton, 18 Ill. 483; Smith *v.* Wetherell, 4 Ill. App. 655; Fox *v.* Turner, 1 Ill. App. 153.

Iowa.— Clay *v.* Ricketts, 66 Iowa 362, 23 N. W. 755; Baker *v.* Johnson County, 37 Iowa 186.

Kansas.— Richardson *v.* Lenhard, 48 Kan. 629, 29 Pac. 1076.

Kentucky.— Davis *v.* Parish, Litt. Sel. Cas. 153, 12 Am. Dec. 287.

Maine.— Jenness *v.* Mt. Hope Iron Co., 53 Me. 20.

Maryland.—Flora First Nat. Bank *v.* Clark, 61 Md. 400, 48 Am. Rep. 114.

Michigan.— Eggleston *v.* Wagner, 46 Mich. 610, 10 N. W. 37; Johnson *v.* Stephenson, 26 Mich. 63.

Missouri.— Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596.

New York.—Hough *v.* Brown, 19 N. Y. 111; Frith *v.* Lawrence, 1 Paige 434.

North Carolina.— Cozart *v.* Herndon, 114 N. C. 252, 19 S. E. 158.

West Virginia.— Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Wisconsin.— Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

United States.— Minneapolis, etc., R. Co. *v.* Columbus Rolling-Mill Co., 119 U. S. 149, 7 S. Ct. 168, 30 L. ed. 376; Quincy First Nat. Bank *v.* Hall, 101 U. S. 43, 25 L. ed. 822; Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; James *v.* Darby, 100 Fed. 224, 40 C. C. A. 341; Goulding *v.* Hammond, 54 Fed. 639, 4 C. C. A. 533; Arthur *v.* Gordon, 37 Fed. 558; Crabtree *v.* St. Paul Opera-House Co., 39 Fed. 746; Ortman *v.* Weaver, 11 Fed. 358.

England.— Hyde *v.* Wrench, 3 Beav. 334, 4 Jur. 1106, 43 Eng. Ch. 334; Tinn *v.* Hoffmann, 29 L. T. Rep. N. S. 271; Sheffield Canal Co. *v.* Sheffield, etc., R. Co., 3 R. & Can. Cas. 121.

See 11 Cent. Dig. tit. "Contracts," §§ 96–103.

Illustration.— Where defendant offered to sell his property to plaintiff for £1,000, and plaintiff answered offering to buy it for £950, which offer defendant refused, and upon receipt of the letter of refusal plaintiff wrote accepting the original offer at £1,000, it was held that there was no contract, as the original offer had lapsed and was no longer open for acceptance. Hyde *v.* Wrench, 3 Beav. 334, 4 Jur. 1106, 43 Eng. Ch. 334.

31. Robertson *v.* Tapley, 48 Mo. App. 239.

32. Goulding *v.* Hammond, 54 Fed. 639, 4 C. C. A. 533.

33. Woolbright *v.* Sneed, 5 Ga. 167.

34. Thus it has been held that an offer is not rejected by an inquiry whether the offerer will change his terms (Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916), an inquiry as to how remittance shall be made (Clark *v.* Dales, 20 Barb. (N. Y.) 42), a suggestion that the business shall be transacted through a bank instead of a person (Brisban *v.* Boyd, 4 Paige (N. Y.) 17), by asking permission to build a kitchen to the house in case a lease was made (Culton *v.*

an acceptance is not a rejection.[35] If the acceptance is complete a request that a formal contract be drawn up embodying the terms of the agreement is immaterial.[36]

b. By Lapse of Time — (i) *In General.*[37] An offer comes to an end at the expiration of the time given for its acceptance; a limitation of time within which an offer is to run being equivalent to the withdrawal of the offer at the end of the time named.[37] Where no time is fixed in the offer it expires at the end of a reasonable time.[38] What is a reasonable time depends largely on the nature of the

Gilchrist, 92 Iowa 718, 61 N. W. 384), by a request in a letter of acceptance that the proposer take certain action (Stotesburg *v.* Massengale, 13 Mo. App. 221), by the expression of a hope by the seller of property in his letter accepting the buyer's offer that the buyer will pay a greater sum for it when hauled (Phillips *v.* Moor, 71 Me. 78), by a statement in a letter of acceptance that the accepter would have liked something different from what is proposed and accepted (Brown *v.* Cairns, 63 Kan. 693, 66 Pac. 1033), or by an acceptance of an offer to buy real estate, providing that the vendor shall have a reasonable time to vacate the premises (Cavender *v.* Waddingham, 5 Mo. App. 457). See also Johnson *v.* Talley, 10 Lea (Tenn.) 248, where A, as agent of B, offered C that if he would dismiss a suit B would pay him five hundred dollars, and he, A, would pay him five hundred dollars, and C accepted except as to A paying him five hundred dollars and dismissed the suit, and it was held a binding agreement as to B and C.

35. Brisban *v.* Boyd, 4 Paige (N. Y.) 17; Gibbins *v.* Northeastern Metropolitan Asylum Dist., 11 Beav. 1, 12 Jur. 22, 17 L. J. Ch. 5; Clive *v.* Beaumont, 1 De G. & Sm. 397, 13 Jur. 226; Bonnerve *v.* Jenkins, 8 Ch. D. 70, 47 L. J. Ch. 758, 38 L. T. Rep. N. S. 81, 26 Wkly. Rep. 294.

36. See *supra*, II, C, 4, l.

37. *Illinois.*— Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35; Larmon *v.* Jordan, 56 Ill. 204.

Kentucky.— Stembridge *v.* Stembridge, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948.

Maryland.— Bernard *v.* Torrance, 5 Gill & J. 383.

Massachusetts.— Horne *v.* Niver, 168 Mass. 4, 46 N. E. 393; Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161.

Minnesota.— Cannon River Manufacturers' Assoc. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497.

New Jersey.— Potts *v.* Whitehead, 20 N. J. Eq. 55, 59, where it is said: "There is no authority, precedent, or principle, by which the time can be extended without consent of the person making it [the offer]." And see Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Taylor *v.* Rennie, 35 Barb. 272; Howells *v.* Stroch, 30 Misc. 569, 62 N. Y. Suppl. 870; Britton *v.* Phillips, 24 How. Pr. 111; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

North Carolina.—Union Nat. Bank *v.* Mills, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538.

Ohio.— Longworth *v.* Mitchell, 26 Ohio St. 334.

Texas.— Killough *v.* Lee, 2 Tex. Civ. App. 260, 21 S. W. 970.

West Virginia.— Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Wisconsin.— Cummings *v.* Lake Realty Co., 86 Wis. 382, 57 N. W. 43.

United States.— Richardson *v.* Hardwick, 106 U. S. 252, 1 S. Ct. 213, 27 L. ed. 145; Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; McConkey *v.* Peach Bottom Slate Co., 68 Fed. 830, 16 C. C. A. 8.

See 11 Cent. Dig. tit. "Contracts," §§ 67, 69.

38. *Alabama.*—Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Martin *v.* Black, 21 Ala. 721.

Illinois.— Larmon *v.* Jordan, 56 Ill. 204; Lehigh Valley Coal Co. *v.* Curtis, 22 Ill. App. 394.

Iowa.— Ferrier *v.* Storer, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752.

Kansas.— Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

Kentucky.— Moxley *v.* Moxley, 2 Metc. 309.

Louisiana.— Boyd *v.* Cox, 15 La. Ann. 609; Ryder *v.* Frost, 3 La. Ann. 523.

Maine.— Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503; Peru *v.* Turner, 10 Me. 185.

Massachusetts.— Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161, where defendant, in May, 1886, offered to buy certain stock from plaintiff "at any time after January 1, 1886, if at that time you desire to have me do so," and plaintiff did not accept the offer until July 9, 1886. It was held that the acceptance was too late. "The words 'at any time,'" said the court, "do not import perpetuity; and if not, then the plaintiff was entitled only to a reasonable time." See also Loring *v.* Boston, 7 Metc. 409.

Michigan.— Bowen *v.* McCarthy, 85 Mich. 26, 48 N. W. 155.

Minnesota.— Stone *v.* Harmon, 31 Minn. 512, 19 N. W. 88.

Missouri.— Bruner *v.* Wheaton, 46 Mo. 363.

Nebraska.— Omaha L. & T. Co. *v.* Goodman, 62 Nebr. 197, 86 N. W. 1082.

New Hampshire.— Barker *v.* Barker, 16 N. H. 333; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268.

New York.—Batterman *v.* Morford, 76 N. Y. 622; Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Taylor *v.* Rennie, 35 Barb. 272, 22 How.

particular offer and the circumstances of the case.[39] An offer to buy or sell land would not require so prompt an acceptance as an offer to buy or sell chattels, corporate stock, etc., of a perishable character or of fluctuating value.[40] An application for shares in a company must, it has been held, be accepted by an allotment within a reasonable time dependent upon the prospectus and object of the company.[41] Where an offer is made to another orally and he goes away without accepting it, it would seem that ordinarily the offer would be considered as having lapsed. For example, if an article is exposed for sale to-day at a certain price and the buyer does not agree a larger sum may be asked to-morrow when he returns prepared to buy.[42] An offer to sell goods sent by mail in the usual course of business, without expressly requiring an answer by return mail, must generally be accepted by the mail leaving during business hours on the day the offer is received, although not necessarily by the next post.[43] An offer by telegram is notice that a prompt reply was required and an acceptance by letter would ordinarily not be in time,[44] nor even a telegram sent the day after it was received.[45]

(II) *Questions of Law and Fact.* The question of reasonable time is a question of law for the court in two classes of cases, viz.: (1) Commercial transactions which happen in the same way, day after day, and present the question of reasonable time on the same data in continually recurring instances, so that by a series of decisions of the courts the reasonable time has been rendered certain; and (2) where the time taken is so clearly reasonable or unreasonable that there can

Pr. 101; Utica, etc., R. Co. *v.* Brinckerhoff, 21 Wend. 139, 34 Am. Dec. 220; Frith *v.* Lawrence, 1 Paige 434.

North Carolina.— Mizell *v.* Burnett, 49 N. C. 249, 69 Am. Dec. 744.

Pennsylvania.— Keck *v.* McKinley, 98 Pa. St. 616; East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53; Carmichael *v.* Newell, 2 Phila. 289, 14 Leg. Int. 188; Barney *v.* Clark, 22 Pittsb. Leg. J. 79.

Texas.— Ft. Worth, etc., R. Co. *v.* Lindsey, 11 Tex. Civ. App. 244, 32 S. W. 714.

Wisconsin.— Sherley *v.* Peehl, 84 Wis. 46, 54 N. W. 267; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

United States.—Ortman *v.* Weaver, 11 Fed. 358.

England.— *In re* Bowron, L. R. 5 Eq. 428; Ramsgate Hotel Co. *v.* Montfiore, L. R. 1 Exch. 109; Powers *v.* Fowler, 4 E. & B. 511, 82 E. C. L. 511; Meynell *v.* Surtees, 1 Jur. N. S. 737, 25 L. J. Ch. 257, 3 Sm. & G. 301, 3 Wkly. Rep. 535.

See 11 Cent. Dig. tit. "Contracts," § 68.

39. *Connecticut.*— Averill *v.* Hedge, 12 Conn. 424.

Illinois.— Larmon *v.* Jordan, 56 Ill. 204.

New Hampshire.—Morse *v.* Bellows, 7 N. H. 549, 28 Am. Rep. 752.

United States.—Crabtree *v.* St. Paul Opera-House Co., 39 Fed. 746; Minnesota Linseed Oil Co. *v.* Collier White-Lead Co., 4 Dill. 431, 17 Fed. Cas. No. 9,635.

England.— Ramsgate Hotel Co. *v.* Montfiore, L. R. 1 Exch. 109.

And see the other cases in the note preceding.

40. *Arkansas.*— Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

Massachusetts.— Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161, holding that an offer to buy stock in a corporation at any time after a certain date was not open for acceptance six months after such date.

Michigan.— Hill *v.* Mathews, 78 Mich. 377, 44 N. W. 286.

New Jersey.— McCracken *v.* Harned, 66 N. J. L. 37, 48 Atl. 513, holding that an option to deliver five thousand shares of corporate stock, at fifty cents a share "on or after three months from November 6th, 1891," expired before April, 1898.

Wisconsin.—Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28, holding that where a letter was received on Saturday ordering the shipment of trees, shipping them upon the following Monday was within a reasonable time.

United States.— Minnesota Linseed Oil Co. *v.* Collier White-Lead Co., 4 Dill. 431, 17 Fed. Cas. No. 9,635; The M. M. Hamilton, 1 Hask. 489, 17 Fed. Cas. No. 9,685.

41. *In re* Bowron, L. R. 3 Ch. 592; Ramsgate Hotel Co. *v.* Montfiore, L. R. 1 Exch. 109.

42. Johnston *v.* Fessler, 7 Watts (Pa.) 48, 32 Am. Dec. 738.

43. *Illinois.*— Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35.

Maryland.— Bernard *v.* Torrance, 5 Gill & J. 383.

Missouri.— Eagle Mill Co. *v.* Caven, 76 Mo. App. 458.

New York.— Batterman *v.* Morford, 76 N. Y. 622; Taylor *v.* Bennie, 35 Barb. 272.

United States.— Ortman *v.* Weaver, 11 Fed. 358.

England.— Dunlop *v.* Higgins, 1 H. L. Cas. 381, 12 Jur. 295.

And see *supra*, II, C, 3, d, (I), (B).

44. Quenerduaine *v.* Cole, 32 Wkly. Rep. 185.

45. James *v.* Marion Fruit Jar & Bottle Co., 69 Mo. App. 207.

be no room for doubt as to the proper answer to the question.[46] Where the answer to the question is one dependent on many different circumstances, which do not constantly recur in other cases of like character, and with respect to which no certain rule of law has theretofore been laid down or could be laid down, the question is one of fact for the jury.[47]

c. By Death or Insanity. The death or insanity of either party before acceptance is communicated causes an offer to lapse. An acceptance communicated to the representatives of the offerer cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate.[48] So a continuing guaranty is revoked by notice of the death of the guarantor,[49] and an authority to act as agent by the death of the principal.[50] Where a subscription to a church building fund is supported by the consideration of other subscriptions made in reliance thereon, and is irrevocable by the conditional subscriber at the time of his death, his death does not operate as a revocation thereof.[51]

d. By Change of Circumstances. Other changes of circumstances before the acceptance have been held to cause the offer to lapse; as for example, the destruction of the subject-matter of the contract;[52] the dissolution of a partnership to whom or by whom it was made;[53] a change in the physical condition of one to whom an offer to insure his life has been made;[54] or bankruptcy of one of the parties which transfers all his property to trustees.[55]

7. Offer and Acceptance by Post or Telegraph — a. In General. As was stated in a previous section parties may and often do enter into a contract by communicating their intention through the post-office, instead of orally,[56] or by

46. Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441; Loring *v.* Boston, 7 Metc. (Mass.) 409; Nunez *v.* Dautel, 19 Wall. (U. S.) 560, 22 L. ed. 161; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, 19 L. ed. 884; Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220; Hamilton *v.* Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530; Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. 83, 8 C. C. A. 14.

47. *Connecticut.*— Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Massachusetts.— Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray 432.

Rhode Island.— Davis *v.* Western Massachusetts Ins. Co., 8 R. I. 277.

Vermont.— Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374.

United States.— Hamilton *v.* Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 3 Sumn. 530, 5 Fed. Cas. No. 2,932.

48. Death.— *Illinois.*— Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; Sutherland *v.* Perkins, 75 Ill. 338.

New York.— Twenty-third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 28 N. Y. St. 482, 6 L. R. A. 807; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262; Frith *v.* Lawrence, 1 Paige 434.

Ohio.— Wallace *v.* Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829.

Pennsylvania.— *In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449.

United States.— The Palo Alto, 2 Ware (U. S.) 344, 18 Fed. Cas. No. 10,700; Marr *v.* Shaw, 51 Fed. 860.

England.— Blades *v.* Free, 9 B. & C. 167, 7 L. J. K. B. O. S. 211, 4 M. & R. 282, 17 E. C. L. 83; Lee *v.* Griffin, 1 B. & S. 272, 7 Jur. N. S. 1302, 30 L. J. Q. B. 252, 4 L. T. Rep. N. S. 546, 9 Wkly. Rep. 702, 101 E. C. L. 272; Campanari *v.* Woodburn, 15 C. B. 400, 3 C. L. R. 14, 1 Jur. N. S. 17, 24 L. J. C. P. 13, 3 Wkly. Rep. 59, 80 E. C. L. 400; *In re* Cheshire Banking Co., 32 C. D. 301, 54 L. T. Rep. N. S. 558; Dickinson *v.* Dodds, 2 Ch. D. 463, 45 L. J. Ch. 777, 24 L. T. Rep. N. S. 594, 34 L. T. Rep. N. S. 607, per Mellish, L. J.; Werner *v.* Humphreys, 2 M. & G. 853, 3 Scott N. R. 226, 40 E. C. L. 889.

Insanity.— Beach *v.* First M. E. Church, 96 Ill. 177.

49. Coulthart *v.* Clementson, 5 Q. B. D. 42, 49 L. J. Q. B. 204, 41 L. T. Rep. N. S. 798, 28 Wkly. Rep. 355; *In re* Sherry, 25 Ch. D. 692. See Guaranty.

50. See Principal and Agent.

51. Waters *v.* Union Trust Co., (Mich. 1902) 89 N. W. 687. See Subscriptions. And see *infra*, IV, D, 10, h, (II).

52. See *infra*, VI, B, 8, e.

53. Goodspeed *v.* Wiard Plow Co., 45 Mich. 322, 7 N. W. 902.

54. Equitable L. Assur. Co. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; Canning *v.* Farquhar, 16 Q. B. D. 727, 55 L. J. Q. B. 225, 54 L. T. Rep. N. S. 350, 34 Wkly. Rep. 423. See Insurance.

55. Meynell *v.* Surtees, 1 Jur. N. S. 737, 25 L. J. Ch. 257, 3 Wkly. Rep. 535.

56. *Georgia.*— Kimbell *v.* Moreland, 55 Ga. 164.

Illinois.— Dana *v.* Short, 81 Ill. 468.

Indiana.— Thames L. & T. Co. *v.* Beville, 100 Ind. 309.

Kentucky.—Hutcheson *v.* Blakeman, 3 Metc. 80.

telegraph;[57] and in either case as soon as an offer is thus made and accepted there is a binding contract.[58] Whether or not the correspondence shows an agreement is always a question of construction.[59] If an agreement be contained in correspondence, a limitation or condition inserted in one or more of the communications need not be repeated or referred to in subsequent ones in order to preserve its force.[60] In the United States a party making an offer by telegraph is responsible for the correct transmission of his message and is bound by it in the terms in which it is delivered to the party addressed.[61]

b. When Offer Is Complete. Where a person uses the post to make an offer, the post-office becomes his agent to carry the offer. The offer is not made when the letter is posted but when it is received, and the offerer must suffer the consequences arising from delay or mistake on the part of the post-office.[62]

Maryland.—Cheney *v.* Eastern Transp. Line, 59 Md. 557.

Massachusetts.— Baylies *v.* Payson, 5 Allen 473.

Missouri.—Stoteshurg *v.* Massengale, 13 Mo. App. 221; Bourne *v.* Shapleigh, 9 Mo. App. 64. And see Whaley *v.* Hinchman, 22 Mo. App. 483.

New York.— Clark *v.* Dales, 20 Barb. 42; Vassar *v.* Camp, 14 Barb. 341.

Pennsylvania.— Ames *v.* Pierson, 174 Pa. St. 597, 34 Atl. 317; Wood *v.* Lovett, 1 Pennyp. 51.

Tennessee.— College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. 382.

Texas.— Duble *v.* Butts, 38 Tex. 312; Short *v.* Treadgill, 3 Tex. Civ. App. Cas. § 267.

West Virginia.—Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

United States.— Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 866, 37 L. ed. 790; Galgate Ship Co. *v.* Starr, 58 Fed. 894; Darlington Iron Co. *v.* Foote, 16 Fed. 646; Deshon *v.* Fosdick, 1 Woods 286, 7 Fed. Cas. No. 3,819; The Palo Alto, 2 Ware 344, 18 Fed. Cas. No. 10,700.

And see the cases cited in the notes following.

See 11 Cent. Dig. tit. "Contracts," §§ 80–82.

57. *Illinois.*— Haas *v.* Myers, 111 Ill. 421, 53 Am. Rep. 634; Cobb *v.* Foree, 38 Ill. App. 255.

Indiana.— Miller *v.* Nugent, 12 Ind. App. 348, 40 N. E. 282.

Kentucky.— Calhoun *v.* Atchison, 4 Bush 261, 96 Am. Dec. 299.

Maine.— True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

Maryland.— Curtis *v.* Gibney, 59 Md. 131.

Missouri.— Whaley *v.* Hinchman, 22 Mo. App. 483.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268.

New York.— Beach *v.* Raritan, etc., R. Co., 37 N. Y. 457; Schonberg *v.* Cheney, 3 Hun 677; Trevor *v.* Wood, 41 Barb. 255 [*reversed* in 36 N. Y. 307, 1 Transcr. App. 248, 3 Abb. Pr. N. S. 355, 93 Am. Dec. 511]; Marschall *v.* Eisen Vineyard Co., 7 Misc. 674, 28 N. Y. Suppl. 62, 58 N. Y. St. 375.

Tennessee.— College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. 382.

United States.— Minnesota Linseed Oil Co. *v.* Collier White-Lead Co., 4 Dill. 431, 17 Fed. Cas. No. 9,635.

England.— Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916.

Canada.—Thorne *v.* Barwick, 16 U. C. C. P. 369; Marshall *v.* Jamieson, 42 U. C. Q. B. 115.

And see the cases cited in the notes following.

See 11 Cent. Dig. tit. "Contracts," §§ 80–82.

58. See the cases above cited.

59. In addition to the cases above cited see the following cases:

Massachusetts.— Cox *v.* Maxwell, 151 Mass. 336, 24 N. E. 50.

Texas.— Short *v.* Threadgill, 3 Tex. App. Civ. Cas. § 267.

Utah.— Société Anonyme, etc. *v.* Old Jordan Min., etc., Co., 9 Utah 483, 35 Pac. 492.

Wisconsin.— Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797.

United States.— Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54; Central Trust Co. *v.* Wabash, etc., R. Co., 38 Fed. 561; Alford *v.* Wilson, 20 Fed. 96.

See 11 Cent. Dig. tit. "Contracts," § 82½.

60. Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235.

61. Dunning *v.* Roberts, 35 Barb. (N. Y.) 463; New York, etc., Printing Tel. Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338; Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127; Saveland *v.* Green, 40 Wis. 431. And see Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

In England it has been held that where a person makes an offer by telegram and it is wrongly transmitted to the offeree and accepted by him there is no contract, the court saying that the post-office authorities are only agents to transmit messages, in the terms in which the senders deliver them. Henkel *v.* Pope, L. R. 6 Exch. 7, 40 L. J. Exch. 15, 23 L. T. Rep. N. S. 419, 19 Wkly. Rep. 106.

62. Averill *v.* Hedge, 12 Conn. 424; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Frith *v.* Lawrence, 1 Paige (N. Y.) 434; Adams *v.* Lindsell, 1 B. & Ald. 681, 19 Rev. Rep. 415. In the case last cited de-

c. Acceptance by Post or Telegraph. Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent.[63] The request or authorization to communicate the acceptance by mail is implied in two cases, viz.: (1) Where the post is used to make the offer, as where a person makes an offer to another by mail and says nothing as to how the answer shall be sent; and (2) where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance.[64] An offer made by post and an acceptance by telegram would doubtless be held to fall under this head. But where an offer is made by advertisement it would not seem that an acceptance is communicated until the letter actually reaches the offerer.[65] The time of acceptance by post or telegraph and the lapse of an offer by delay is elsewhere considered.[66]

d. Agreement Concluded When Acceptance Posted or Telegraphed. Since agreements made by means of the post or the telegraph are simply an illustration of the general rule before stated that the offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent, and it makes no difference whatever that through mistake of the post-office authorities or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offerer. This is now the well-settled rule in England[67] and Canada,[68] and in the United States,[69]

fendants offered to sell wool to plaintiff by letter dated September 2, "Receiving your answer in course of post," but misdirected the letter, so that plaintiff did not receive it until September 5, when he posted his acceptance, but defendants had meanwhile sold the wool. It was held that the agreement was complete on plaintiff's posting the letter of acceptance, the court saying that "the defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs."

63. Adams *v.* Lindsell, 1 B. & Ald. 681, 19 Rev. Rep. 415, where it is said that if this were not so no contract could ever be completed by the post, for, if the offerers were not bound by their offer when accepted by the offerees until the answer is received, then the offerees ought not to be bound till after they have received the notification that the offerers have received their answer and assented to it, and so it might go on *ad infinitum*. And see the other cases cited in the notes preceding and in those following.

64. In Henthorn *v.* Fraser, [1892] 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. Rep. N. S. 439, 40 Wkly. Rep. 434, H who lived at Birkenhead, a town near Liverpool, called at the office of a land society in Liverpool to negotiate for the sale of some houses belonging to him. The secretary there handed him a written offer for his property, which he took away with him. On the next day the secretary posted a withdrawal of the offer. The letter containing the withdrawal was posted between twelve and one o'clock and did not reach Birkenhead until after five P. M. In the meantime H had, at three-fifty P. M., placed in the post-office at Birkenhead a letter accepting the offer, which did not actually reach the secretary's office until the next day. It was held that the contract was complete when the letter containing the acceptance was posted at Birkenhead.

65. Haldane *v.* U. S., 69 Fed. 819, 16 C. C. A. 447.

66. See *supra*, II, C, 3, d, (I), (B); II, C, 6, b.

67. *In re* Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. 372; *In re* Imperial Land Co., L. R. 13 Eq. 148, 41 L. J. Ch. 198, 25 L. T. Rep. N. S. 692, 20 Wkly. Rep. 164; *In re* Constantinople, etc., Hotel Co., L. R. 11 Eq. 86, 40 L. J. Ch. 39, 23 L. T. Rep. N. S. 834, 19 Wkly. Rep. 219; Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666; Duncan *v.* Topham, 8 C. B. 225, 65 E. C. L. 225; Byrne *v.* Van Tienhoven, 5 C. P. D. 344, 44 J. P. 667, 49 L. J. C. P. 316, 42 L. T. Rep. N. S. 371; Thomson *v.* James, 18 Dunlop B. & M. 1; Newcomb *v.* De Roos, 2 E. & E. 271, 6 Jur. N. S. 68, 29 L. J. Q. B. 4, 8 Wkly. Rep. 5, 105 E. C. L. 271; Household F., etc., Acc. Ins. Co. *v.* Grant, 4 Ex. D. 216, 48 L. J. Exch. 577, 41 L. T. Rep. N. S. 298, 27 Wkly. Rep. 858; Potter *v.* Sanders, 6 Hare 1, 31 Eng. Ch. 1.

68. Prosser *v.* Henderson, 20 U. C. Q. B. 438. *Compare*, however, Underwood *v.* Maguire, 6 Quebec Q. B. 237, 45 Centr. L. J. 383.

69. *Alabama.*— Linn *v.* McLean, 80 Ala. 360; Levisohn *v.* Waganer, 76 Ala. 412; Falls *v.* Garther, 9 Port. 605.

except perhaps in Massachusetts, where it has been held that the accepter takes the risk of his letter being lost or delayed.[70]

e. Letter Must Be Properly Stamped, Addressed, and Posted. As the post-office, under its regulations, does not forward an unstamped letter, it is clear that an acceptance to bind the offerer from the time it is dropped in the post-office must be contained in an envelope properly stamped.[71] And it is likewise necessary that the letter shall be properly addressed[72] and properly deposited for transmission.[73] Street letter-boxes are a part of the post-office system, and a letter deposited in one of these boxes is considered as being mailed at the post-office.[74]

f. Offer Requiring Actual Receipt of Acceptance. The rule that a letter of acceptance takes effect when it is mailed does not apply of course where the offer requires actual receipt of the letter or telegram of acceptance, as where it says, "Unless I receive your answer by a certain time, I will not consider myself bound."[75] Such a condition may in some cases be implied from the nature of the case and the form of the previous negotiations.[76]

g. Revocation of Offer. As we have seen, an offer not under seal may be revoked at any time before acceptance, unless there is a binding agreement to hold it open, but it cannot be revoked after acceptance.[77] And revocation of an offer cannot prevent an effectual acceptance unless it is actually communicated to the offeree.[78] It follows that if an offer be sent by letter through the post, although by the regulations of the office the sender may not be able to recall his letter, yet he may by other means if possible withdraw the offer before it is

Arkansas.— Kempner *v.* Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

Connecticut.— Averill *v.* Hedge, 12 Conn. 424.

Georgia.— Bryant *v.* Booze, 55 Ga. 438; Levy *v.* Cohen, 4 Ga. 1.

Illinois.— Haas *v.* Myers, 111 Ill. 421, 53 Am. Rep. 634; Cobb *v.* Foree, 38 Ill. App. 255.

Indiana.— Barr *v.* Insurance Co. of North America, 61 Ind. 488; Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96.

Iowa.— Hunt *v.* Higman, 70 Iowa 406, 30 N. W. 769; Siebold *v.* Davis, 67 Iowa 560, 25 N. W. 778; Ferrier *v.* Storer, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752; Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kansas.— Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

Kentucky.— Calhoun *v.* Atchison, 4 Bush 261, 96 Am. Dec. 299; Hutcheson *v.* Blakeman, 3 Metc. 80; Chiles *v.* Nelson, 7 Dana 281.

Maryland.—Stockham *v.* Stockham, 32 Md. 196; Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Michigan.— Wilcox *v.* Cline, 70 Mich. 517, 38 N. W. 555.

Missouri.— Egger *v.* Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; Lungstrass *v.* German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100; Lancaster *v.* Elliot, 42 Mo. App. 503; Greeley-Burnham Grocer Co. *v.* Capen, 23 Mo. App. 301; Whaley *v.* Hinchman, 22 Mo. App. 483; Noyes *v.* Phœnix Mut. L. Ins. Co., 1 Mo. App. 584.

New Hampshire.— Abbott *v.* Shepard, 48 N. H. 14.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268 [*affirmed* in 27 N. J. L. 645]; Potts *v.* Whitehead, 20 N. J. Eq. 55.

New York.— Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Schonberg *v.* Cheney, 3 Hun 677; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262; Brisban *v.* Boyd, 4 Paige 17. See Frith *v.* Lawrence, 1 Paige 434.

Pennsylvania.—Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339; Barney *v.* Clark, 22 Pittsb. L. J. 69.

Rhode Island.—Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

Vermont.—Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127.

Wisconsin.—Washburn *v.* Fletcher, 42 Wis. 152.

United States.— Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 811, 37 L. ed. 790; Tayloe *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187; Darlington Iron Co. *v.* Foote, 16 Fed. 646; Minnesota Linseed Oil Co. *v.* Collier White-Lead Co., 4 Dill. (U. S.) 431, 17 Fed. Cas. No. 9,635.

70. Lewis *v.* Browning, 130 Mass. 173; McCulloch *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278. But see Brauer *v.* Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

71. Britton *v.* Phillips, 24 How. Pr. (N. Y.) 111; Blake *v.* Fire Ins. Co., 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15.

72. Potts *v.* Whitehead, 20 N. J. Eq. 55.

73. See Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35, where a letter of acceptance was given to a boy to mail, and he neglected to do so for several days.

74. Wood *v.* Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

75. Lewis *v.* Browning, 130 Mass. 173.

76. Haas *v.* Meyers, 111 Ill. 421, 53 Am. Rep. 634.

77. See *supra*, II, C, 5.

78. See *supra*, II, C, 5, c.

accepted,[79] as by a second letter sent by the same post and delivered at the same time with the first letter,[80] or by a letter received by the offeree before he has posted his acceptance.[81] But a revocation of the offer which is not actually notified to the person to whom the offer has been made, or which is brought to his knowledge after he has communicated his acceptance of the offer, is altogether inoperative; as in the case of a letter of revocation not delivered until after the offer contained in a former letter has been accepted by posting the letter of acceptance, although it may have been posted before the acceptance of the offer was mailed.[82]

h. Post-Office Regulations as to Reclaiming Letter. In the English cases it is always assumed that the letter on being posted is beyond the control of the sender — that it becomes the property of the addressee as soon as it is put into the mail.[83] Within a few years the regulations of the United States post-office have been altered and the writer or sender may apply for a letter he has put in the mail, and when properly identified the postmaster must return it to him or telegraph to the office of the addressee whose postmaster must return it to the mailing postmaster, if it has not been delivered.[84] The question then will arise, whether a change in the regulations of the post-office can affect the law that the acceptance is final when the letter is dropped in the post-office. It seems that it does.[85]

III. FORMAL REQUISITES.

A. Seal. A contract under seal is a contract to which the seal of the party or parties executing it is affixed, and which derives its validity from its form

79. Newcomb *v.* De Roos, 2 E. & E. 271, 6 Jur. N. S. 68, 29 L. J. Q. B. 4, 8 Wkly. Rep. 5, 105 E. C. L. 271.

80. Sherwin *v.* National Cash-Register Co., 5 Colo. App. 162, 38 Pac. 392; Dunsmore *v.* Alexander, 9 Shaw D. & B. 190.

81. *Re* London, etc., Bank, 81 L. T. Rep. N. S. 512.

82. *Connecticut.*— Averill *v.* Hedge, 12 Conn. 424.

Illinois.— Larmon *v.* Jordan, 56 Ill. 204; Gregg *v.* Wooliscroft, 52 Ill. App. 214.

Iowa.— Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Maryland.— Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Massachusetts.—Brauer *v.* Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 378.

Michigan.— Peck *v.* Freese, 101 Mich. 321, 59 N. W. 600; Wilcox *v.* Cline, 70 Mich. 517.

Pennsylvania.—Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St. 339.

United States.— Patrick *v.* Bowman, 149 U. S. 411, 13 S. Ct. 811, 37 L. ed. 790; Tayloe *v.* Merchants' F. Ins. Co., 9 How. 390, 13 L. ed. 187; Winterport Granite, etc., Co. *v.* Jasper, Holmes 99, 30 Fed. Cas. No. 17,898.

England.— Stevenson *v.* McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. N. S. 897, 28 Wkly. Rep. 916; Henthorn *v.* Frazer, [1892] 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. Rep. N. S. 439, 40 Wkly. Rep. 434; Byrne *v.* Van Tienhoven, 5 C. P. D. 344, 44 J. P. 667, 49 L. J. C. P. 316, 42 L. T. Rep. N. S. 371.

83. See Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666, 691 (where Blackburn, J., says that he may change his mind but cannot recover the letter from the post-office); Dunmore *v.* Alexander, 9 Shaw D. & B. 190. Mr. Justice Holmes puts it this way: "The offerer when he drops the letter containing the counter promise into the letter-box, does an overt act, which, by general understanding, renounces control over the letter, and puts it into a third hand for the benefit of the offerer, with liberty to the latter at any moment thereafter to take it." Holmes Com. L. 306.

84. United States Post-office Regulations, 487, 489.

85. In an English case decided in 1873, a letter containing bills of exchange indorsed to the person to whom it was addressed was posted at Lyons, France. Afterward, and before the bills left the office, the sender notified the post-office authorities that he desired its return. The rules of the French post-office permit a person who has posted a letter to recover it at any time before it is despatched from the office where it is posted, on complying with certain forms. It was held that the property to the bills had not passed. Mellish, L. J., said: "The question therefore arises, of which party the post office is the agent. In this country, where the sender of a letter cannot get it returned after it has been posted, if the indorsee of a bill authorizes the indorser to send the bill through the post office, the bill as soon as it is posted becomes the property of the indorsee. But according to the regulations of the French Post Office a person who posts a letter may get it back on complying with certain forms at any time before the letter has left the town where it is posted. I am inclined to think that the effect of that rule is that the post office is the agent of the sender of the letter until it leaves the town, and that the indorsement

alone, and not from the fact of agreement[86] or from consideration.[87] A contract under seal is necessary at common law where the promise is without consideration, and in many jurisdictions conveyances of land and certain other contracts are required by statute to be under seal. Contracts under seal are treated under other titles.[88]

B. Writing — 1. Necessity For. The only formal contract in our law is the contract under seal, all others being parol contracts, depending for their validity upon consideration, whether they be by word of mouth or in writing.[89] The only contracts which, in the absence of a statute, are required to be in writing, outside of those requiring a seal, are bills of exchange and promissory notes.[90] The necessity of writing, as evidence of agreement or as giving validity to the agreement, is, except in these cases, purely statutory. The most important statute of this class is the statute of frauds of 29 Charles II, the provisions of which have been substantially reënacted in most of the states and territories. Under these statutes many agreements which might otherwise be entered into by word of mouth have been rendered by positive statutory enactment either void or unenforceable unless embodied in a written document.[91] Where statutory power is given to certain persons to make contracts this does not require that the contract shall necessarily be in writing to bind them.[92]

2. Where Writing Essential Outside of Statutes. An agreement may be good by word of mouth, and yet if it is the intention of the parties that it shall not be binding until put in writing, there can be no enforceable agreement until that is done, for even a written memorandum of a contract to be subsequently drawn up and signed is not an enforceable agreement.[93] And the parties may contract between themselves that no oral agreement in regard to future transactions between them shall be binding on them except the agreement be made in writing.[94] It must also be remembered that there is a general rule of evidence, of far-reaching importance, that evidence of an oral agreement is not admissible to contradict or add to the terms of a written contract.[95]

3. Form of Language. To make an enforceable agreement in writing no particular form of words is essential. The intention of the parties is alone looked to and the use of inapt words or bad English will not affect the validity of the agreement,[96] although it may its construction.[97] Yet every writing, although signed by one or both of the parties, is not to be construed as an agreement,[98] as for example a mere schedule of prices for work and materials.[99] The same is

of the bills contained in it is not complete till the letter is dispatched from the town." *Ex p.* Cote, L. R. 9 Ch. 27, 31, 43 L. J. Bankr. 19, 29 L. T. Rep. N. S. 598, 22 Wkly. Rep. 39.

86. See *supra*, II, C, 5, a, (IV).

87. See *infra*, IV, B, 3.

88. See Bonds, 5 Cyc. 721; Deeds; Mortgages; Seals.

89. Quigly *v.* Muse, 15 La. Ann. 197; Stabler *v.* Cowman, 7 Gill & J. (Md.) 284.

As to consideration see *infra*, IV, B.

90. See Commercial Paper, 7 Cyc. 542.

91. See Frauds, Statute of.

92. Austin *v.* Foster, 9 Pick. (Mass.) 341; Central Lunatic Asylum *v.* Flanagan, 80 Va. 110.

93. Baird *v.* Ætna L. Ins. Co., (Pa. 1886) 4 Atl. 199. See *supra*, II, C, 4, l.

94. Abbott *v.* Gatch, 13 Md. 314, 317, 71 Am. Dec. 635, where A was building a wall for B under a contract which provided that "no extra charges to be made unless a written agreement be made and attached to this contract," and it was held that although B had directed and A had done extra work on the wall at B's request, there could be no recovery in the absence of a writing on the subject.

A new oral agreement waiving the conditions of a written contract may be proved. See *infra*, IX, B, 1, f, (II).

95. See Evidence.

96. Wenzell *v.* Breckinridge, 3 Dana (Ky.) 482; Marshall *v.* Craig, 1 Bibb (Ky.) 374; Louisiana State Bank *v.* New Orleans Nav. Co., 3 La. Ann. 294; Dunbar *v.* Owens, 10 Rob. (La.) 139; Gasquet *v.* Oakey, 15 La. 537; Knox *v.* Dixon, 4 La. 466, 23 Am. Dec. 488; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Bean *v.* Clark, 30 Fed. 225.

97. Construction of written contracts see *infra*, VIII.

Mistake in names of parties see Names.

98. Shepard *v.* Carpenter, 54 Minn. 153, 55 N. W. 906; Miller *v.* Collyer, 36 Barb. (N. Y.) 250; Ames *v.* Pierson, 4 Pa. Dist. 492.

99. Eyser *v.* Weissgerber, 2 Iowa 463.

true of an acknowledgment in the form of a due-bill.[1] And even a writing in the form of a receipt may contain words showing a contract.[2]

4. Agreement in Several Writings. An agreement may be collected from several different writings which when connected show the parties, subject-matter, terms, and consideration,[3] as in the case of contracts entered into by correspondence.[4] A written agreement of which there are two copies, one signed by each of the parties, is binding upon both to the same extent as if there had been only one copy of the agreement, and both had signed it.[5]

5. Agreement Partly Written and Partly Oral. An agreement may be partly in writing and partly by word of mouth.[6] A contract may be in writing as to one party and oral as to the others, as where a person makes his offer in writing and the other party accepts orally or *vice versa*.[7]

C. Signing — 1. Necessity For. As a general rule a written agreement cannot be said to be a completed contract until it is signed by all the parties to it.[8] And this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed.[9] Yet it is competent for

1. Carson *v.* Lucas, 13 B. Mon. (Ky.) 213. But see Commercial Paper, 7 Cyc. 573.

2. Starkey *v.* Peters, 18 Conn. 181; White *v.* Merrell, 32 Ill. 511; Bird *v.* Thayer, 8 Blackf. (Ind.) 146.

Receipt may be an agreement.— The language of a receipt may be such as to make it an agreement as in the following cases:

A writing signed by defendant reciting that he has received a relinquishment of a lease from plaintiff "for consideration of one hundred and fifty dollars, to be paid him in ten days." Dexter *v.* Orlander, 89 Ala. 262, 7 So. 115.

"Received . . . of James Wilson & Co. two thousand six hundred and seventy-five and five one-hundredths dollars, as an advance on one hundred barrels linseed-oil in their store; for which advance we agree to pay them interest at the rate six per cent. per annum; a commission of two and a half per cent. on sales; storage five cents per barrel per month, and insurance." Wilson *v.* Bailey, 1 Handy (Ohio) 177, 12 Ohio Dec. (Reprint) 89.

A writing stating that a person bought of another two cars of potatoes, at fifty-four cents for sixty-two pounds, to be loaded on track at a certain place, paid cash twenty dollars, and signed by the seller. Smith *v.* Halligan, 9 N. Y. St. 425.

"Received of H. Gaul, the following orders or demands for collection, and to be paid over to said Gaul or his order, on the 1st day of November next, or as soon thereafter as collected: . . . A. S. Whiting." Wood *v.* Whiting, 21 Barb. (N. Y.) 190.

3. Esmay *v.* Gorton, 18 Ill. 483.

4. See *supra*, II, C, 7.

5. Morris *v.* McKee, 96 Ga. 611, 24 S. E. 142.

Duplicate contracts are treated as originals, although the parties may have chosen to call one "original copy" and the other "duplicate copy." Crane *v.* Partland, 9 Mich. 493.

6. Gordon *v.* Gordon, 96 Ind. 134; St. Louis, etc., R. Co. *v.* Maddox, 18 Kan. 546.

Rule excluding parol evidence.— It must be borne in mind, however, that where the parties have undertaken to put their contract in writing parol evidence of a contemporaneous or prior oral agreement is not admissible to add to its terms or to contradict them. See Evidence.

7. Grove *v.* Hodges, 55 Pa. St. 504.

8. *Alabama.* — Vastbinder *v.* Metcalf, 3 Ala. 100.

Illinois.— Keating *v.* Nelson, 33 Ill. App. 357; Wetenkamp *v.* Billigh, 27 Ill. App. 585. 585.

Indiana.— Lewis *v.* Crow, 69 Ind. 434.

Louisiana.— Fish *v.* Johnson, 16 La. Ann. 29.

Maine.— Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545.

Massachusetts. — Mattoon *v.* Barnes, 112 Mass. 463.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569.

Nevada.— Keller *v.* Blasdel, 1 Nev. 491.

Pennsylvania.— Finney *v.* Finney, 1 Pearson 70.

South Carolina.— McDaniel *v.* Anderson, 19 S. C. 211.

Texas.— Ayers *v.* Herring, (Tex. Civ. App. 1895) 32 S. W. 1060.

United States.— Arnold *v.* Scharbauer, 116 Fed. 492.

See 11 Cent. Dig. tit. "Contracts," §§ 171–179.

9. *California.*— Barber *v.* Burrows, 51 Cal. 404. 473.

Illinois.— Waggeman *v.* Bracken, 52 Ill. 468.

Maine.— Goodenow *v.* Dunn, 21 Me. 86.

Maryland.— Howard *v.* Carpenter, 11 Md. 259.

New Jersey. — Emery *v.* Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541.

New York.— Brooklyn City R. Co. *v.* Brooklyn Cent. R. Co., 32 Barb. 358.

Texas.— Osborne *v.* Holland, 1 Tex. App. Civ. Cas. § 1087.

See 11 Cent. Dig. tit. "Contracts," § 163.

the parties to adopt it as their contract without signing it, provided their intention to do so is clear.[10] It has been held in some cases that it is necessary to prove the signing of a contract only by the party to be charged and not by the party who is to be benefited by the agreement.[11]

2. AGREEMENT SIGNED BY ONE AND ADOPTED BY THE OTHER. When a contract is signed by one of the parties only, but is accepted and acted on by the other party, it is just as binding as if it were signed by both of the parties.[12] So also where a proposal is made in writing by one party and accepted by the other either verbally or by acting on it the contract is a written one.[13] But where a person sends to another two written instruments purporting to be counterparts of a proposed contract, but which differ materially, and asks him to accept and return

10. Dillon *v.* Anderson, 43 N. Y. 231; Girard L. Ins., etc., Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. ed. 1062. And see American Pub., etc., Co. *v.* Walker, 87 Mo. App. 503.

Mutuality see *infra*, IV, D, 9, h, (VII).

Specifications.— Where the parties have signed a written agreement which refers to specifications the specifications need not be signed. White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Moore *v.* U. S., 1 Ct. Cl. 90.

Where the agreements of the parties are contained in separate instruments, as where one signs a note for the purchase-money and the other an agreement to convey the property when the money is paid, both parties need not sign each instrument. Lee *v.* Dozier, 40 Miss. 477.

Where a bond conditioned on the performance of a contract refers to the contract as thereto attached, an execution of the bond with the contract attached thereto is an execution of the contract also. Busch *v.* Hart, 62 Ark. 330, 35 S. W. 534.

Modification after signing.— Parties may insert, by mutual consent, modifications in a written document already signed by them and they will be bound by such altered contract without signing it. Vidvard *v.* Cushman, 35 Hun (N. Y.) 18.

11. Esmay *v.* Gorton, 18 Ill. 483; Waltz *v.* Waltz, 84 Ind. 403; Western Maryland R. Co. *v.* Orendorff, 37 Md. 328.

12. *Alabama.*— Wetumpka, etc., R. Co. *v.* Hill, 7 Ala. 772.

California.— Bloom *v.* Hazzard, 104 Cal. 310, 37 Pac. 1037; Reedy *v.* Smith, 42 Cal. 245; Luckhart *v.* Ogden, 30 Cal. 547; Clary *v.* Hoagland, 13 Cal. 173.

Georgia.— Jernigan *v.* Wimberly, 1 Ga. 220.

Illinois.— Sellers *v.* Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 549; Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Short *v.* Kieffer, 142 Ill. 266; Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1060 [*affirming* 31 Ill. App. 630]; Esmay *v.* Gorton, 18 Ill. 487; Johnson *v.* Dodge, 17 Ill. 433.

Indiana.— Indianapolis Natural Gas Co. *v.* Kobbey, 135 Ind. 357, 35 N. E. 392; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Fairbanks *v.* Meyers, 98 Ind. 92; Street *v.* Chapman, 29 Ind. 142; Kieth *v.* Kerr, 17 Ind. 284.

Iowa.— Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. Rep. 284; Dows *v.* Morse, 62 Iowa 231, 17 N. W. 495; Bell *v.* Byerson, 11 Iowa 233, 17 Am. Dec. 142; Attix *v.* Pelan, 5 Iowa 336.

Louisiana.— Broussard *v.* Verret, 43 La. Ann. 929, 9 So. 905; Smith *v.* Morse, 20 La. Ann. 220; Lesseps *v.* Wicks, 12 La. Ann. 739.

Maine.— Young *v.* Ward, 33 Me. 359.

Massachusetts.— Mattoon *v.* Barnes, 112 Mass. 463.

Minnesota.— Griffin *v.* Bristle, 39 Minn. 456, 40 N. W. 523; Magoon *v.* Minnesota Packing Co., 34 Minn. 434, 26 N. W. 235.

Missouri.— Stone *v.* Pennock, 31 Mo. App. 544; Bernor *v.* Bagnell, 20 Mo. App. 543. And see American Pub., etc., Co. *v.* Walker, 87 Mo. App. 503.

New Jersey.—Marshall *v.* Hann, 17 N. J. L. 425; Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456.

New York.— Dutch *v.* Mead, 36 N. Y. Super. Ct. 427; Secor *v.* Law, 9 Bosw. 163; Darby *v.* Pettee, 2 Duer 139; Reynolds *v.* Welsh, 8 N. Y. St. 404.

Ohio.— Bacon *v.* Daniels, 37 Ohio St. 279.

Pennsylvania.—Grove *v.* Hodges, 55 Pa. St. 504; Flannery *v.* Dechert, 13 Pa. St. 505. See Pennsylvania R. Co. *v.* Bost, 104 Pa. St. 26, holding that where a railroad company had adopted rules and regulations for minors entering into its service for wages, to work in its shops, on acceptance of a person under those rules they become binding on both parties, though signed only by the apprentice.

South Carolina.— Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645.

Texas.— Campbell *v.* McFadin, 71 Tex. 28, 9 S. W. 138; Leonard *v.* Portier, 3 Tex. App. Civ. Cas. § 362.

Vermont.— Brandon Mfg. Co. *v.* Morse, 48 Vt. 322; Patchin *v.* Swift, 21 Vt. 292.

Wisconsin.— McPhee *v.* McDermott, 77 Wis. 33, 45 N. W. 808.

United States.— Bean *v.* Clark, 30 Fed. 225.

See *supra*, II, C, 3, c, (V), (VI); and 11 Cent. Dig. tit. "Contracts," §§ 177, 218.

Mutuality see *infra*, IV, D, 9, h, (VII).

13. Ellis *v.* Abell, 10 Ont. App. 226. And see *supra*, II, C, 3 c, (III).

the duplicate, and he signs but one of the instruments and returns it, this is the contract between them.[14]

3. Parties Signing Bound. As a general rule one signing a contract is bound by its terms,[15] although he may not be named in it.[16]

4. Mode of Signing. It is not necessary that the signature of a party to a contract should appear at the end thereof. If his name is written by him in any part of the contract, or at the top, or the right or left hand, with intention to sign or for the purpose of authenticating the instrument, it is sufficient to bind him.[17] Manifestly, however, the mere fact that one's name appears in the body of a written document cannot, standing alone, make him a party to it, where he has not signed it.[18] One may sign with initials or mark, etc.,[19] and in ink or pencil, or may adopt a printed or stamped signature.[20]

5. Signing by Procuration or Adoption. One may be bound by an agreement to which his signature is affixed by procuration, adoption, or ratification, as well as though it had been written by his own hand.[21] Where one signs another's name for him in his presence and by his direction, it is the act of the person whose name is signed as much as though he wrote the signature himself.[22] Any

14. Baird *v.* Harper, (Del. 1902) 51 Atl. 141 [*reversing* 3 Pennew. (Del.) 110, 50 Atl. 326].

15. Van Nostrand *v.* New York Guaranty, etc., Co., 39 N. Y. Super. Ct. 73.

16. Staples *v.* Wheeler, 38 Me. 372; Kendall *v.* Kendall, 7 Me. 171; Clarke *v.* Rawson, 2 Den. (N. Y.) 135; Thompson *v.* Coffman, 15 Oreg. 631, 16 Pac. 713. *Compare*, however, Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27; Blackmen *v.* Davis, 128 Mass. 538; Evans *v.* Conklin, 71 Hun (N. Y.) 536, 24 N. Y. Suppl. 1081, 54 N. Y. St. 915.

17. *Arkansas.*— Henry *v.* Allen, 49 Ark. 122, 4 S. W. 201.

Illinois.— McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661.

Missouri.— Donnell Mfg. Co. *v.* Repass, 75 Mo. App. 420.

New York.— Perkins *v.* Goodman, 21 Barb. 218.

Pennsylvania.— Steininger *v.* Hoch, 39 Pa. St. 263, 80 Am. Dec. 521.

Tennessee.— Noe *v.* Hodges, 3 Humphr. 162.

Texas.— Close *v.* Judson, 34 Tex. 288; Prince *v.* Thompson, 21 Tex. 480; Fulshear *v.* Randon, 18 Tex. 275, 277, 70 Am. Dec. 281 (where it is said: "If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature").

See 11 Cent. Dig. tit. "Contracts," §§ 172, 180.

Statute of frauds.— This has been repeatedly held in the case of a "note or memorandum" under the statute of frauds. See Frauds, Statute of.

18. Thomas *v.* Caldwell, 50 Ill. 138; Lombard *v.* Guilliet, 11 Mart. (La.) 453.

19. Palmer *v.* Stephens, 1 Den. (N. Y.) 471. And see Frauds, Statute of. See also Names.

One may sign with the English translation of his French name — as "Seam" for "Couture." Augur *v.* Couture, 68 Me. 427.

Surname.— Where a person in subscribing money to build a church signed only his surname, with the addition of the word "family," he was held bound by such adopted signature to the same extent as though he had signed his full name. Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535.

20. See Frauds, Statute of.

21. Davis *v.* Cleghorn, 25 Ill. 212; Frost *v.* Deering, 21 Me. 156; Speckels *v.* Sax, 1 E. D. Smith (N. Y.) 253 (where a written agreement was shown and read to a woman, and she took a pencil for the purpose of writing her name; but, perceiving that her name was already written, she said that she supposed that it was all right); Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; Cooper *v.* Schwartz, 40 Wis. 54. And see Principal and Agent.

22. *California.*— Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84.

Georgia.— Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Indiana.— Henderson *v.* Barbee, 6 Blackf. 26; Crow *v.* Carter, 5 Ind. App. 169, 31 N. E. 937.

Maine.— Bird *v.* Decker, 64 Me. 550; Frost *v.* Deering, 21 Me. 156.

Maryland.— Williams *v.* Woods, 16 Md. 220.

Massachusetts.— Wood *v.* Goodridge, 6 Cush. 117, 52 Am. Dec. 771; Gardner *v.* Gardner, 5 Cush. 483, 484, 52 Am. Dec. 740 (where it is said: "The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign").

Minnesota.— Pottgieser *v.* Dorn, 16 Minn. 204.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

New York.— Harris *v.* Story, 2 E. D. Smith 363.

North Carolina.—Kime *v.* Brooks, 31 N. C. 218.

Pennsylvania.— Pierce *v.* Hakes, 23 Pa. St. 231.

defect in the method of executing a written instrument evidencing a contract may, it seems, be cured by ratification.[23]

D. Delivery. To the execution of a contract in writing delivery is ordinarily an essential element;[24] and a delivery on condition is not a complete delivery until the condition is fulfilled.[25] But a writing not delivered may be evidence of the actual terms of an agreement between the parties.[26] And to entitle one to sue on a contract made with another for his benefit it is not necessary that the contract shall have been delivered to him, but it is sufficient if it was delivered to the person with whom it was made.[27]

E. Date. A written agreement is valid although undated.[28]

F. Leaving Blanks in Writing. A writing is incomplete as an agreement where blanks as to essential matters are left in it,[29] unless they can be supplied from other parts of the writing itself.[30] But one signing a paper and leaving blanks in it is ordinarily presumed to give authority to the holder to fill the blanks in accordance with the general character of the instrument.[31]

G. Revenue Stamps — 1. Necessity For — a. In General. In the absence of a statute of course no stamp is required in order to render a written contract

South Carolina.— Wallace *v.* McCollough, 1 Rich. Eq. 426.

United States.— Stevens *v.* Vancleve, 4 Wash. 262, 23 Fed. Cas. No. 13,412.

England.— Rex *v.* Longnor, 4 B. & Ad. 647, 2 L. J. M. C. 62, 1 N. & M. 576, 24 E. C. L. 284; Hudson *v.* Revett, 5 Bing. 368, 7 L. J. C. P. O. S. 145, 30 Rev. Rep. 649, 15 E. C. L. 625; Ball *v.* Dunsterville, 4 T. R. 313, 2 Rev. Rep. 394.

And see Principal and Agent.

Authority by telephone.—One may by telephone direct another to sign for him. Long *v.* Goodwin, 28 Pittsb. Leg. J. N. S. 449.

23. Citizens' Bank *v.* Tucker, 6 Rob. (La.) 443; Marign *v.* Union Bank, 5 Rob. (La.) 354; Beal *v.* McKiernan, 8 La. 569; McManus *v.* Jewett, 6 La. 530; Sugar Creek School Directors *v.* McBride, 22 Pa. St. 215; Wooters *v.* Smith, 56 Tex. 198.

24. *California.*— Hoen *v.* Simmons, 1 Cal. 119, 52 Am. Dec. 291.

Connecticut.— Callender *v.* Colegrove, 17 Conn. 1.

Illinois.— Bierdeman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876.

Massachusetts.— Springfield *v.* Harris, 107 Mass. 532; Blanchard *v.* Blackstone, 102 Mass. 343.

Minnesota.— Jenson *v.* Chicago, etc., R. Co., 37 Minn. 383, 34 N. W. 743.

New Hampshire.— Morrison *v.* Insurance Co. of North America, 64 N. H. 137, 7 Atl. 378.

New York.— Universal Beer Keg Co. *v.* Brown, 9 N. Y. St. 91; Kahn *v.* John Kress Brewing Co., 17 Misc. 394, 39 N. Y. Suppl. 1093.

Pennsylvania.— *In re* Field, 2 Rawle 351, 21 Am. Dec. 454.

Texas.— Wheeler, etc., Mfg. Co. *v.* Briggs, (Tex. 1891) 18 S. W. 555.

Vermont.— King *v.* Woodbridge, 34 Vt. 565; Hakes *v.* Hotchkiss, 23 Vt. 231.

See 11 Cent. Dig. tit. "Contracts," § 207 *et seq.*

Delivery of contracts under seal. See Bonds, 5 Cyc. 740; Deeds; Mortgages.

Delivery of bill or note see Commercial Paper, 7 Cyc. 683.

The place of delivery is the place of execution.— Butler *v.* Myer, 17 Ind. 77.

The words "made and executed" in a written instrument import a delivery. Elbring *v.* Mullen, (Ida. 1894) 38 Pac. 404.

25. *Colorado.*— Lamar Milling, etc., Co. *v.* Craddock, 5 Colo. App. 303, 37 Pac. 950.

Illinois.— Bierdeman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Weaver *v.* Snow, 60 Ill. App. 624.

New York.— Benton *v.* Martin, 52 N. Y. 570.

North Carolina.— Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698.

Virginia.—Wendlinger *v.* Smith, 75 Va. 309, 40 Am. Rep. 727.

See 11 Cent. Dig. tit. "Contracts," §§ 209 *et seq.*

Nor is a signing on condition.— Andrews *v.* Etteridge, 9 Mass. 383.

Contract left with scrivener to make duplicate.— Where a building contract was signed by the parties in a scrivener's office, and left with him to have a duplicate made to be sent to one of them, it was held that there was a delivery. Blanchard *v.* Blackstone, 102 Mass. 343.

26. Mildren *v.* Pennsylvania Steel Co., 90 Pa. St. 317.

27. Copeland *v.* Simmers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; Waltz *v.* Waltz, 84 Ind. 403.

28. Longley *v.* Caruthers, 64 Tex. 287.

Omitting date on bill or note see Commercial Paper, 7 Cyc. 542.

29. Atkins *v.* Van Buren School Tp., 77 Ind. 447; Pepper *v.* Harris, 73 N. C. 365.

Blanks in sealed instruments see Bonds, 5 Cyc. 739; Deeds; Mortgages.

Blanks in bills and notes see Commercial Paper, 7 Cyc. 619.

30. Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148, 559.

31. Implied authority to fill blanks in instrument see Alterations of Instruments, 2 Cyc. 159.

complete and valid.[32] But sometimes the revenue laws require written agreements or agreements of a particular kind to be stamped, and omission of the stamp in such a case may render an agreement invalid.[33]

b. Instruments Requiring Stamps. Where a revenue tax is imposed on documents of a special character, to determine whether a stamp is required in any given case the form of the document is to be looked to rather than the transaction of which it is a part. Stamps are imposed not on transactions but on documents.[34] Under the several stamp acts requiring agreements to be stamped, a letter containing an offer which is accepted verbally does not require a stamp, as the acts do not contemplate that every document which may be given in evidence to show the existence of an agreement should be stamped, but only such agreements as would be evidence against both the contracting parties.[35] In the absence of express statutory provision, a receipt for property delivered, such as an express receipt, is not such an agreement within the meaning of the revenue acts as requires a stamp,[36] although it has been held that a receipt for money loaned which imports an obligation to repay it must be stamped as an instrument for the payment of money.[37] Under the various United States revenue acts the stamp duty is not imposed upon instruments made necessary in legal proceedings or where the imposition of the duty would be a tax upon the exercise by the state of its governmental functions.[38]

c. Amount of Stamps. One revenue stamp is sufficient where a number of persons severally bind themselves in a penalty by one bond, conditioned that each

32. Bayly *v.* McKnight, 19 La. Ann. 321.

Contracts made before but delivered after repeal of the Stamp Act do not require stamps. Burton *v.* Shotwell, 13 Bush (Ky.) 271.

33. See *infra*, III, G, 4. And see, generally, INTERNAL REVENUE.

34. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728; Merchants' Warehouse Co. *v.* McClain, 112 Fed. 787; Granby Mercantile Co. *v.* Webster, 98 Fed. 604.

"Call" for stock.— In Treat *v.* White, 181 U. S. 264, 21 S. Ct. 611, 45 L. ed. 853, it was held that a "call" for stock, which contains an absolute promise to sell the stock at any time within a designated period, although it may be a unilateral contract, is an agreement to sell, within the meaning of the War Revenue Act of June 13, 1898, Schedule A, § 25, requiring a stamp tax of two cents on each hundred dollars of face value or fraction thereof.

Warrant of attorney.—In Tolman *v.* Treat, 106 Fed. 679, it was held that a warrant of attorney, which in fact was a retainer, by virtue of which an attorney at law was authorized to appear in the court in behalf of a client to take certain steps as attorney in litigation to which the client was a party, was not subject to a stamp tax under the War Revenue Act of June 30, 1898.

35. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206.

Massachusetts.— Crocker *v.* Foley, 13 Allen 376.

Pennsylvania.— Hurst *v.* Johnston, 6 Phila. 593, 25 Leg. Int. 173.

Vermont.— Atkins *v.* Plympton, 44 Vt. 21.

United States.— See Snow *v.* Miles, 3 Cliff. 608, 22 Fed. Cas. No. 13,146.

England.— Beeching *v.* Westbrook, 1 Dowl. N. S. 18, 10 L. J. Exch. 464, 8 M. & W. 411; Vollans *v.* Fletcher, 1 Exch. 20, 16 L. J. Exch. 173. See also Vaughton *v.* Brine, 9 L. J. C. P. 326, 1 M. & G. 359, 1 Scott N. R. 258, 39 E. C. L. 801.

See 11 Cent. Dig. tit. "Contracts," § 194.

Contract evidenced by letters.— It was held in Myers *v.* Smith, 48 Barb. (N. Y.) 614, that where an alleged contract was evidenced by letters, all the letters offered as evidence of the contract must be stamped by the party who signed them or the contract would be void under a statute for want of proper stamps.

36. Belger *v.* Dinsmore, 51 Barb. (N. Y.) 69, 34 How. Pr. (N. Y.) 421; De Barre *v.* Livingston, 48 Barb. (N. Y.) 511.

Warehouse receipts.— It was held in McClain *v.* Merchants' Warehouse Co., 115 Fed. 295, 53 C. C. A. 155, that postal cards sent out by a warehouse company, on receipt at its warehouse of goods consigned to a party, reciting: "The merchandise designated below is now at these warehouses subject to your order on payment of the freight due thereon. . . . Merchandise not removed within 10 days from date will be stored subject to tariff of charges," etc., were not warehouse receipts within Schedule A of the Warehouse Revenue Act of June 13, 1898, and were not subject to the stamp tax as such.

37. Hoops *v.* Atkins, 41 Ga. 109.

38. McGovern *v.* Hoesbach, 53 Pa. St. 176 (which was a case of an insolvent's bond); Dawson *v.* McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841; McNally *v.* Field, 119 Fed. 445; Bettman *v.* Walwick, 108 Fed. 46, 47 C. C. A. 185; U. S. *v.* Owens, 100 Fed. 70.

and every one of them shall perform the same matter;[39] where a debtor compounds with his creditors and each creditor signs the same deed;[40] where several mariners join in a bill of sale of their several shares of prize-money;[41] where an agreement is made by several for a subscription to one common fund, although it is several as to each subscriber;[42] where an annuity by three is sold, one being a mere surety;[43] where several underwriters on the same policy all agree to refer the demand of the insured on such policy;[44] where an apprentice is bound for a certain number of years, part with a certain party and the remainder with a different party, to learn different trades;[45] and where members of a mutual insurance club all execute the same power of attorney, authorizing persons therein named to sign the club policies for them.[46] Where several instruments are executed together as one transaction by and between the same parties, and constitute but one contract, it is only necessary to affix the stamps required for one contract.[47] In England it has been held sufficient to affix the amount of stamps required by the act in force at the time of the stamping, although the tax is less than at the time the instrument was executed.[48]

2. WHO MAY AFFIX. It is immaterial by whom the proper stamp is affixed to an instrument,[49] unless the statute clearly provides that it shall be affixed by a particular person.[50]

3. TIME OF AFFIXING. While the proper time to affix the stamp to the instrument is upon its execution, yet failure to affix a stamp at such time may be cured, under the statute, by allowing the stamp to be affixed in open court at the time the instrument is offered in evidence,[51] or by a provision conferring upon the collector of internal revenue of the proper district the authority to affix the proper

39. Ballard *v.* Burnside, 49 Barb. (N. Y.) 102.

40. Bowen *v.* Ashley, 2 B. & P. N. R. 274.

41. Baker *v.* Jardine, 13 East 235 note.

42. Davis *v.* Williams, 13 East 232, 1 Smith K. B. 5.

43. Cook *v.* Jones, 15 East 237.

44. Goodson *v.* Forbes, 1 Marsh. 525, 6 Taunt. 171, 1 E. C. L. 561.

45. Rex *v.* Louth, 8 B. & C. 247, 2 M. & R. 273, 15 E. C. L. 129.

46. Allen *v.* Morrison, 8 B. & C. 565, 7 L. J. K. B. O. S. 106, 3 M. & R. 70, 15 E. C. L. 280.

47. Bowker *v.* Goodwin, 7 Nev. 135; Parks *v.* Comstock, 59 Barb. (N. Y.) 16.

Duplicate agreements.— When an agreement which the law does not require to be executed in duplicate is so executed and only one instrument is stamped that one is a binding contract on both parties. Bondurant *v.* Crawford, 22 Iowa 40.

Unnecessary stamps.—It was held in Weltner *v.* Riggs, 3 W. Va. 445, that it was no objection to a contract which a revenue act required to bear a five-cent stamp to render it admissible in evidence that it bore two five-cent stamps.

48. Buckworth *v.* Simpson, 1 C. M. & R. 834, 1 Gale 38, 4 L. J. Exch. 104, 5 Tyrw. 344; Deakin *v.* Penniall, 2 Exch. 320, 17 L. J. Exch. 217; Doe *v.* Whittingham, 4 Taunt. 20, 13 Rev. Rep. 554. *Contra*, Clarke *v.* Roche, 3 Q. B. D. 170, 47 L. J. Q. B. 147, 37 L. T. Rep. N. S. 633, 26 Wkly. Rep. 42.

49. Adams *v.* Dale, 29 Ind. 273; Patterson *v.* Eames, 54 Me. 203; New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Mays *v.* Rutledge, 37 Tex. 134.

Maker of instrument.— It was held, however, in Myers *v.* Smith, 48 Barb. (N. Y.) 614, that a person executing a document which requires a stamp is the one to affix it, and that in any event it cannot be affixed nor the cancellation be made by another party without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed.

50. Internal revenue collector.—Under the former United States Stamp Act, where the stamp was not affixed at the time of the execution of an agreement, the agreement was held void unless the proper stamp was affixed by the collector of internal revenue for the district. Mobile, etc., R. Co. *v.* Edwards, 46 Ala. 267. And under this statute it was held that the judge presiding at the trial of an action on an instrument had no power to authorize the plaintiff to stamp the instrument in his presence. Bernard's Succession, 24 La. Ann. 402; Corrie *v.* Billiu, 23 La. Ann. 250; Wayman *v.* Torreyson, 4 Nev. 124.

51. *Alabama.*— Foster *v.* Holley, 49 Ala. 593.

Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 622

Indiana.— Wright *v.* McFadden, 25 Ind. 483.

Louisiana.— Pavy *v.* Bertinot, 25 La. Ann. 469.

Maine.— Patterson *v.* Eames, 54 Me. 203.

Massachusetts.— Tobey *v.* Chipman, 13 Allen 123.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635; New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695; Frazer *v.* Robinson, 42 Miss. 121.

stamp, upon sufficient showing that the omission to stamp was the result of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the government of the duty or to evade or delay the payment thereof.[52]

4. Effect of Omission. Where the revenue stamps required by statute to be affixed to an instrument are purposely omitted, with an intent to evade the duty, the instrument is void and inadmissible in evidence.[53] But where the omission to affix stamps is without intent to evade the provisions of the statutes, the rule seems settled that it will not render the instrument void or inadmissible in evidence.[54] An intent to defraud by the omission of a stamp from an instrument

Missouri.— Boly *v.* Lake, 54 Mo. 201; Day *v.* Baker, 36 Mo. 125.

Nevada.— Carpenter *v.* Johnson, 1 Nev. 331.

New Hampshire.—Janvrin *v.* Fogg, 49 N. H. 340; Garland *v.* Lane, 46 N. H. 245.

New York.— Frink *v.* Thompson, 4 Lans. 489; Beebe *v.* Hutton, 47 Barb. 187; De Reguie *v.* Lewis, 3 Rob. 708.

Pennsylvania.— Walsh *v.* Carroll, 6 Phila. 590, 25 Leg. Int. 133 (in which case it was held that where, by the direction of a maker, a stamp was placed on a note within a reasonable time after it was made it was admissible in evidence); Gay *v.* Comstock, 2 Wkly. Notes Cas. 532.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Under the United States Revenue Act of June 13, 1898, providing that no instrument or paper therein specified shall be admitted in evidence until a stamp shall be affixed thereto, it has been held that such stamp may be affixed to the instrument at any time before it is offered in evidence. Sioux City First Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. 1076; Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077; Jones *v.* Western Mfg. Co., 27 Wash. 136, 67 Pac. 586.

52. *Colorado.*—Browne *v.* Steck, 2 Colo. 70.

Connecticut.— Corbin *v.* Tracy, 34 Conn. 325.

Iowa.— McAfferty *v.* Hale, 24 Iowa 355; Brown *v.* Crandal, 23 Iowa 112 (where it was held, however, that such office could not be performed by a deputy collector).

Kansas.—Green *v.* McCracken, 64 Kan. 330, 67 Pac. 857.

Louisiana.—Levy *v.* Loeb, 25 La. Ann. 496; Pavy *v.* Bertinot, 25 La. Ann. 469; Hoyt *v.* Benner, 22 La. Ann. 353.

Maryland.— Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Michigan.— Peoria M. & F. Ins. Co. *v.* Perkins, 16 Mich. 380.

Mississippi.— Frazer *v.* Robinson, 42 Miss. 121.

New York.— Parks *v.* Comstock, 59 Barb. 16.

Ohio.— Harper *v.* Clark, 17 Ohio St. 190.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Vermont.— Green Mountain Cent. Institute *v.* Britain, 44 Vt. 13.

West Virginia.— Logan *v.* Dils, 4 W. Va. 397.

53. Byington *v.* Oaks, 32 Iowa 488; Sawyer *v.* Parker, 57 Me. 39; Maynard *v.* Johnson, 2 Nev. 25.

54. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355; Bates *v.* Bailey, 57 Ala. 73; Berry *v.* Nall, 54 Ala. 446; Blunt *v.* Bates, 40 Ala. 470.

Arkansas.— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623; Dorris *v.* Grace, 24 Ark. 326.

California.— Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617; Hallock *v.* Jaudin, 34 Cal. 167.

Illinois.— Craig *v.* Dimock, 47 Ill. 308.

Iowa.— Mitchell *v.* Home Ins. Co., 32 Iowa 421. But see Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685.

Kentucky.— Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996. And see Hunter *v.* Cobb, 1 Bush 239.

Maryland.—Wingert *v.* Zeigler, 91 Md. 318, 46 Atl. 1074, 80 Am. St. Rep. 453, 51 L. R. A. 316; Black *v.* Woodrow, 39 Md. 194.

Massachusetts.— Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499; Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150; Crocker *v.* Foley, 13 Allen 376; Govern *v.* Littlefield, 13 Allen 127 note; Tobey *v.* Chipman, 13 Allen 123.

Michigan.—Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Sammons *v.* Halloway, 21 Mich. 162, 4 Am. Rep. 465.

Minnesota.— Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106; Sanborn *v.* Nockin, 20 Minn. 178; Cabbott *v.* Radford, 17 Minn. 320.

Mississippi.—Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Missouri.— Whitehill *v.* Schickle, 43 Mo. 537.

Nevada.— Maynard *v.* Johnson, 2 Nev. 16.

New York.— Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466; Cagger *v.* Lansing, 57 Barb. 421; Schermerhorn *v.* Burgess, 55 Barb. 422, 38 How. Pr. 123; Vorebeck *v.* Roe, 50 Barb. 302; New Haven, etc., Co. *v.* Quintard, 1 Sweeny 89, 6 Abb. Pr. N. S. 128.

Ohio.—Stewart *v.* Hopkins, 30 Ohio St. 502; Gaylor *v.* Hunt, 23 Ohio St. 255; Harper *v.* Clark, 17 Ohio St. 190; Harris *v.* Trimble, 1 Cinc. Super. Ct. 108.

Pennsylvania.— McGovern *v.* Hoesback, 53 Pa. St. 176. But see Chartiers, etc., Turnpike Co. *v.* McNamara, 72 Pa. St. 278, 13 Am. Rep. 673.

Rhode Island.— Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35, 53 L. R. A. 739.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Vermont.— Atkins *v.* Plympton, 44 Vt. 21; Hitchcock *v.* Sawyer, 39 Vt. 412.

requiring a stamp will not be presumed, but must be proved like any other fraud;[55] and the burden of proof is upon the party relying upon the omission.[56]

5. Effect of Subsequent Stamping. Where an instrument from which the stamp has been omitted at the time of its execution is afterward stamped as prescribed by statute, either by the proper collector or in the presence of the court, it is thereby rendered valid from the date of its execution.[57]

6. Presumption as to Proper Stamping. In the absence of other evidence it will be presumed that instruments recorded at a time when it was the duty of the recorder to refuse to record instruments not properly stamped were so stamped.[58] This presumption likewise obtains, in the absence of proof to the contrary, in an action upon a lost instrument.[59]

Virginia.— Hale *v.* Wilkinson, 21 Gratt. 75.

West Virginia.—Weltner *v.* Riggs, 3 W. Va. 445.

Wisconsin.— Smith *v.* Scott, 31 Wis. 437; Timp *v.* Dockham, 29 Wis. 440; Rheinstrom *v.* Cone, 26 Wis. 163, 7 Am. Rep. 48.

United States.— Campbell *v.* Wilcox, 10 Wall. 421, 19 L. ed. 973; Dowell *v.* Applegate, 7 Sawy. 232, 7 Fed. 881.

See 11 Cent. Dig. tit. "Contracts," § 202.

55. *Alabama.*— Whigham *v.* Pickett, 43 Ala. 140.

Indiana.— Adams *v.* Dale, 29 Ind. 273.

Maine.— Sawyer *v.* Parker, 57 Me. 39.

Maryland.— Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Massachusetts.— Govern *v.* Littlefield, 13 Allen 127; Trull *v.* Moulton, 12 Allen 396; Desmond *v.* Norris, 10 Allen 250.

Pennsylvania.— Ritter *v.* Brendlinger, 58 Pa. St. 68.

West Virginia.—Weltner *v.* Riggs, 3 W. Va. 445.

56. *Alabama.*—Bibb *v.* Bonds, 57 Ala. 509; Perryman *v.* Greenville, 51 Ala. 507; Whigham *v.* Pickett, 43 Ala. 140.

California.—Hallock *v.* Jaudin, 34 Cal. 167.

Colorado.— Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Iowa.— Sioux City First Nat. Bank *v.* Stone, (1902) 91 N. W. 1076; Harvey *v.* Weiland, 115 Iowa 564, 88 N. W. 1077; Works *v.* Hershey, 35 Iowa 340; Mitchell *v.* Home Ins. Co., 32 Iowa 421.

Maine.— Dela *v.* Stanwood, 61 Me. 51; Brown *v.* Thompson, 59 Me. 372; Sawyer *v.* Parker, 57 Me. 39.

Maryland.—Black *v.* Woodrow, 39 Md. 194.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

New York.— Baker *v.* Baker, 6 Lans. 509; Cagger *v.* Lansing, 57 Barb. 421; Quin *v.* Lloyd, 1 Sweeny 253; New Haven, etc., Co. *v.* Quintard, 1 Sweeny 89, 6 Abb. Pr. N. S. 128. But see Davy *v.* Morgan, 56 Barb. 218; Howe *v.* Carpenter, 53 Barb. 382; Beebe *v.* Hutton, 47 Barb. 187; Baird *v.* Pridmore, 31 How. Pr. 359.

Pennsylvania.— Marco *v.* Marx, 33 Pittsb. Leg. J. 420.

Rhode Island.— Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35, 53 L. R. A. 739.

Wisconsin.— Smith *v.* Scott, 31 Wis. 437; Timp *v.* Dockham, 29 Wis. 440; Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125.

57. *Arkansas.*— Dorris *v.* Grace, 24 Ark. 326.

Iowa.— Doud *v.* Wright, 22 Iowa 336.

Kansas.—Green *v.* McCracken, 64 Kan. 330, 67 Pac. 857.

Massachusetts.— Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150, where an agreement for submission to arbitration, stamped after the rendition of the award, was held sufficient.

Michigan.— Gibson *v.* Hibbard, 13 Mich. 214.

New Hampshire.— Aldrich *v.* Hagan, 50 N. H. 60; Janvrin *v.* Fogg, 49 N. H. 340.

New York.— Vail *v.* Knapp, 49 Barb. 299.

Ohio.—Stewart *v.* Hopkins, 30 Ohio St. 502.

Pennsylvania.— Long *v.* Spencer, 78 Pa. St. 303; Tripp *v.* Bishop, 56 Pa. St. 424; Hetzell *v.* Gregory, 7 Phila. 148; Corry Nat. Bank *v.* Rouse, 3 Pittsb. 18.

West Virginia.— Logan *v.* Dils, 4 W. Va. 397.

Wisconsin.— Knox *v.* Huidekoper, 21 Wis. 527. See also Robbins *v.* Deverill, 20 Wis. 142.

England.—Rogers *v.* James, 2 Marsh. 425, 7 Taunt. 147, 2 E. C. L. 300.

Intervening rights.— It was held in McBride *v.* Doty, 23 Iowa 122, that as a record of an instrument insufficiently stamped does not import constructive notice to third parties under the Revenue Act, the subsequent attaching of an additional stamp by the revenue collector does not cure the defect so as to interfere with intervening rights.

58. *Iowa.*—Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281.

Louisiana.— Grand *v.* Cox, 24 La. Ann. 462.

Minnesota.—Owsley *v.* Greenwood, 18 Minn. 429; Cabbott *v.* Radford, 17 Minn. 320; Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Thayer *v.* Barney, 12 Minn. 502.

West Virginia.— Myers *v.* McGraw, 5 W. Va. 30.

England.— Bradlaugh *v.* De Rin, L. R. 3 C. P. 286, 37 L. J. C. P. 146, 18 L. T. Rep. N. S. 904, 16 Wkly. Rep. 1128.

59. Marine Invest. Co. *v.* Haviside, L. R. 5 H. L. 624, 42 L. J. Ch. 173.

7. Improper Cancellation or Failure to Cancel. The rule seems to be well established that under the various internal revenue acts requiring stamps to be affixed to certain instruments courts are not prevented from receiving in evidence instruments bearing the requisite value in stamps, merely because they do not appear to have been duly canceled.[60]

8. Applicability of Federal Statute in State Courts. It has often been held that United States statutes requiring revenue stamps upon certain instruments, and providing that when not stamped they shall not be admissible in evidence in any court, are applicable only to federal courts. Some of the courts place their decisions upon the ground that congress has not the constitutional authority to prescribe rules of evidence for state courts,[61] while other decisions have been

60. *Colorado.*— Patterson *v.* Gile, 1 Colo. 200.

Indiana.— Doffin *v.* Guyer, 39 Ind. 215; Adams *v.* Dale, 29 Ind. 273; Goodwine *v.* Wands, 25 Ind. 101.

Iowa.— Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

Louisiana.— Browne *v.* Bennett, 24 La. Ann. 618; D'Armond *v.* Dubose, 22 La. Ann. 131, 2 Am. Rep. 718.

Massachusetts.— Desmond *v.* Norris, 10 Allen 250.

Pennsylvania.—Andress *v.* Thomas, 6 Wkly. Notes Cas. 414; Corry Nat. Bank *v.* Rouse, 3 Pittsb. 18.

Texas.— Jacobs *v.* Cunningham, 32 Tex. 774; Schultz *v.* Herndon, 32 Tex. 390.

Vermont.—Chaplin *v.* Horton, 36 Vt. 684.

61. *Arkansas.*— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

California.— Bennett *v.* Morris, (1894) 37 Pac. 929.

Florida.— Forcheimer *v.* Holly, 14 Fla. 239.

Georgia.— Small *v.* Slocumb, 112 Ga. 279, 37 S. E. 481, 81 Am. St. Rep. 50, 53 L. R. A. 130.

Illinois.— Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840; Bowen *v.* Byrne, 55 Ill. 467; Wilson *v.* McKenna, 52 Ill. 43; Hanford *v.* Obrecht, 49 Ill. 146; Bunker *v.* Green, 48 Ill. 243; Craig *v.* Dimock, 47 Ill. 308; Latham *v.* Smith, 45 Ill. 29; Pierpont *v.* Johnson, 104 Ill. App. 27; Masterofsky *v.* Hellman, 99 Ill. App. 214; Mullin *v.* Johnson, 98 Ill. App. 621; National Masonic Acc. Assoc. *v.* Seed, 95 Ill. App. 43.

Indiana.— Dillingham *v.* Parks, (1902) 65 N. E. 300; Wallace *v.* Cravens, 34 Ind. 534.

Kentucky.— Hunter *v.* Cobb, 1 Bush 239.

Louisiana.— Holt *v.* Board of Liquidators, 33 La. Ann. 673; Pargoud *v.* Richardson, 30 La. Ann. 1286.

Maine.— Wade *v.* Curtis, 96 Me. 309, 52 Atl. 762; Wade *v.* Foss, 96 Me. 230, 52 Atl. 640.

Michigan.—Sammons *v.* Halloway, 21 Mich. 162, 4 Am. Rep. 465.

Mississippi.— Griffin Lumber Co. *v.* Myer, 80 Miss. 435, 31 So. 787; Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732.

Missouri.— More *v.* Clymer, 12 Mo. App. 11.

Nebraska.— Sulpho Saline Bath Co. *v.* Allen, (1902) 92 N. W. 354.

New Hampshire.— Woodward *v.* Roberts, 58 N. H. 503.

New York.— Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466; People *v.* Gates, 43 N. Y. 40; People *v.* Fromme, 35 N. Y. App. Div. 459, 54 N. Y. Suppl. 833; Howe *v.* Carpenter, 53 Barb. 382; Gregory *v.* Hitchcock Pub. Co., 31 Misc. 173, 63 N. Y. Suppl. 975; Loring *v.* Chase, 26 Misc. 318, 56 N. Y. Suppl. 312.

Rhode Island.— Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35, 53 L. R. A. 739.

Tennessee.—Southern Ins. Co. *v.* Estes, 106 Tenn. 472, 62 S. W. 149, 82 Am. St. Rep. 892, 52 L. R. A. 915; Sporrer *v.* Eifler, 1 Heisk. 633.

Texas.— Jacobs *v.* Spofford, 34 Tex. 152; Schultz *v.* Herndon, 32 Tex. 390; Thomas *v.* State, 40 Tex. Crim. 562, 51 S. W. 242, 76 Am. St. Rep. 740, 46 L. R. A. 454; Watson *v.* Mirike, (Tex. Civ. App. 1901) 61 S. W. 538.

Washington.— Foster *v.* Pacific Clipper Line, (1902) 71 Pac. 48.

Contra, Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685; Chartiers, etc., Turnpike Co. *v.* McNamara, 72 Pa. St. 278, 13 Am. Rep. 673.

Constitutional power.— It was held in Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466, that it is not within the constitutional power of congress to declare that a contract of conveyance between citizens of a state affecting real estate is void for the reason that a revenue stamp has been omitted. And in Duffy *v.* Hobson, 40 Cal. 240, 243, 6 Am. Rep. 617, the court said: "Congress has no constitutional authority to legislate concerning the rules of evidence administered in the Courts of this State, nor to affix conditions or limitations upon which those rules are to be applied and enforced; nor can it rightfully convert these Courts into tax gatherers for the benefit of the Federal Government, nor charge them with the duty of inquiring whether or not the revenue laws of the United States have been observed, or of investigating into the motives of parties in omitting to affix revenue stamps to the contracts they may have made."

Recording unstamped instruments.— Acts of congress relating to the recording of unstamped instruments have been held to apply only to such instruments as are required by federal law to be recorded and to federal officers. Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499; People *v.* Fromme, 35 N. Y. App.

placed upon the ground that congress did not intend that the various revenue acts should apply to state courts.[62]

9. What Law Governs. The better doctrine seems to be that where an unstamped instrument is declared to be void by the *lex loci contractus* it will be void everywhere,[63] unless the foreign statute simply renders such instrument, when unstamped, inadmissible in evidence, when the statute will have no extra-territorial effect.[64] In some jurisdictions, however, the rule is laid down that domestic courts will not take notice of the revenue laws of foreign countries, and therefore that a contract will be enforced in such forum, although invalid for want of proper stamps in the country where it was entered into.[65]

IV. CONSIDERATION.

A. Definition. Various definitions of consideration are to be found in the text-books and judicial opinions. A sufficient one is: A benefit to the party promising or a loss or detriment to the party to whom the promise is made.[66]

Div. 459, 54 N. Y. Suppl. 833; Stewart *v.* Hopkins, 30 Ohio St. 502.

62. *Colorado.*— Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Connecticut.— Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; Rockwell *v.* Hunt, 40 Conn. 328; Griffin *v.* Ranney, 35 Conn. 239.

Massachusetts.— Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Lynch *v.* Morse, 97 Mass. 458 note; Carpenter *v.* Snelling, 97 Mass. 452.

Michigan.— Clemens *v.* Conrad, 19 Mich. 170.

Nevada.— Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 83 Am. St. Rep. 566, 48 L. R. A. 305.

North Carolina.— Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887; Sellars *v.* Johnson, 65 N. C. 104; Haight *v.* Grist, 64 N. C. 739.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Virginia.— Crews *v.* Farmers' Bank, 31 Gratt. 348; Talley *v.* Robinson, 22 Gratt. 888; Hale *v.* Wilkinson, 21 Gratt. 75. But see Woodson *v.* Randolph, 1 Va. Cas. 128.

63. Satterthwaite *v.* Doughty, 44 N. C. 314, 59 Am. Dec. 554; Fant *v.* Miller, 17 Gratt. (Va.) 47; Clegg *v.* Levy, 3 Campb. 166; Alves *v.* Hodgson, 2 Esp. 528, 7 T. R. 241, 4 Rev. Rep. 433; Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289. See also *infra*, XI, B, 6.

64. Fant *v.* Miller, 17 Gratt. (Va.) 47; Lambert *v.* Jones, 2 Patt. & H. (Va.) 144.

65. Kohn *v.* The Renaisance, 5 La. Ann. 25, 52 Am. Dec. 577; Skinner *v.* Tinker, 34 Barb. (N. Y.) 333; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508*n*; Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94; Armendiez *v.* Serna, 40 Tex. 291; James *v.* Catherwood, 3 D. & R. 190, 16 E. C. L. 165. See also Wynne *v.* Jackson, 5 L. J. Ch. O. S. 55, 2 Russ. 351, 3 Eng. Ch. 351.

66. Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79. See Curie *v.* Misa, L. R. Exch. 162, where it is said that consideration may consist not only in the payment of money but in some other "right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." And see *infra*, IV, D, 1.

Other definitions are: A consideration is a benefit to the promisor and a detriment to the promisee or both. Drake *v.* Lanning, 49 N. J. Eq. 452, 24 Atl. 378.

The consideration upon which a contract is founded is the reason which moves the contracting party to enter into the contract. 2 Bl. Comm. 443.

Any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant. Tindal, C. J., in Laythoarp *v.* Bryant, 2 Bing. N. Cas. 735, 2 Hodges 25, 5 L. J. C. P. 217, 3 Scott 238, 29 E. C. L. 739.

Consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise. Anson Contr. p. 74.

A consideration of a promise is the thing given or done by the promisee in exchange for the promise. Langdale Contr. § 45.

For other definitions see the following cases:

Alabama.— Alabama, etc., R. Co. *v.* South, etc., R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. Rep. 401; Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240.

Georgia.— Molyneux *v.* Collier, 17 Ga. 46; Tompkins *v.* Philips, 12 Ga. 52.

Illinois.— Doyle *v.* Knapp, 4 Ill. 334.

Maine.— Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406; Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68; Fisher *v.* Bartlett, 8 Me. 122, 22 Am. Dec. 225.

Massachusetts.— Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286; Doyle *v.* Dixon, 97 Mass. 208, 93 Am. Dec. 80.

New Jersey.— Sterling *v.* Sinnickson, 5 N. J. L. 756.

North Carolina.— New Hanover Bank *v.* Bridgers, 98 N. C. 67, 3 S. E. 826, 2 Am. St.

B. Necessity of Consideration — 1. In General. At common law every contract not under seal requires a consideration to support it, that is, as shown in the above definition, some benefit to the promisor, or some loss or detriment to the promisee.[67] It has been laid down by the highest judicial tribunal of England

Rep. 317; Reddick *v.* Jones, 28 N. C. 107, 44 Am. Dec. 68.

Ohio.— Terrill *v.* Auchauer, 14 Ohio St. 80.

Pennsylvania.— Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107.

United States.— Brooklyn City, etc., R. Co. *v.* New York Nat. Bank of Republic, 102 U. S. 14, 26 L. ed. 61; Grandin *v.* U. S., 22 Wall. 496, 22 L. ed. 858; Violett *v.* Patton, 5 Cranch 142, 3 L. ed. 61.

England.— Thomas *v.* Thomas, 2 Q. B. 851, 2 G. & D. 226, 6 Jur. 645, 11 L. J. Q. B. 104, 42 E. C. L. 945.

See 11 Cent. Dig. tit. "Contracts," § 223.

What is and what is not a consideration see *infra*, IV, D.

Good and valuable consideration distinguished see *infra*, IV, D, 6.

67. *Alabama.*— Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758; Files *v.* McLeod, 14 Ala. 611; Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

Arkansas.— Raigauel *v.* Ayliff, 16 Ark. 594.

California.— Hendy *v.* Kier, 59 Cal. 138; Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223.

Connecticut.— Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79.

Georgia.— Lanier *v.* Brooker, 65 Ga. 761; Lowe *v.* Bryant, 32 Ga. 235.

Illinois.— Chilcote *v.* Kile, 47 Ill. 88; Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79; Wilson *v.* Keller, 9 Ill. App. 347.

Indiana.— Buchanan *v.* Lee, 69 Ind. 117; Barner *v.* Morehead, 22 Ind. 354; Epperly *v.* Little, 5 Ind. 420; Clark *v.* Snelling, Smith 201.

Iowa.— Steele *v.* Sanchez, 80 Iowa 507, 45 N. W. 870; Moeckly *v.* Gorton, 78 Iowa 202, 42 N. W. 648; Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228.

Kansas.— Clark *v.* Libbey, 17 Kan. 634.

Kentucky.— McGee *v.* Bast, 6 J. J. Marsh. 453; Gwathmey *v.* Sewell, 2 A. K. Marsh. 138; Lillard *v.* Casey, 2 Bibb 459.

Maine.— Richardson *v.* Noble, 77 Me. 390; Richardson *v.* Williams, 49 Me. 558; Jewett *v.* Wadleigh, 32 Me. 110; Chase *v.* Vaughan, 30 Me. 412.

Maryland.— Duttera *v.* Babylon, 83 Md. 536, 35 Atl. 64; Snyder *v.* Jones, 38 Md. 542; Folck *v.* Smith, 13 Md. 85; Robinson *v.* Marshall, 11 Md. 251.

Massachusetts.— Lyon *v.* Williams, 5 Gray 557; Vincent *v.* Gorham, 3 Metc. 343; Adams Bank *v.* Anthony, 18 Pick. 238; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Wilson *v.* Clements, 3 Mass. 1.

Minnesota.— Sharpe *v.* Rogers, 12 Minn. 174; Bolles *v.* Carli, 12 Minn. 113; Michaud *v.* Lagarde, 4 Minn. 43.

Mississippi.— Union Bank *v.* Govan, 10 Sm. & M. 333.

Missouri.— Bailey *v.* Smock, 61 Mo. 213; McClanahan *v.* Schricker, 45 Mo. 280; Bailey *v.* Walker, 29 Mo. 407; Hunt *v.* Johnston, 23 Mo. 432.

New Hampshire.—Hammond *v.* Hussey, 51 N. H. 40, 12 Am. Rep. 41; Lang *v.* Johnson, 24 N. H. 302.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54; Morford *v.* Vunck, 3 N. J. L. 584; Tulane *v.* Clifton, 47 N. J. Eq. 351, 20 Atl. 1086; Massaker *v.* Mackerley, 9 N. J. Eq. 440.

New York.— Belknap *v.* Bender, 75 N. Y. 446, 31 Am. Rep. 476; McCafferty *v.* Decker, 12 Hun 455; Wilson *v.* Baptist Education Soc., 10 Barb. 308; Wood *v.* Mulock, 48 N. Y. Super. Ct. 70; Talmadge *v.* Spofford, 41 N. Y. Super. Ct. 428; Williams *v.* Hubbell, 1 N. Y. Suppl. 769, 17 N. Y. St. 385; People *v.* Shall, 9 Cow. 778; Taylor *v.* Bates, 5 Cow. 376; Burnet *v.* Bisco, 4 Johns. 235; Thorne *v.* Deas, 4 Johns. 84.

North Carolina.— Ashe *v.* De Rossett, 53 N. C. 240.

Ohio.— Cleveland *v.* Lenze, 27 Ohio St. 383.

Pennsylvania.— Hess' Estate, 150 Pa. St. 346, 24 Atl. 676; Martin's Estate, 131 Pa. St. 638, 18 Atl. 987; Shorb *v.* Shultz, 43 Pa. St. 207; Wager *v.* Chew, 15 Pa. St. 325; Kennedy *v.* Ware, 1 Pa. St. 445, 44 Am. Dec. 145; Whitehill *v.* Wilson, 3 Penr. & W. 405, 24 Am. Dec. 326; Mechling's Appeal, 2 Grant 157.

South Carolina.— Wilson *v.* Patrick, 1 Nott & M. 112.

Tennessee.— Gillespie *v.* Edmunston, 11 Humphr. 553; Clark *v.* Small, 6 Yerg. 418; Smith *v.* Rankin, 4 Yerg. 1, 26 Am. Dec. 213; Roper *v.* Stone, Cooke 497.

Texas.— Richarz *v.* Wolcken, 34 Tex. 102; Tooke *v.* Bonds, 29 Tex. 419; Taylor *v.* Witherspoon, 23 Tex. 642; Travis *v.* Duffau, 20 Tex. 49; Jones *v.* Holliday, 11 Tex. 412, 62 Am. Dec. 487.

Vermont.— Barnes *v.* Hall, 55 Vt. 420; Pomeroy *v.* Slade, 16 Vt. 220; Phalan *v.* Stiles, 11 Vt. 82; Larabee *v.* Ovit, 4 Vt. 45.

Virginia.— Reed *v.* Vannorsdale, 2 Leigh 569; Mosby *v.* Leeds, 3 Call 439.

West Virginia.— Lydick *v.* Baltimore, etc., R. Co., 17 W. Va. 427.

Wisconsin.— Mygatt *v.* Tarbell, 85 Wis. 457, 55 N. W. 1031.

United States.— Watson *v.* Dunlap, 2 Cranch C. C. 14, 29 Fed. Cas. No. 17,282.

England.— Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18.

See 11 Cent. Dig. tit. "Contracts," §§ 220, 221.

Civil law.— The doctrine is unknown to

that although it is undoubtedly true that every man is by the law of nature bound to fulfil his engagements, it is equally true that the law supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an agreement is *nudum pactum ex quo non oritur actio*.[68]

2. CONTRACTS IN WRITING. Lord Mansfield in an early case ruled that a promise if in writing was binding without consideration, saying that consideration was simply necessary for the sake of supplying evidence of the promisor's intention to bind himself, and that where this was supplied by other forms, as by writing, it was not required.[69] But he was overruled by the house of lords,[70] and it is now well settled that except as hereafter shown, for all promises not under seal, whether oral or in writing, a consideration is necessary.[71]

3. CONTRACTS UNDER SEAL. If the parties use the solemnities of a deed in which to record their agreement, a consideration is not necessary. It is sometimes said that a seal imports a consideration or that a consideration will be presumed in case of a contract under seal; but the truth is that at common law a seal dispenses with the necessity for a consideration.[72] This has been changed in some jurisdictions by statute.[73]

4. GRATUITOUS BAILMENT. The promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance.[74]

5. STATUTORY OBLIGATIONS. A statutory obligation on a bond or other obligation made valid and authorized by positive law needs no consideration to support it.[75]

the civil law. Mouton *v.* Noble, 1 La. Ann. 192. But see Broaddus *v.* Nolley, 25 La. Ann. 184.

68. Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18.

What is and what is not a consideration see *infra*, IV, D.

69. Pillans *v.* Van Mierop, 3 Burr. 1663.

70. Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18.

71. *Alabama.*— Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

Connecticut.—Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79.

Massachusetts.— Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

New Jersey.— Perrins *v.* Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388.

New York.— People *v.* Shall, 9 Cow. 778; Burnet *v.* Bisco, 4 Johns. 235.

Pennsylvania.— Crawford's Appeal, 61 Pa. St. 52, 100 Am. Dec. 609.

Tennessee.— Clark *v.* Small, 6 Yerg. 418; Roper *v.* Stone, Cooke 497.

Virginia.—Beverley *v.* Holmes, 4 Munf. 95; Mosby *v.* Leeds, 3 Call 439.

England.— Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18, where it was said: "All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved."

See 11 Cent. Dig. tit. "Contracts," §§ 220, 221.

72. *Georgia.*— Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761.

Kentucky.— McClanahan *v.* Henderson, 2 A. K. Marsh. 388, 12 Am. Dec. 412.

Massachusetts.— Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41.

New Jersey.— Aller *v.* Aller, 40 N. J. L. 446.

New York.— Parker *v.* Parmele, 20 Johns. 130, 11 Am. Dec. 253.

Pennsylvania.— Cosgrove *v.* Cummings, 195 Pa. St. 497, 46 Atl. 69.

South Carolina.— Cusack *v.* White, 2 Mill 279, 12 Am. Dec. 669.

United States.— Storm *v.* U. S., 94 U. S. 76, 24 L. ed. 42.

England.— Pillans *v.* Van Mierop, 3 Burr. 1663.

See also BONDS, 5 Cyc. 742; COVENANTS; DEEDS; SEALS.

73. Williams *v.* Whittell, 69 N. Y. App. Div. 340, 74 N. Y. Suppl. 820. See DEEDS; SEALS.

74. *Connecticut.*— Clark *v.* Gaylord, 24 Conn. 484.

Indiana.— Dart *v.* Lowe, 5 Ind. 131.

Maine.— Ames *v.* Taylor, 49 Me. 381.

Massachusetts.— Newhall *v.* Paige, 10 Gray 366.

Missouri.— Bailey *v.* Walker, 29 Mo. 407.

New York.— Beardslee *v.* Richardson, 11 Wend. 25, 25 Am. Dec. 596; Thorne *v.* Deas, 4 Johns. 84.

North Carolina.— Robinson *v.* Threadgill, 35 N. C. 39.

England.— Hart *v.* Miles, 4 C. B. N. S. 371, 27 L. J. C. P. 218, 93 E. C. L. 371; Coggs *v.* Bernard, 2 Ld. Raym. 909; Elsee *v.* Gatward, 5 T. R. 143.

And see BAILMENTS, 5 Cyc. 168.

75. Carpenter *v.* Mather, 4 Ill. 374; Mittnacht *v.* Kellermann, 105 N. Y. 461, 12 N. E. 28; Turner *v.* Hadden, 62 Barb. (N. Y.) 480;

C. Presumption of Consideration — 1. Negotiable Instruments. A negotiable instrument has a presumption of consideration which, however, may be rebutted as between the parties.[76]

2. Written Contracts Generally. By statute in some of the states this presumption of consideration has been extended to all written instruments.[77]

D. What Constitutes a Consideration — 1. In General. It may be laid down as a general rule, in accordance with the definition given above,[78] that there is a sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee.[79] It is not necessary that a benefit should

Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95; Sterner *v.* Palmer, 34 Pa. St. 131.

Express promise.— A statutory obligation is a sufficient consideration to sustain an express promise, as the promise of a father of a bastard to maintain it. Hargroves *v.* Freeman, 12 Ga. 342. See Bastards, 5 Cyc. 639, note 80.

76. Conine *v.* Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230; William *v.* Forbes, 114 Ill. 167, 28 N. E. 463; Townsend *v.* Derby, 3 Metc. (Mass.) 363; Mills *v.* Barber, 5 Dowl. P. C. 77, 2 Gale 5, 5 L. J. Exch. 204, 1 M. & W. 425. And see Commercial Paper, 8 Cyc. 222.

77. See Stimson Amer. Stat. L. § 4121, where it is shown that such statutes are in force in California, Iowa, Indiana, Kansas, Kentucky, and Missouri. And see Montgomery County *v.* Auchley, 92 Mo. 129, 4 S. W. 425; Houck *v.* Frisbee, 66 Mo. App. 16; Wulze *v.* Schaefer, 37 Mo. App. 551. See also Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53.

78. See *supra*, IV, A.

79. In addition to the cases hereafter specifically referred to see the following:

Alabama.— Hatton *v.* Jordan, 29 Ala. 266; Bradford *v.* Goldsborough, 15 Ala. 311.

Arkansas.—Bell *v.* Greenwood, 21 Ark. 249.

California.— Visalia Gas, etc., Co. *v.* Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105.

Colorado.— Bennett *v.* Morse, 6 Colo. App. 122, 39 Pac. 582.

Connecticut.— Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100; Clark *v.* Gaylord, 24 Conn. 484.

Florida.— Hunter *v.* Wilson, 21 Fla. 250.

Georgia.— Sanders *v.* Carter, 91 Ga. 450, 17 S. E. 345; Porter *v.* Pool, 62 Ga. 238.

Illinois.— Pratt *v.* Paris Gas Light, etc., Co., 155 Ill. 531, 40 N. E. 1032.

Indiana.—Taylor *v.* Williams, 120 Ind. 414, 22 N. E. 118; Wolford *v.* Powers, 85 Ind. 294, 44 Am. Rep. 16; Glasgow *v.* Hobbs, 32 Ind. 440; Miller *v.* Upton, 6 Ind. 53.

Iowa.— Handrahan *v.* O'Regan, 45 Iowa 298; Mills *v.* Brown, 11 Iowa 314.

Kansas.— Holmden *v.* Janes, 42 Kan. 762, 23 Pac. 92.

Kentucky.— Talbott *v.* Stemmons, 89 Ky. 222, 12 S. W. 297, 11 Ky. L. Rep. 451, 25 Am. St. Rep. 531, 5 L. R. A. 856; Butt *v.* Napier, 14 Bush 39.

Louisiana.— Dean *v.* Wade, 15 La. Ann. 230.

Maine.— Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49; Pierce *v.* Weymouth, 45 Me. 481; Kavanagh *v.* Saunders, 8 Mc. 422.

Maryland.— Steele *v.* Steele, 75 Md. 477, 23 Atl. 959; Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 474, 9 Am. St. Rep. 422; Ohlendorf *v.* Kanne, 66 Md. 495, 8 Atl. 351.

Massachusetts.— Gunther *v.* Gunther, 181 Mass. 217, 63 N. E. 402; Tarbell *v.* Linehan, 151 Mass. 448, 24 N. E. 325; Train *v.* Gold, 5 Pick. 380.

Michigan.— Stoddard *v.* Prescott, 58 Mich. 542, 25 N. W. 508; Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

Minnesota.— Goetz *v.* Foos, 14 Minn. 265, 100 Am. Dec. 218.

Mississippi.—Byrne *v.* Cummings, 41 Miss. 192; Odineal *v.* Barry, 24 Miss. 9.

Missouri.— Lindell *v.* Rokes, 60 Mo. 249, 21 Am. Rep. 395.

Montana.—Horsky *v.* Helena Consol. Water Co., 13 Mont. 229, 33 Pac. 689.

Nebraska.— Carlisle *v.* Dauchy, 26 Nebr. 337, 41 N. W. 1119.

New Hampshire.—Hoskins *v.* Fogg, 60 N. H. 402; Edson *v.* Fuller, 22 N. H. 183.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54; Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Buckingham *v.* Ludlum, 41 N. J. Eq. 348, 7 Atl. 851.

New York.— Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 21 Am. St. Rep. 693, 36 N. Y. St. 888, 12 L. R. A. 463; Chittenden *v.* Morris, 117 N. Y. 515, 23 N. E. 163, 27 N. Y. St. 838; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524; Adams *v.* Honness, 62 Barb. 326; Dutch *v.* Harrison, 37 N. Y. Super. Ct. 306; McKay *v.* Buffalo Bill's Wild West Co., 17 Misc. 396, 39 N. Y. Suppl. 1041; Cohen *v.* Hirsch, 6 Misc. 596, 26 N. Y. Suppl. 1, 55 N. Y. St. 691; Allaire *v.* Ouland, 2 Johns. Cas. 52. And see Roussel *v.* Mathews, 171 N. Y. 634, 63 N. E. 1122; Crook *v.* Scott, 65 App. Div. 139, 72 N. Y. Suppl. 516.

North Carolina.— Brown *v.* Ray, 32 N. C. 72, 51 Am. Dec. 379; Etheridge *v.* Thompson, 29 N. C. 127.

Ohio.—Lesher *v.* Karshner, 47 Ohio St. 302, 24 N. E. 882.

Oklahoma.— Mulhall *v.* Mulhall, 3 Okla. 304, 41 Pac. 109.

Oregon.— Yen *v.* Ah Ho, (Oreg. 1884) 4 Pac. 303.

Pennsylvania.— Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 50 Am. St. Rep. 807, 29 L. R. A. 423; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107.

accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.[80] And in the matter of a benefit, a mere expectation or hope,[81] or a contingent benefit[82] is sufficient; as for example the expectation of advantage or profit from the thing promised.[83] Indeed there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from

South Carolina.— Norwood *v.* Faulkner, 22 S. C. 367, 55 Am. Rep. 717; Charleston Bank *v.* State Bank, 13 Rich. 291; Moore *v.* Caldwell, 8 Rich. Eq. 22.

Tennessee.— Knox *v.* Thomas, 5 Humphr. 573.

Texas.— Harrison *v.* Knight, 7 Tex. 47; Hodo *v.* Leeman, 27 Tex. Civ. App. 204, 65 S. W. 381.

Vermont.— Keyes *v.* Allen, 65 Vt. 667, 27 Atl. 319; Dorwin *v.* Smith, 35 Vt. 69; Page *v.* Thrall, 2 Vt. 448.

Virginia.— Lester *v.* Lester, 28 Gratt. 737.

Washington.— Staver *v.* Missimer, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142.

West Virginia.— Barbour County Ct. *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

Wisconsin.— Lyman *v.* Babcock, 40 Wis. 503. See also Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

United States.— Emerson *v.* Slater, 22 How. 28, 16 L. ed. 360; Condit *v.* Bergmeier, 63 Fed. 937; Shirly *v.* Harris, 3 McLean 330, 21 Fed. Cas. No. 12,798.

England.— Currie *v.* Misa, L. R. 10 Exch. 153; Bainbridge *v.* Firmstone, 8 A. & E. 743, 1 P. & D. 2, 1 W. W. & H. 600, 35 E. C. L. 822; Traver *v.* ——, Sid. 57.

See 11 Cent. Dig. tit. "Contracts," § 223 *et seq.*

Equitable interest.— An equitable interest is as good as a legal interest (so far as consideration is concerned). Bradford *v.* Goldsborough, 15 Ala. 311; Pierce *v.* Weymouth, 45 Me. 481; Currier *v.* Hodgdon, 3 N. H. 82; Hudson *v.* Critcher, 53 N. C. 485.

80. *Alabama.*— Alabama Great Southern R. Co. *v.* South, etc., Alabama R. Co., 84 Ala. 570, 3 So. 286, 6 Am. St. Rep. 401.

Colorado.— Dyer *v.* McPhee, 6 Colo. 174; Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73.

Georgia.—Molyneaux *v.* Collier, 17 Ga. 46; Tompkins *v.* Philips, 12 Ga. 52.

Illinois.— Buchanan *v.* International Bank, 78 Ill. 500; White *v.* Walker, 31 Ill. 422; Bryan *v.* Dyer, 28 Ill. 188; Doyle *v.* Knapp, 4 Ill. 334; Hughes *v.* Sprague, 4 Ill. App. 361.

Indiana.— Judd *v.* Martin, 97 Ind. 173; Glasgow *v.* Hobbs, 32 Ind. 440.

Kentucky.— Overstreet *v.* Philips, 1 Litt. 120; Lemaster *v.* Burkhart, 2 Bibb 25.

Maine.— Hilton *v.* Southwick, 17 Me. 303, 35 Am. Dec. 253.

Maryland.— Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422.

Massachusetts.— Train *v.* Gold, 5 Pick. 380; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87.

Mississippi.— Magee *v.* Catching, 33 Miss. 672.

Missouri.— Pitt *v.* Gentle, 49 Mo. 74; Carr *v.* Card, 34 Mo. 513; Houck *v.* Frisbee, 66 Mo. App. 16.

Nebraska.— Ricketts *v.* Scothorn, 57 Nebr. 51, 54, 77 N. W. 365, 73 Am. St. Rep. 491, 42 L. R. A. 794, where a grandfather gave his granddaughter a non-negotiable note for two thousand dollars saying: "I have fixed out something that you have not got to work any more," and the girl thereupon gave up her employment. It was held that the grandfather was liable on the note.

New Hampshire.— Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82.

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54; Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365.

New York.— White *v.* Baxter, 71 N. Y. 454; Sands *v.* Crooke, 46 N. Y. 564; Seaman *v.* Seaman, 12 Wend. 381; Powell *v.* Brown, 3 Johns. 100.

North Carolina.— New Hanover Bank *v.* Bridgers, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317; Watkins *v.* James, 50 N. C. 105; Brown *v.* Ray, 32 N. C. 72, 51 Am. Dec. 379.

South Carolina.— Corbett *v.* Cochran, 3 Hill 41, 30 Am. Dec. 348.

Vermont.— Dorwin *v.* Smith, 35 Vt. 69.

Wyoming.— Barrett *v.* Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953.

United States.— Townsley *v.* Sumrall, 2 Pet. 170, 7 L. ed. 386; Violett *v.* Patton, 5 Cranch 142, 3 L. ed. 61.

England.— Jones *v.* Ashburnham, 4 East 455, 1 Smith K. B. 188.

See 11 Cent. Dig. tit. "Contracts," § 223 *et seq.*

81. Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73; Bryan *v.* Dyer, 28 Ill. 188; Garrow *v.* Davis, 15 How. (U. S.) 272, 14 L. ed. 692; Gill *v.* Stebbins, 2 Paine (U. S.) 417, 10 Fed. Cas. No. 5,431.

82. Molyneux *v.* Collier, 17 Ga. 46; Greene *v.* Bartholomew, 34 Ind. 235; Newhall *v.* Paige, 10 Gray (Mass.) 366.

83. *Alabama.*— Steele *v.* Brown, 18 Ala. 700.

Louisiana.— Barbin *v.* Police Jury, 15 La. Ann. 544.

Maine.— Doyle *v.* White, 26 Me. 341, 45 Am. Dec. 110; Oakes *v.* Cushing, 24 Me. 313.

New York.— Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. 9.

Ohio.— Himrod Furnace Co. *v.* Cleveland, etc., R. Co., 22 Ohio St. 451.

doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.[84]

2. Illustrations of Sufficient Consideration. Aside from the cases referred to in the following sections, the following have been held to constitute a sufficient consideration to uphold a promise, viz.: The confidence induced by undertaking a service for another;[85] the substitution of a sixty days' note in place of cash;[86] giving permission to weigh property;[87] making a payment on a promissory note before it is legally demandable;[88] a contract between two indorsers of a note that they will divide the loss between them;[89] the desire of a party to have a contract discharged, and mutual promises to deliver up obligations held by each;[90] becoming surety in an executor's bond;[91] indorsement of a promissory note;[92] service to be rendered by a promisee in securing a loan or gift for the promisor;[93] payment of interest in advance;[94] giving permission to a party to assume and manage a defense in suit;[95] sale of an equitable title to land;[96] transfer of or promise to transfer property;[97] promise to deliver or actual delivery of property to which the party has a right of possession;[98] a conveyance of land to another upon the latter's promise to sell it, and pay over the price received above a certain sum;[99] the delivery and acceptance of goods;[1] the benefit to a bank from the use of money collected on a note;[2] an agreement to settle and arrange matters to pre-

See 11 Cent. Dig. tit. "Contracts," § 224.

84. Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49; Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 36 N. Y. St. 888, 21 Am. St. Rep. 463, 12 L. R. A. 463; Currie *v.* Misa, L. R. 10 Exch. 153. And see *infra*, IV, D, 3.

85. Gwaltney *v.* Wheeler, 26 Ind. 415; Hammond *v.* Hussey, 51 N. H. 40, 12 Am. Rep. 41.

86. Smucker *v.* Larimore, 21 Ill. 267.

87. Bainbridge *v.* Firmstone, 8 A. & E. 743, 1 P. & D. 2, 1 W. W. & H. 600, 35 E. C. L. 822, holding it a sufficient consideration for the licensee's promise to return the property in good condition.

88. Newsam *v.* Finch, 25 Barb. (N. Y.) 175. See *infra*, IV, D, 12, c, (III), (A).

89. Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152.

90. Leach *v.* Keach, 7 Iowa 232. See *infra*, IV, D, 10.

91. Perkins *v.* Mayfield, 5 Port. (Ala.) 182.

92. Litchfield *v.* Falconer, 2 Ala. 280.

93. Barley *v.* Buell, 70 Cal. 335, 11 Pac. 632; Matter of Walker, 15 Abb. N. Cas. (N. Y.) 465.

94. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373. See Commercial Paper, 7 Cyc. 732, note 40; 901, note 86.

95. Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Case *v.* Kinney, 7 Ohio Dec. (Reprint) 178, 1 Cinc. L. Bul. 277.

96. Whitbeck *v.* Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503.

97. *Alabama.*— Mobile Branch Bank *v.* James, 9 Ala. 949.

Georgia.— Robson *v.* Jones, 27 Ga. 296; Tillinghast *v.* Banks, 14 Ga. 649.

Illinois.— Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 [*reversing* 20 Ill. App. 473].

Iowa.— Stevenson *v.* Robertson, 55 Iowa 689, 8 N. W. 661.

Kansas.— Holmden *v.* Janes, 42 Kan. 762, 23 Pac. 92.

Maine.— Linscott *v.* McIntyre, 15 Me. 201, 33 Am. Dec. 602.

Michigan.— Stanley *v.* Nye, 54 Mich. 277, 20 N. W. 73.

Mississippi.— Brewer *v.* Bessinger, 25 Miss. 86; Mississippi R. Co. *v.* Scott, 7 How. 79.

New York.— Knowles *v.* Erwin, 43 Hun 150.

Oklahoma.— Mulhall *v.* Mulhall, 3 Okla. 304, 41 Pac. 109.

Pennsylvania.— Ahl's Appeal, 129 Pa. St. 26, 18 Atl. 471.

United States.— Cox *v.* Robinson, 70 Fed. 760.

See 11 Cent. Dig. tit. "Contracts," § 260.

98. *California.*— Visalia Gas, etc., Co. *v.* Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105.

Connecticut.— Clark *v.* Gaylord, 24 Conn. 484.

Illinois.— Leverenz *v.* Haines, 32 Ill. 357.

Indiana.— Miller *v.* Upton, 6 Ind. 83; Rollins *v.* Hare, 15 Ind. App. 677, 44 N. E. 374.

Massachusetts.— Hayes *v.* Kyle, 8 Allen 300.

Mississippi.— Burton *v.* Wells, 30 Miss. 688.

New York.— Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

North Carolina.— Etheridge *v.* Thompson, 29 N. C. 127.

Vermont.— Keyes *v.* Allen, 65 Vt. 667, 27 Atl. 319; Smith *v.* Rogers, 35 Vt. 140; Lincoln *v.* Blanchard, 17 Vt. 464.

See 11 Cent. Dig. tit. "Contracts," § 262.

99. Linscott *v.* McIntire, 15 Me. 201, 33 Am. Dec. 602.

1. McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

2. Thompson *v.* State Bank, 3 Hill (S. C.) 77, 30 Am. Dec. 354.

vent a suit from being brought against the promisor;[3] services by one not bound in law to render them in aiding a party in interest in his preparation for trial by disclosing who were informed upon material points and what they testify to;[4] subscription to a common object with others;[5] an order for the payment of money which relieves the drawee from any further liability to the drawer;[6] an agreement by an innkeeper to hold the baggage of a traveler for the benefit of another innkeeper until the board bill contracted by such traveler to the latter should be paid;[7] assumption of the promisor's debt;[8] employment of the promisor;[9] preventing a diminution in the value of property;[10] taking a note out of a bank where it has been placed for collection;[11] voluntary surrender by a widow of the watch, clothes, and all other personal property belonging to her husband's estate, even though the estate was insolvent;[12] undertaking by an agent to sell property, in consideration of which the owner promises to pay a certain sum if the agent makes a sale, and half that sum if the owner sells himself;[13] assignment of a contract with a third person;[14] transfer of rights under option to buy property;[15] assignment of a lease, subject to be avoided by reëntry, upon the part of the grantor;[16] transfer or other assignment of a right of action against the promisor or a third person;[17] assignment of a judgment;[18] assumption of a liability at the request of the promisor;[19] agreement to credit upon a preëxisting

3. Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

4. Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Chandler *v.* Mason, 2 Vt. 193.

5. See *infra*, IV, D, 10, h.

6. Brem *v.* Covington, 104 N. C. 589, 10 S. E. 706.

7. Hartzell *v.* Saunders, 49 Mo. 433, 8 Am. Rep. 136.

8. Horsky *v.* Helena Consol. Water Co., 13 Mont. 229, 33 Pac. 689; Chittenden *v.* Morris, 117 N. Y. 515, 23 N. E. 163, 27 N. Y. St. 838; Terry *v.* Clark, 84 Va. 221, 4 S. E. 372.

9. Davies *v.* Racer, 72 Hun (N. Y.) 43, 25 N. Y. Suppl. 293, 55 N. Y. St. 191.

10. Odineal *v.* Barry, 24 Miss. 9.

11. Stewart *v.* Eden, 2 Cai. (N. Y.) 150.

12. Gunther *v.* Gunther, 181 Mass. 217, 63 N. E. 402.

13. Hoskins *v.* Fogg, 60 N. H. 402.

14. *Indiana.*— Smith *v.* Flack, 95 Ind. 116; Cates *v.* Bales, 78 Ind. 285.

Maine.— Warren *v.* Wheeler, 21 Me. 484.

Missouri.— Russell *v.* Barcroft, 1 Mo. 514; Reed *v.* Crane, 89 Mo. App. 670.

New York.— Gardiner *v.* Hopkins, 5 Wend. 23.

Vermont.— Carleton *v.* Jackson, 21 Vt. 481.

See 11 Cent. Dig. tit. "Contracts," § 270.

15. Reed *v.* Crane, 89 Mo. App. 670.

16. Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391.

17. *Georgia.*— Porter *v.* Pool, 62 Ga. 238.

Iowa.— Starr *v.* Wilson, Morr. 438.

Kentucky.— Haggard *v.* Conkwright, 7 Bush 16, 3 Am. Rep. 297.

Louisiana.— Dean *v.* Wade, 15 La. Ann. 230.

Massachusetts.— Rogers *v.* Union Stone Co., 134 Mass. 31.

Michigan.— Stoddard *v.* Prescott, 58 Mich. 542, 25 N. W. 508.

New Hampshire.— Edson *v.* Fuller, 22 N. H. 183; Currier *v.* Hodgdon, 3 N. H. 82.

New York.— Whitbeck *v.* Whitbeck, 9 Cow. 266, 18 Am. Dec. 503.

Pennsylvania.— Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 50 Am. St. Rep. 807, 29 L. R. A. 423.

Tennessee.— Knox *v.* Thomas, 5 Humphr. 573.

Texas.— Harrison *v.* Knight, 7 Tex. 47.

Washington.— Staver *v.* Missimer, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142.

See 11 Cent. Dig. tit. "Contracts," §§ 270, 272.

18. Dickerson *v.* Derrickson, 39 Ill. 574; Trafton *v.* Rogers, 13 Me. 315; State Nat. Bank *v.* Walser, 46 Mo. 348.

19. *Alabama.*— Hatton *v.* Jordan, 29 Ala. 266; Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366; Perkins *v.* Mayfield, 5 Port. 182.

Connecticut.— Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100.

Indiana.— Freeman *v.* Brehm, (Ind. App. 1892) 30 N. E. 712.

Iowa.— Mills *v.* Brown, 11 Iowa 314.

Maine.— Industry *v.* Starks, 65 Me. 167; Williams *v.* Hagar, 50 Me. 9.

Maryland.— Steele *v.* Steele, 75 Md. 477, 23 Atl. 959.

Montana.— Horsky *v.* Helena Consol. Water Co., 13 Mont. 229, 33 Pac. 689.

New Hampshire.— Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82. But see Smith *v.* Mudgett, 20 N. H. 527.

New Jersey.— Sell *v.* Steller, 53 N. J. Eq. 397, 32 Atl. 211.

New York.— Chittenden *v.* Morris, 117 N. Y. 515, 23 N. E. 163, 27 N. Y. St. 838; Westfall *v.* Parsons, 16 Barb. 645; Gilsey *v.* Wild, 1 Hilt. 305.

Tennessee.— McNairy *v.* Thompson, 1 Sneed 141.

Virginia.— Terry *v.* Clark, 84 Va. 221, 4 S. E. 372; Ruffners *v.* Putney, 12 Gratt. 541.

See 11 Cent. Dig. tit. "Contracts," § 241.

debt;[20] loan or advancement of money or property;[21] giving or promising an exclusive right or privilege on the promisee's property or business;[22] promise to indemnify another against a prospective loss or damage;[23] purchase of stock or other property;[24] purchase of a stock in trade or of a professional practice;[25] payment of a void judgment;[26] and loan of credit.[27] Money is of course a valuable consideration.[28] And so are stock or bonds of a public or private corporation.[29]

3. NEED NOT BE MONEY OR MONEY VALUE. As a valid consideration may be the doing or promising to do something not illegal, at the request of the promisor, which the promisee is not already under a legal obligation to do, or forbearing to do something which he has a legal right to do, it is clear that a consideration need not be a thing of pecuniary value or even reducible to a money value.[30] A promise for example to pay another a certain sum of money if he will abstain from the use of liquor and tobacco for a certain time is binding in favor of the promisee, on the ground that a man has a legal right to use liquor and tobacco.[31]

Guaranty of promisor's debt.— Farr *v.* Bach, 13 Ind. App. 125, 41 N. E. 393; Carroll *v.* Sullivan, 103 Mass. 31; Carter *v.* Howard, 17 Misc. (N. Y.) 381, 39 N. Y. Suppl. 1060.

Payment or discharge of claims against promisor.— Bell *v.* Greenwood, 21 Ark. 249; Hunter *v.* Wilson, 21 Fla. 250; Harrod *v.* Brick, 1 Duv. (Ky.) 180; Goetz *v.* Foos, 14 Minn. 265, 100 Am. Dec. 218.

20. Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 83, 16 N. Y. St. 831; Lyman *v.* Babcock, 40 Wis. 503.

21. *Colorado.*— Bennett *v.* Morse, 6 Colo. App. 122, 39 Pac. 582.

Indiana.— Leedy *v.* Crumbaker, 13 Ind. 523.

Iowa.— Brooks *v.* Ellis, 3 Greene (Iowa) 527.

Massachusetts.— Hennessey *v.* Connor, 139 Mass. 120, 29 N. E. 475.

Oregon.— Yen *v.* Ah Ho, (1884) 4 Pac. 303.

South Carolina.— Norwood *v.* Faulkner, 22 S. C. 367, 55 Am. Rep. 717.

Vermont.— Bruce *v.* Hastings, 41 Vt. 380, 98 Am. Dec. 592.

United States.— Gattman *v.* Honea, 10 Fed. Cas. No. 5,271.

See 11 Cent. Dig. tit. "Contracts," § 269.

22. Fish *v.* Dunn, 59 Minn. 99, 60 N. W. 843; Bracco *v.* Tighe, 75 Hun (N. Y.) 140, 27 N. Y. Suppl. 34, 58 N. Y. St. 589; Condit *v.* Bergmeier, 63 Fed. 937.

23. *California.*— Mound City, etc., Assoc. *v.* Slauson, 65 Cal. 425, 4 Pac. 396 (an agreement to protect plaintiff against any personal judgment on a contract of guaranty); Hobbs *v.* Duff, 23 Cal. 596 (assignment to secure the assignee against his liability as surety on an appeal-bond of the assignor).

Iowa.— Taylor *v.* Galland, 3 Greene 17.

Massachusetts.— Hubbard *v.* Coolidge, 1 Metc. 84.

Nebraska.— Carlile *v.* Dauchy, 26 Nebr. 337, 41 N. W. 1119.

New York.— White *v.* Baxter, 71 N. Y. 254 [*affirming* 41 N. Y. Super. Ct. 358].

See 11 Cent. Dig. tit. "Contracts," § 250.

24. Crook *v.* Scott, 65 N. Y. App. Div. 139, 72 N. Y. Suppl. 516, holding that plaintiff's payment for stock was a sufficient consideration to support defendant's promise to pay a certain annual dividend, if the corporation should fail to do so.

25. Such a purchase is a sufficient consideration to support the purchaser's promise to pay the seller's debts. Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344. It has also been held in a number of cases to be a sufficient consideration for the seller's agreement not to engage in the same business or profession for a certain period or in a certain vicinity.

Indiana.— Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Massachusetts.— Pierce *v.* Woodward, 6 Pick. 206.

Mississippi.— Thompson *v.* Means, 11 Sm. & M. 604.

New York.— Mott *v.* Mott, 11 Barb. 127.

Pennsylvania.— Gompers *v.* Rochester, 56 Pa. St. 194.

See 11 Cent. Dig. tit. "Contracts," § 263. See also *infra*, VII, B, 3, f, (VII), (I).

26. Taylor *v.* Williams, 120 Ind. 414, 22 N. E. 118.

27. Willging *v.* Walker, 14 Ky. L. Rep. 144; Gray *v.* Brackenridge, 2 Penr. & W. (Pa.) 75.

28. Williams *v.* Allen, 123 Mass. 391; McKee *v.* Lamon, 159 U. S. 317, 16 S. Ct. 11, 40 L. ed. 165.

Confederate money was regarded as a valuable consideration in contracts made in the Confederate states. Rivers *v.* Moss, 6 Bush (Ky.) 600; Rodes *v.* Patillo, 5 Bush (Ky.) 271; Martin *v.* Hortin, 1 Bush (Ky.) 629.

29. Coles *v.* Kennedy, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Gore *v.* Mason, 18 Me. 84; Charleston *v.* Caulfield, 19 S. C. 201.

30. Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49; Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 21 Am. St. Rep. 693, 12 L. R. A. 463; Currie *v.* Misa, L. R. 10 Exch. 153.

31. Talbott *v.* Stemmons, 89 Ky. 222, 12 S. W. 297, 11 Ky. L. Rep. 451, 25 Am. St. Rep. 531, 5 L. R. A. 856; Lindell *v.* Rokes, 60 Mo. 249, 21 Am. Rep. 395; Hamer *v.* Sidway, 125 N. Y. 538, 27 N. E. 256, 21 Am.

And so it has been held of a promise to pay to a divorced wife a stated annuity if she will conduct herself with sobriety and in a respectable, orderly, and virtuous manner, as she is under no obligation to the husband to remain sober or virtuous.[32] Other acts, forbearances, or promises which have been held a sufficient consideration for a promise to pay money or do other acts are: the use of a patent medicine for a disease;[33] traveling for pleasure and benefit at the request of the promisor;[34] attending or promising to attend the promisor's funeral;[35] naming or giving another the right to name a child;[36] changing a child's name;[37] appointment of a person as guardian;[38] giving information of any kind to another;[39] or the surrender by a mother of her illegitimate child.[40]

4. Benefit to a Third Person. A benefit to a third person is a sufficient consideration for a promise.[41]

5. What Is Not a Consideration — a. In General. On the other hand there is no consideration for a promise where no benefit is conferred upon the promisor nor detriment suffered by the promisee, and the promisor neither undertakes to do anything which he is not bound to do nor forbears to do anything which he has a right to do.[42] It makes no difference that one to whom a naked promise

St. Rep. 693, 12 L. R. A. 463. *Compare* Conant *v.* Jackson, 16 Vt. 335.

32. Dunton *v.* Dunton, 18 Vict. L. Rep. 114, 46 Alb. L. J. 11.

33. Carlill *v.* Carbolic Smoke Ball Co., [1892] 2 Q. B. 484, 56 J. P. 665, 61 L. J. Q. B. 696 [*affirmed* in [1893] 1 Q. B. 256, 57 J. P. 326, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210].

34. Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422.

35. Earle *v.* Angell, 157 Mass. 294, 32 N. E. 164.

36. Wolford *v.* Powers, 85 Ind. 294, 44 Am. Rep. 16; Diffenderfer *v.* Scott, 5 Ind. App. 243, 32 N. E. 87; Eaton *v.* Libbey, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511.

37. Babcock *v.* Chase, 92 Hun (N. Y.) 264, 36 N. Y. Suppl. 879, 72 N. Y. St. 401.

38. State *v.* Baker, 8 Md. 44, holding it to be a sufficient consideration to support his promise to act without compensation. *Compare*, however, Smith *v.* Smith, 3 Leon. 88.

39. Green *v.* Brooks, 81 Cal. 328, 22 Pac. 849; Lucas *v.* Pico, 55 Cal. 126; Goree *v.* Wilson, 1 Bailey (S. C.) 597; Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Chandler *v.* Mason, 2 Vt. 193.

As to location of spring in mine.— Reed *v.* Golden, 28 Kan. 632, 42 Am. Rep. 180.

As to price of land.— McLaughlin *v.* Barnard, 2 E. D. Smith (N. Y.) 372.

As to future value of stocks.— Parsons *v.* Robinson, 59 N. Y. Super. Ct. 546, 15 N. Y. Suppl. 138, 39 N. Y. St. 376; White *v.* Drew, 56 How. Pr. (N. Y.) 53.

40. Benge *v.* Hiatt, 82 Ky. 666, 56 Am. Rep. 912. *Contra*, Wallace *v.* Rappleye, 103 Ill. 229.

41. Shaffer *v.* Ryan, 84 Ind. 140; Watt *v.* Rice, 1 La. Ann. 280; Crook *v.* Scott, 65 N. Y. App. Div. 139, 22 N. Y. Suppl. 516 (holding that a person's purchase of stock in a corporation and payment therefor was a good consideration for another's promise to pay a certain annual dividend if the corporation should fail to do so); Miller *v.* Drake, 1 Cai. (N. Y.) 45; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61. See also McKinney *v.* Armstrong, 97 Ill. App. 208. And see *infra*, IV, D, 11, d.

Right of such third person to sue on the promise see *infra*, V, C, 4.

42. *Alabama.*— Johnson *v.* Sellers, 33 Ala. 265.

Arkansas.— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

California.— Liening *v.* Gould, 13 Cal. 598.

District of Columbia.—Merrick *v.* Giddings, 1 Mackey 394.

Georgia.— Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. 886.

Illinois.— Phœnix Ins. Co. *v.* Rink, 110 Ill. 538; Moon *v.* Jennings, 8 Ill. App. 168.

Indiana.— Holmes *v.* Boyd, 90 Ind. 332.

Iowa.— Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428; Ayres *v.* Chicago, etc., R. Co., 52 Iowa 478, 3 N. W. 522. See also East Omaha Land Co. *v.* Hansen, 117 Iowa 96, 90 N. W. 705.

Kansas.— Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163.

Kentucky.— Eblin *v.* Miller, 78 Ky. 371; Ford *v.* Crenshaw, 1 Litt. 68.

Maine.— White *v.* Oakes, 88 Me. 367, 34 Atl. 176.

Maryland.—Schroeder *v.* Fink, 60 Md. 436; Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Massachusetts.— Warren *v.* Hodge, 121 Mass. 106; Vincent *v.* Gorham, 3 Metc. 343.

Michigan.— Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Minnesota.— Lankton *v.* Stewart, 27 Minn. 346, 7 N. W. 360.

Mississippi.— Keith *v.* Miles, 39 Miss. 442, 77 Am. Dec. 685.

Missouri.— Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918.

New Hampshire.— Gordon *v.* Gordon, 56 N. H. 170.

was made has suffered damage through relying or acting upon it.[43] The detriment to the promisee which suffices as a consideration for a contract must be a detriment on entering into the contract, not from the breach of it.[44]

b. Illustrations of No Consideration. The following in addition to the cases hereafter referred to have been held not to be founded on or to furnish sufficient consideration to uphold the undertaking, viz.: An agreement, either orally or in writing, to give another the refusal of his property indefinitely or for a certain time;[45] a promise to bear part of the expense of a suit made by one not interested in nor a party to the suit;[46] an agreement by a postmaster's successor to redeliver a certain letter-case owned by the postmaster, if on writing to Washington the latter found that the department did not claim it;[47] an agreement to convey land when it shall be paid for from the profits to be realized by the purchaser;[48] a promise by a creditor that a sum of money in his hands belonging to a third person shall be applied or accounted for as a part payment of the debt of the promisee;[49] a verbal agreement by a purchaser at a sheriff's sale with his own money to hold the premises in trust for the defendant;[50] a note given to a father for property that had been previously delivered as an advancement;[51] a promise not to levy on property;[52] a promise by the payee of a note that he will not collect it;[53] an agreement to pay damages for the detention of money beyond the amount detained;[54] a subsequent agreement by the maker of a note to pay a

New Jersey.— Conover *v.* Stillwell, 34 N. J. L. 54; Sterling *v.* Sinnickson, 5 N. J. L. 756; Buckingham *v.* Ludlum, 40 N. J. Eq. 422, 2 Atl. 265.

New York.— Coleman *v.* Eyre, 45 N. Y. 38 [*reversing* 1 Sweeny 476]; Farnsworth *v.* Clark, 44 Barb. 601; Krumenacker *v.* Betz, 26 Misc. 744, 56 N. Y. Suppl. 1042; Taylor *v.* Bates, 5 Cow. 376; Thorne *v.* Deas, 4 Johns. 84. And see Mendel *v.* Pickrell, 37 Misc. 813, 76 N. Y. Suppl. 937.

North Carolina.— Bryan *v.* Foy, 69 N. C. 45; Heathman *v.* Hall, 38 N. C. 414.

North Dakota.— McGlynn *v.* Scott, 4 N. D. 18, 58 N. W. 460.

Ohio.— Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

Pennsylvania.—Cleaver *v.* Lewhart, 182 Pa. St. 285, 37 Atl. 811; Bixler *v.* Ream, 3 Penr. & W. 282; Keffer's Estate, 12 Phila. 55, 35 Leg. Int. 90.

Rhode Island.—Rose *v.* Daniels, 8 R. I. 381.

South Carolina.— Ferrell *v.* Scott, 2 Speers 344, 42 Am. Dec. 371.

Tennessee.—Shuder *v.* Newby, 85 Tenn. 348, 3 S. W. 438; Whitson *v.* Fowlkes, 1 Head 533, 73 Am. Dec. 184.

Texas.— Von Brandenstein *v.* Ebensberger, 71 Tex. 267, 9 S. W. 163.

Vermont.— Barlow *v.* Smith, 4 Vt. 139; Hawley *v.* Farrar, 1 Vt. 420.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 14 Am. Rep. 171.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

Wisconsin.— Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269.

United States.— Arnold *v.* Scharbauer, 116 Fed. 492.

England.— Wade *v.* Simeon, 2 C. B. 548, 3 D. & L. 587, 10 Jur. 412, 15 L. J. C. P. 114, 52 E. C. L. 548; Lamphugh *v.* Brathwayt, Hob. 147; Nichols *v.* Raynbred, Hob. 121.

See 11 Cent. Dig. tit. "Contracts," § 273 *et seq.*

43. Bragg *v.* Danielson, 141 Mass. 195, 4 N. E. 622; Thorne *v.* Deas, 4 Johns. (N. Y.) 84.

44. Ridgeway *v.* Grace, 2 Misc. (N. Y.) 293, 21 N. Y. Suppl. 934, 50 N. Y. St. 326; Crowther *v.* Farrer, 15 Q. B. 677, 15 Jur. 535, 20 L. J. Q. B. 298, 69 E. C. L. 677; Gerhard *v.* Bates, 1 C. L. R. 868, 2 E. & B. 476, 17 Jur. 1097, 22 L. J. Q. B. 364, 1 Wkly. Rep. 383, 75 E. C. L. 476. *Contra*, Watkins *v.* James, 50 N. C. 105, where it is said that inconvenience or loss arising to a party from the breach of a promise constitutes a consideration for the promise.

45. *Colorado.*— Smith *v.* Bateman, 8 Colo. App. 336, 46 Pac. 213.

Illinois.— Crandall *v.* Willig, 165 Ill. 233, 46 N. E. 755.

Maryland.— Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417.

Minnesota.—Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

New York.— Burnet *v.* Bisco, 4 Johns. 235.

Pennsylvania.— Stefflee *v.* Kerr, 2 Woodw. 175.

England.— Cooke *v.* Oxley, 3 T. R. 653, 1 Rev. Rep. 783.

See *supra*, II, C, 5, a, (III), (IV).

46. Whitson *v.* Fowlkes, 1 Head (Tenn.) 533, 73 Am. Dec. 184.

47. Smith *v.* Force, 31 Minn. 119, 16 N. W. 704.

48. Beall *v.* Clark, 71 Ga. 818.

49. Fisher *v.* Willard, 20 N. H. 421.

50. Dollar Sav. Bank *v.* Bennett, 76 Pa. St. 402.

51. Marsh *v.* Crown, 104 Iowa 556, 73 N. W. 1046.

52. Merchants Bank *v.* Davis, 3 Ga. 112.

53. Weaver *v.* Fries, 85 Ill. 356.

54. Phetteplace *v.* Steere, 2 Johns. (N. Y.) 442.

certain sum if the note is not paid punctually when due;[55] a promise made by a debtor when tendering such money as his creditor is bound to receive, and which is the full measure of the liability, to pay more in another currency, of greater value in the transaction of business;[56] an agreement by the cashier of a bank with another not to take notes with the latter's name on them as surety, unless they contain the names of other sureties who are solvent;[57] an agreement with a judgment debtor by a stranger to purchase the judgment and allow the debtor one-half the profits to be made by a sale of the debtor's land;[58] a promise by a judgment creditor to pay certain other judgments held by other creditors out of the proceeds of an execution sale;[59] a promise made by an attorney during a suit that if plaintiff should be nonsuited or cast in the suit the attorney would reimburse him all the costs;[60] a father's promise to his daughter to lease his own farm from her and pay her a certain rent;[61] a promise by a building contractor to put another coat of oil on the inside of a house, made after he had fully complied with his contract, and without any additional consideration;[62] a promise of a holder of a joint and several note to one of the makers who had made a partial payment to look to the other maker for payment of the balance;[63] a promise by an indorser of a promissory note to pay one half of a judgment recovered by the holder against the maker and indorsers upon the note;[64] a promise by the president of a village board to pay attorneys for their services in prosecutions for illegally selling intoxicating liquors;[65] a promise to pay a certain sum if the promisee is not married within a certain time, where the promisor will not profit by the promisee remaining single or suffer injury by his marriage.[66]

c. Promise to Make Gift. A promise to make a gift lacks a consideration and is unenforceable.[67]

d. Promise to Pay Money. A promise to pay money where there is no legal obligation to pay (and no other consideration) is not enforceable.[68]

55. Shirly *v.* Harris, 3 McLean (U. S.) 330, 21 Fed. Cas. No. 12,798.

56. McElderry *v.* Jones, 67 Ala. 203.

57. North Atchison Bank *v.* Gay, 114 Mo. 203, 21 S. W. 479.

58. Harrison *v.* Bailey, 14 S. C. 334.

59. Branson *v.* Kitchenman, 148 Pa. St. 541, 24 Atl. 61.

60. Mitchell *v.* Bell, 1 N. C. 157, 2 Am. Dec. 627.

61. Snyder *v.* Guthrie, 21 Hun (N. Y.) 341.

62. Widiman *v.* Brown, 83 Mich. 241, 47 N. W. 231.

63. Smith *v.* Bartholomew, 1 Metc. (Mass.) 276, 25 Am. Dec. 365.

64. Dygert *v.* Gros, 9 Barb. (N. Y.) 506.

65. Hooker *v.* Russell, 67 Wis. 257, 30 N. W. 358, holding that the promise is not supported by the benefit or advantage to him as a citizen and officer of the village from the enforcement of the laws against the sale of intoxicating liquors.

66. Sterling *v.* Sinnickson, 5 N. J. L. 756.

67. *California.*—Peck *v.* Brumagim, 31 Cal. 440, 89 Am. Dec. 195.

Georgia.—Chandler *v.* Chandler, 62 Ga. 612.

Illinois.— Williams *v.* Forbes, 114 Ill. 167, 28 N. E. 463; Walton *v.* Walton, 70 Ill. 142; Arnold *v.* Franklin, 3 Ill. App. 141.

Indiana.— Johnson *v.* Griest, 85 Ind. 503; Harmon *v.* James, 7 Ind. 263.

Massachusetts.— Warren *v.* Durfee, 126 Mass. 338.

Missouri.— Spencer *v.* Vance, 57 Mo. 427.

New Hampshire.— Blasdel *v.* Locke, 52 N. H. 238.

New Jersey.— Prickett *v.* Prickett, 20 N. J. Eq. 478.

New York.— Jackson *v.* Twenty-Third St. R. Co., 88 N. Y. 520; Dodge *v.* Pond, 23 N. Y. 69; Cloyes *v.* Cloyes, 36 Hun 145; Brink *v.* Gould, 7 Lans. 425; Fink *v.* Cox, 18 Johns. 145, 9 Am. Dec. 191; Pearson *v.* Pearson, 7 Johns. 26.

Pennsylvania.— Zimmerman *v.* Streeper, 75 Pa. St. 147; Crawford's Appeal, 61 Pa. St. 52, 100 Am. Dec. 609; *In re* Campbell, 7 Pa. St. 100, 47 Am. Dec. 503.

Rhode Island.— Taylor *v.* Staples, 8 R. I. 170, 5 Am. Rep. 556.

South Carolina.—Hall *v.* Howard, Rice 310, 33 Am. Dec. 115; Pitts *v.* Mangum, 2 Bailey 588; Priester *v.* Priester, Rich. Eq. Cas. 26, 18 Am. Dec. 191.

Tennessee.— Price *v.* Thomas, 3 Head 283.

Vermont.— Frost *v.* Frost, 33 Vt. 639.

England.— Antrobus *v.* Smith, 12 Ves. Jr. 39, 8 Rev. Rep. 278.

See 11 Cent. Dig. tit. "Contracts," § 258.

68. *Alabama.*—Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Jelks *v.* McRae, 25 Ala. 440.

California.— Oullahan *v.* Baldwin, 100 Cal. 648, 35 Pac. 310; Waterloo Turnpike Road Co. *v.* Cole, 51 Cal. 381.

Florida.— Jones *v.* McCallum, 21 Fla. 392.

Georgia.— Merchants' Bank *v.* Davis, 3 Ga. 112.

e. Promise to Pay Debt of Third Person. A promise to pay the debt of another is *nudum pactum* and void for want of consideration,[69] unless there be some new benefit to the obligor or some detriment to the obligee, as a promise of forbearance or the like.[70]

6. Good and Valuable Consideration Distinguished. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation (generally parent or child, or husband or wife) being founded on motives of generosity, prudence, and natural duty; a valuable consideration is the benefit or detriment which we have just defined. Courts and text-writers are prone to use the word "good" when meaning "valuable," for the only consideration which the law recognizes as sufficient to support a contract is the valuable one. A promise founded on a good consideration is a gratuitous one and unenforceable.[71] And even deeds made upon good consideration only are considered as voluntary. Although they may be valid at law between the

Illinois.— Martin *v.* Stubbings, 20 Ill. App. 381.

Massachusetts.— Lyon *v.* Williams, 5 Gray 557.

Pennsylvania.— Logan *v.* Mathews, 6 Pa. St. 417.

See 11 Cent. Dig. tit. "Contracts," § 256.

69. *Alabama.*— Watson *v.* Reynolds, 54 Ala. 191; Beall *v.* Ridgeway, 18 Ala. 117.

California.— Comstock *v.* Breed, 12 Cal. 286.

Georgia.— Whelan *v.* Edwards, 29 Ga. 315.

Illinois.— Hahn *v.* Maxwell, 33 Ill. App. 261.

Indiana.— Tousey *v.* Taw, 19 Ind. 212; Bingham *v.* Kimball, 17 Ind. 396; Vogel *v.* O'Toole, 2 Ind. App. 196, 28 N. E. 209.

Iowa.— Walker *v.* Irwin, 94 Iowa 448, 62 N. W. 785.

Kentucky.— Harris *v.* Amos, 6 T. B. Mon. 563.

Maine.— Richardson *v.* Williams, 49 Me. 558; Thomas *v.* Delphy, 33 Me. 390.

Missouri.— Flemm *v.* Whitmore, 23 Mo. 430.

New Jersey.—Pike *v.* Van Riper, 57 N. J. L. 290, 30 Atl. 529.

New York.— Bogardus *v.* Young, 64 Hun 398, 19 N. Y. Suppl. 885, 46 N. Y. St. 780; Farnsworth *v.* Clark, 44 Barb. 601; Bunnell *v.* Empire Laundry Machinery Co., 1 Silv. Supreme 511, 5 N. Y. Suppl. 591, 24 N. Y. St. 675; Odell *v.* Mulry, 9 Daly 381; Blunt *v.* Boyd, 6 N. Y. Leg. Obs. 361.

Pennsylvania.— Hess' Estate, 150 Pa. St. 346, 24 Atl. 676; Bixler *v.* Ream, 3 Penr. & W. 282.

South Carolina.— Pope *v.* Fort, 2 McMull. 60.

Tennessee.— Bates *v.* Whitson, 2 Head 155; Gilman *v.* Kibler, 5 Humphr. 19.

Vermont.— *In re* Goddard, 66 Vt. 415, 29 Atl. 634; Barlow *v.* Smith, 4 Vt. 139.

United States.— Shaw *v.* Thompson, Olc. Adm. 144, 21 Fed. Cas. No. 12,726.

Contra, in Louisiana. New Orleans, etc., R. Co. *v.* Chapman, 8 La. Ann. 97; New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Roh. 378; Flood *v.* Thomas, 5 Mart. N. S. 560.

See 11 Cent. Dig. tit. "Contracts," § 332.

70. *California.*— Malone *v.* Crescent City Mill, etc., Co., 77 Cal. 38, 18 Pac. 858.

Illinois.— Smith *v.* Finch, 3 Ill. 321.

Indiana.—Whitesell *v.* Heiney, 58 Ind. 108; Helms *v.* Kearns, 40 Ind. 124; Millard *v.* Porter, 18 Ind. 503.

Kansas.— Patton *v.* Mills, 21 Kan. 163.

Massachusetts.— Smith *v.* Mayo, 1 Allen 160; Carnegie *v.* Morrison, 2 Metc. 381; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154.

Michigan.— Barker *v.* Brown, 74 Mich. 888, 41 N. W. 169; Brown *v.* Hazen, 11 Mich. 219.

Missouri.— Flanagan *v.* Hutchinson, 47 Mo. 237.

New York.— Tolhurst *v.* Powers, 133 N. Y. 460, 31 N. E. 326, 45 N. Y. St. 665 [*affirming* 61 Hun 105, 15 N. Y. Suppl. 420, 39 N. Y. St. 581]; Hosmer *v.* True, 19 Barb. 106; Benedict *v.* Dunning, 1 Daly 241.

Oregon.— Ludwick *v.* Watson, 3 Oreg. 256.

Vermont.— Bagley *v.* Moulton, 42 Vt. 184; Fullam *v.* Adams, 37 Vt. 391.

Wisconsin.— Hawes *v.* Woolcock, 26 Wis. 629.

See 11 Cent. Dig. tit. "Contracts," § 333 *et seq.*

Forbearance to sue see *infra,* IV, D, 10, c.

71. *Connecticut.*—Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79.

Illinois.—Kirkpatrick *v.* Taylor, 43 Ill. 207.

Indiana.— West *v.* Cavins, 74 Ind. 265; Denman *v.* McMahin, 37 Ind. 241.

Iowa.— Dawson *v.* Dawson, 12 Iowa 512.

Maryland.— Schroeder *v.* Fink, 60 Md. 436; Ellicott *v.* Turner, 4 Md. 476; Pennington *v.* Gittings, 2 Gill & J. 208.

Massachusetts.— Dodge *v.* Adams, 19 Pick. 429; Loomis *v.* Newhall, 15 Pick. 159; Mills *v.* Wyrnan, 3 Pick. 207.

Missouri.— Brooks *v.* Owens, 112 Mo. 35, 19 S. W. 723, 20 S. W. 492.

New Jersey.— Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

New York.— Duvoll *v.* Wilson, 9 Barb. 487; Hadley *v.* Reed, 12 N. Y. Suppl. 163, 34 N. Y. St. 949; Fink *v.* Cox, 18 Johns. 145, 9 Am. Dec. 191.

Pennsylvania.— Kennedy *v.* Ware, 1 Pa. St. 445, 44 Am. Dec. 145; Wilson *v.* Wilson, 2 Pittsb. 201.

parties, they are not aided in equity, and are liable to be held void as against creditors and purchasers for value.[72]

7. Motive and Consideration Distinguished. Motive and consideration must be distinguished, for they are not the same thing. The fact that there is a motive for a promise does not supply the element of consideration.[73]

8. Marriage and Promise to Marry. Marriage is considered a valuable consideration[74] between the parties to the marriage and will support a contract made in consideration of it, as a contract of mutual promises to marry.[75] And marriage is a sufficient consideration to support a promise by a third party to the husband or wife,[76] as a promise to convey land in consideration of the promisee's marrying.[77] So marriage is a sufficient consideration to support a marriage settlement.[78] The promise of an infant to marry is a good consideration for a cor-

South Carolina.— Priester *v.* Priester, Rich. Eq. Cas. 261, 18 Am. Dec. 191.

Vermont.— Holley *v.* Adams, 16 Vt. 206, 42 Am. Dec. 508.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171; Parker *v.* Carter, 4 Munf. 273, 26 Am. Dec. 513; Chandler *v.* Neal, 2 Hen. & M. 124.

Contra, Ford *v.* Ellingwood, 3 Metc. (Ky.) 359; Matthews *v.* Williams, 25 La. Ann. 585.

See 11 Cent. Dig. tit. "Contracts," § 286 *et seq.*

72. Washband *v.* Washband, 27 Conn. 424; Henderson *v.* McDonald, 84 Ind. 149; Stovall *v.* Barnett, 4 Litt. (Ky.) 207; Buckle *v.* Mitchell, 18 Ves. Jr. 100, 11 Rev. Rep. 155; Pulvertoft *v.* Pulvertoft, 18 Ves. Jr. 84, 11 Rev. Rep. 151; 2 Bl. Comm. 297. See Deeds; Fraudulent Conveyances.

"The distinction between good and valuable consideration, or family affection as opposed to money value, is only to be found in the history of the law of real property." Anson Contr. 79; Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393.

Cases other than parent and child or husband and wife.— Collateral consanguinity is not a consideration upon which equity will enforce a covenant or agreement. Hayes *v.* Kershow, 1 Sandf. Ch. (N. Y.) 258. Nor is the relationship of brother and sister. Grigsby *v.* Grigsby, 8 Ky. L. Rep. 131.

Relationship by marriage.— Mere affinity by marriage is not sufficient to support an executory contract (Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Corwin *v.* Corwin, 6 N. Y. 342, 57 Am. Dec. 453 [*reversing* 9 Barb. (N. Y.) 219]); as in the case of uncle and nephew or niece (Mark *v.* Clark, 11 B. Mon. (Ky.) 44; Buford *v.* McKee, 1 Dana (Ky.) 107), or brother and sister-in-law (Kirksey *v.* Kirksey, 8 Ala. 131; Cotton *v.* Graham, 84 Ky. 672, 8 Ky. L. Rep. 658, 2 S. W. 647).

73. "Motive has most often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purposes, from a desire on the part of an executor to carry out the wishes of a deceased friend or a desire on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law." Anson Contr. 79. See Philpot *v.* Gruninger, 14 Wall. (U. S.) 570, 20 L. ed. 743; Thomas *v.* Thomas, 2 Q. B. 851, 2 G. & D. 226, 6 Jur. 645, 11 L. J. Q. B. 104, 42 E. C. L. 945.

Moral obligation see *infra,* IV, D, 13.

74. Lionberger *v.* Baker, 88 Mo. 447; Whelan *v.* Whelan, 3 Cow. (N. Y.) 537.

75. Wood *v.* Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603.

Mutual promises to marry see *infra,* IV, D, 10. And see Breach of Promise to Marry, 5 Cyc. 1000.

76. *Iowa.*— Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261.

Maryland.— Waters *v.* Howard, 8 Gill 262; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

North Carolina.—Arnold *v.* Estis, 92 N. C. 162; Gurvin *v.* Cromartie, 33 N. C. 174, 53 Am. Dec. 406; Wall *v.* Scales, 16 N. C. 476.

Pennsylvania.— Barr *v.* Hill, Add. 276.

South Carolina.— Cahorne *v.* Godfrey, 3 Desauss. 514, 5 Am. Dec. 593.

Virginia.— Scott *v.* Osborne, 2 Munf. 413; Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531; Argenbright *v.* Campbell, 3 Hen. & M. 144.

England.— Shadwell *v.* Shadwell, 9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. Rep. N. S. 628, 9 Wkly. Rep. 163, 99 E. C. L. 159.

See 11 Cent. Dig. tit. "Contracts," § 239.

A promise by the father of an illegitimate daughter in consideration of the promisee's marrying her is binding. Wall *v.* Scales, 16 N. C. 476.

Effect of existing engagement to marry see *infra,* IV, D, 12, d, note 73.

Promise by one already married see *infra,* IV, 10, f, (III).

77. Barr *v.* Hill, Add. (Pa.) 276.

78. *California.*— Snyder *v.* Webb, 3 Cal. 83.

Connecticut.— Smith *v.* Chapell, 31 Conn. 589.

Georgia.— Cartledge *v.* Cutliff, 29 Ga. 758.

responding promise.[79] But mere expectation on the part of the promisee that the promisor would marry her is not a sufficient consideration for a promise.[80]

9. Executed and Executory Consideration — a. In General. The consideration for a promise may be executed or executory. An executed consideration is some act performed or some value given at the time of making the promise and in return for the promise then made.[81] An agreement upon an executed consideration arises where one of the parties has in the act which amounts to an offer or an acceptance, as the case may be, done all that he is bound to do under the agreement, leaving an outstanding liability on the other side only. The two forms of agreement growing out of this kind of consideration are: (1) the acceptance of an executed consideration, and (2) consideration executed upon request. In either case there is no contract until the consideration is executed, and so long as the consideration remains executory it is voluntary and may be withheld, differing in this respect from contracts with executory considerations or mutual promises, in which the contract is complete upon the mere exchange of promises, and the consideration in either case, although executory, is obligatory.[82] An executory consideration is a promise to do or to give something, or to forbear from doing something, in return for some other promise or thing done.[83]

b. Acceptance of Executed Consideration. In the case of acceptance of an executed consideration, the agreement is in the form of an offer of an executed consideration followed by its acceptance. This is the offer of an act for a promise and arises when a man offers his labor or goods under such circumstances that he obviously expects to be paid for them, and the contract arises when the labor or goods are accepted, the accepter becoming bound to pay a reasonable price for them,[84] provided as we have seen the person to whom the offer is made has an opportunity of accepting or rejecting the thing offered.[85]

c. Consideration Executed Upon Request. In the case of consideration executed upon request, the agreement is in the form of a request to perform the consideration followed by the performing of the consideration according to the request.[86] An executed consideration will not support a promise, express or

Illinois.— May *v.* May, 158 Ill. 209, 42 N. E. 56.

Kentucky.— Sanders *v.* Miller, 79 Ky. 517, 42 Am. Rep. 237; Crostwaight *v.* Hutchinson, 2 Bibb 407, 5 Am. Dec. 619.

Maryland.—Albert *v.* Winn, 5 Md. 66.

Massachusetts.— Tarbell *v.* Tarbell, 10 Allen 278.

New Jersey.— Skillman *v.* Skillman, 13 N. J. Eq. 403.

Ohio.— Stilley *v.* Folger, 14 Ohio 610.

South Carolina.— U. S. Bank *v.* Brown, 2 Hill Eq. 558, 30 Am. Dec. 380.

Texas.— McLeod *v.* Board, 30 Tex. 238, 94 Am. Dec. 301.

Virginia.— Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531.

United States.— Kesner *v.* Trigg, 98 U. S. 50, 25 L. ed. 83; English *v.* Foxall, 2 Pet. 595, 7 L. ed. 531.

See Husband and Wife.

Consideration of highest character.—Marriage is not only a valuable consideration, but a valuable consideration of the highest character.

Illinois.— Rockafellow *v.* Newcomb, 57 Ill. 186.

Indiana.— Bunnel *v.* Witherow, 29 Ind. 123.

Maine.— Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556.

New York.— Verplank *v.* Sterry, 12 Johns. 536, 7 Am. Dec. 348.

Wyoming.— Metz *v.* Blackburn, 9 Wyo. 481, 65 Pac. 857.

United States.— Prewit *v.* Wilson, 103 U. S. 22, 26 L. ed. 360; Magniac *v.* Thompson, 7 Pet. 348, 8 L. ed. 709.

79. Willard *v.* Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

Promise of infant generally as a consideration see *infra*, IV, D, 10, c.

80. Raymond *v.* Sellick, 10 Conn. 480.

81. Leake Contr. 18; U. S. Bank *v.* Lee, 13 Pet. (U. S.) 107, 10 L. ed. 81 [*affirming* 5 Cranch C. C. (U. S.) 319, 2 Fed. Cas. No. 922].

Past consideration.— It must be remembered that an executed consideration is not the same thing as a "past" consideration. See *infra*, IV, D, 14.

82. Leake Contr. 36.

83. Leake Contr. 18. See *infra*, IV, D, 10.

84. Bowker *v.* Hoyt, 18 Pick. (Mass.) 555; Hoadley *v.* McLaine, 10 Bing. 482, 25 E. C. L. 231; Hart *v.* Mills, 15 L. J. Exch. 200, 15 M. & W. 85. See *supra*, II, C, 2, b, (III); II, C, 3, c, (II), (IV).

85. See *supra*, II, C, 2, e, (II).

86. Phelps *v.* Townsend, 8 Pick. (Mass.) 392; Weatherly *v.* Miller, 47 N. C. 166;

implied, unless the consideration was moved by a previous request,[87] but this request may be implied from the circumstances of the case.[88] This is the offer of a promise for an act already discussed,[89] and is illustrated by the case of an advertisement of a reward for services, which makes a binding promise to give the reward when the service is rendered,[90] in cases in which one requests another to deliver or render services or goods, and the latter does so,[91] and in many other cases.[92] Where there is no request, either express or implied, there is no contract

Deveraux *v.* Cooper, 15 Vt. 88. See *supra*, II, C, 2, b, (IV); II, C, 3, c, (III).

87. See *supra*, II, C, 3, c, (IV); *infra*, IV, D, 14.

88. Thus where a person is employed by another to deal with property for a certain purpose, and in the course of his employment he is compelled to pay duties to the government, he may recover the amount from the other as on an implied request to pay them, and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, as when he is placed by him under a liability to pay and does pay, makes no difference. Seymour *v.* Bridge, 14 Q. B. D. 460, 54 L. J. Q. B. 347; Read *v.* Anderson, 13 Q. B. D. 779, 49 J. P. 4, 53 L. J. Q. B. 532, 51 L. T. Rep. N. S. 55, 32 Wkly. Rep. 950; Brittain *v.* Lloyd, 15 L. J. Exch. 43, 14 M. & W. 762. And if one party promise another to pay him a sum of money if he will do a particular act and the latter does the act before the revocation of the promise the promise becomes binding, although the promisee does not at the time engage to do the act, the doing the act being a good consideration for the previous promise and the promise amounting to a request to do the act. Barnes *v.* Perine, 9 Barb. (N. Y.) 202.

89. See *supra*, II, C, 2, b, (IV).

90. See *supra*, II, C, 2, b, (IV); II, C, 3, b, (II); II, C, 3, c, (III).

91. *Connecticut.*— Consociated Presb. Soc. *v.* Staples, 23 Conn. 544.

Illinois.— Lake *v.* Freer, 11 Ill. App. 576.

Indiana.— Schenck *v.* Sithoff, 75 Ind. 485.

Maine.— Hilton *v.* Southwick, 17 Me. 303, 35 Am. Dec. 253.

Maryland.— Haines *v.* Haines, 6 Md. 435.

Massachusetts.— Goward *v.* Waters, 98 Mass. 596.

Michigan.— Vereycken *v.* Vanden Brooks, 102 Mich. 119, 60 N. W. 687.

Mississippi.— Crawford *v.* Avery, 35 Miss. 205.

Missouri.— Fitzgerald *v.* Barker, 85 Mo. 13; Koch *v.* Lay, 38 Mo. 147; Yeoman *v.* Mueller, 33 Mo. App. 343.

Nebraska.— Lewis *v.* Owen, 26 Nebr. 156, 42 N. W. 285.

New Hampshire.— Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New York.— Reynolds *v.* Guilbert, 13 Hun 301; Eccleston *v.* Ogden, 34 Barb. 444; Mather *v.* Perry, 2 Den. 162.

Ohio.— Nott *v.* Johnson, 7 Ohio St. 270.

Pennsylvania.— McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. St. 139, 25 Atl. 579; Peters *v.* Wainwright, 4 Pennyp. 418.

South Carolina.— Meacham *v.* McKie, 1 Hill 374.

Vermont.— Dorwin *v.* Smith, 35 Vt. 69.

Virginia.— Scott *v.* Osborne, 2 Munf. 413.

England.— Dugdale *v.* Lovering, L. R. 10 C. P. 196; Betts *v.* Gibbins, 2 A. & E. 57, 4 L. J. K. B. 1, 29 E. C. L. 47; Toplis *v.* Grane, 5 Bing. N. Cas. 636, 7 Scott 620, 35 E. C. L. 341.

See 11 Cent. Dig. tit. "Contracts," § 355.

92. Berry *v.* Graddy, 1 Metc. (Ky.) 553, where a person promised the husband of a favorite niece that he would pay five thousand dollars toward the price of a farm, if the husband would buy it instead of removing to another state, and the husband did buy it and live there. See also Rumbolds *v.* Parr, 51 Mo. 592; Halsa *v.* Halsa, 8 Mo. 303; Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. (N. Y.) 363, 4 Abb. Pr. N. S. (N. Y.) 56, 33 How. Pr. (N. Y.) 347 [*reversing* 32 How. Pr. (N. Y.) 1].

Money paid upon request.— If one request another to pay money for him, in a manner importing an undertaking to repay it, the amount when paid becomes a debt — the request to pay and the payment according to the request forming a contract to pay the amount, which is technically described in law as a debt "for money paid by the plaintiff for the defendant at his request." Leake Contr. 55; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

Services performed at request.— The performance or the promise to perform services at the request of the other party, either for him or for a third person, is a sufficient consideration.

Arkansas.— Benton *v.* Holliday, 44 Ark. 56.

Iowa.— Hancock *v.* McFarland, 17 Iowa 124.

Kentucky.— Roberts *v.* Sayre, 6 T. B. Mon. 188.

Louisiana.— Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189.

Maine.— Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68.

Massachusetts.— Rice *v.* Dwight Mfg. Co., 2 Cush. 80; Wilson *v.* Church, 1 Pick. 23.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Missouri.— Stone *v.* Pennock, 31 Mo. App. 544.

Nebraska.— Wilson *v.* Moore, 13 Nebr. 240, 13 N. W. 217.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 23 N. Y. St. 739, 24 N. Y. St. 534, 4 L. R. A. 566; Hamlin *v.* Wheelock, 42 Hun 530; Artcher *v.* McDuffie, 5 Barb. 147; Dodge *v.* Clyde, 7 Rob. 410; Whitestown First Religious Soc. *v.* Stone, 7 Johns. 112.

Pennsylvania.— Bentley *v.* Lamb, 112 Pa.

to pay for services rendered or money paid, even though the services or payment may be beneficial to the party;[93] and the mere acceptance of beneficial services rendered without a request implies no promise to pay for them.[94]

10. Mutual Promises — a. In General. Subject to the qualifications hereinafter stated, a promise to do an act or to forbear from doing an act is just as valuable a consideration for a promise as the act or forbearance would be.[95] Where mutual promises are made the one furnishes a sufficient consideration to

St. 480, 4 Atl. 200, 56 Am. Rep. 330; Neal *v.* Gilmore, 79 Pa. St. 421; Smith *v.* McKenna, 53 Pa. St. 151; Conrad *v.* Conrad, 4 Dall. 130, 1 L. ed. 771.

Vermont.— Hubbell *v.* Olmstead, 36 Vt. 619.

93. *Alabama.*— Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162.

Louisiana.— White *v.* Jones, 14 La. Ann. 681.

New Hampshire.— Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329.

New Jersey.— Force *v.* Haines, 17 N. J. L. 385.

New York.— Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237.

South Carolina.— James *v.* O'Driscoll, 2 Bay 101, 1 Am. Dec. 632.

England.— Leigh *v.* Dickeson, 15 Q. B. D. 60, 54 L. J. Q. B. 18, 52 L. T. Rep. N. S. 790, 33 Wkly. Rep. 538; Taylor *v.* Laird, 1 H. & N. 266, 25 L. J. Exch. 329.

A person cannot make another his debtor, for money advanced or services rendered, without the consent of the party benefited. There must be a previous request, express or implied, or an assent or sanction given after the money is paid or the act done.

Arizona.— Davis *v.* Breon, 1 Ariz. 240, 25 Pac. 537.

Illinois.— Alton *v.* Mulledy, 21 Ill. 76.

Missouri.— Watkins *v.* Richmond College, 41 Mo. 302.

Washington.— Williams *v.* Miller, 1 Wash. Terr. 88.

England.— *In re* Winchilsea, 39 Ch. D. 168, 58 L. J. Ch. 20, 59 L. T. Rep. N. S. 167, 37 Wkly. Rep. 77; Falcke *v.* Scottish Imperial Ins. Co., 34 Ch. D. 234, 56 L. J. Ch. 707, 56 L. T. Rep. N. S. 220, 35 Wkly. Rep. 143; *In re* Leslie, 23 Ch. D. 552; Child *v.* Morley, 8 T. R. 610.

See *supra*, II, C, 2, e, (II), note 61.

94. Tascott *v.* Grace, 12 Ill. App. 639; Frear *v.* Hardenbergh, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; Pattinson *v.* Luckley, L. R. 10 Exch. 330, 44 L. J. Exch. 180, 33 L. T. Rep. N. S. 360; Munro *v.* Butt, 8 E. & B. 738, 4 Jur. N. S. 1231, 92 E. C. L. 738; British Empire Shipping Co. *v.* Somes, E. B. & E. 353, 96 E. C. L. 353; Burn *v.* Miller, 4 Taunt. 745, 14 Rev. Rep. 655; Ellis *v.* Hamlen, 3 Taunt. 52, 12 Rev. Rep. 595; Stokes *v.* Lewis, 1 T. R. 20.

95. *Illinois.*— Funk *v.* Hough, 29 Ill. 145.

Kentucky.— Butt *v.* Napier, 14 Bush 39.

Massachusetts.— Earle *v.* Angell, 157 Mass. 294, 32 N. E. 164.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486.

New Jersey.— Buckingham *v.* Ludlum, 40 N. J. Eq. 422, 2 Atl. 265.

New York.— Coleman *v.* Eyre, 45 N. Y. 38; Norris *v.* Tiffany, 6 Misc. 380, 26 N. Y. Suppl. 750, 56 N. Y. St. 406; Porter *v.* Rose, 12 Johns. 209, 7 Am. Dec. 306; Briggs *v.* Tillotson, 8 Johns. 304. And see Roussel *v.* Mathews, 171 N. Y. 634, 63 N. E. 1122 [*affirming* 62 App. Div. 1, 70 N. Y. Suppl. 886].

North Carolina.— Worthy *v.* Brady, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034; Howe *v.* O'Mally, 5 N. C. 287, 3 Am. Dec. 693.

Tennessee.— Seward *v.* Mitchell, 1 Coldw. 87.

Vermont.— Missisquoi Bank *v.* Sabin, 48 Vt. 239.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

Wyoming.— Cramer *v.* Redman, (1902) 68 Pac. 1003.

United States.— Phillips *v.* Preston, 5 How. 278, 12 L. ed. 152.

See 11 Cent. Dig. tit. "Contracts," § 344 *et seq.*

Illustrations.—The following promises for example have been held sufficient consideration for promises given in return: A promise to advance money (Gutchess *v.* Daniels, 49 N. Y. 605), to pay the debts of a firm (Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344), to open a new road (Butt *v.* Napier, 14 Bush (Ky.) 39), to take all the notes of a certain bank which defendant could purchase and deliver to promisor (Smith *v.* Spies, 2 Hall (N. Y.) 477), to secure the surrender of a lease (Borden *v.* Curtis, 46 N. J. Eq. 468, 19 Atl. 127), to give an indemnity bond (Pratt *v.* Paris Gas Light, etc., Co., 155 Ill. 531, 40 N. E. 1032), to make an offer for certain property (Buckingham *v.* Ludlum, 41 N. J. Eq. 348, 7 Atl. 851), to use partnership funds to pay a debt (McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997), to resign a private office or employment (Allison *v.* Loomis, 5 Silv. Supreme (N. Y.) 254, 9 N. Y. Suppl. 33, 29 N. Y. St. 617), to bring suit or obtain judgment against another (Tarbell *v.* Linehan, 151 Mass. 448, 24 N. E. 325; Beckwith *v.* Brackett, 97 N. Y. 52; Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125), to discontinue a suit (Deen *v.* Milne, 113 N. Y. 303, 20 N. E. 861, 22 N. Y. St. 620), or to support another (Worthy *v.* Brady, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034; Lester *v.* Lester, 28 Gratt. (Va.) 737; Keener *v.* Keener, 34 W. Va. 421, 12 S. E. 729).

Signing a note as surety is a consideration for a promise. Grigsby *v.* Schwarz, 82 Cal. 278, 22 Pac. 1041.

support an action upon the other.[96] Where written contracts bear the same date

96. In addition to the cases above cited see the following:

California.— Siddall *v.* Clark, 89 Cal. 321, 26 Pac. 829.

Illinois.— Morrill *v.* Colehour, 82 Ill. 618; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 454; Funk *v.* Hough, 29 Ill. 145; Low *v.* Forbes, 18 Ill. 568; Crane *v.* Hutchinson, 3 Ill. App. 30.

Indiana.— Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671; Downey *v.* Hinchman, 25 Ind. 453.

Iowa.— Nilles *v.* Welsh, 89 Iowa 491, 56 N. W. 657; Boies *v.* Vincent, 24 Iowa 387.

Kentucky.— Nunnally *v.* White, 3 Metc. 584; Wilson *v.* Davis, 1 A. K. Marsh. 219.

Maine.—Appleton *v.* Chase, 19 Me. 74; Babcock *v.* Wilson, 17 Me. 372, 35 Am. Dec. 263.

Massachusetts.— Price *v.* Minot, 107 Mass. 49; Hubbard *v.* Coolidge, 1 Metc. 84; Stearns *v.* Barrett, 1 Pick. 443, 11 Am. Dec. 223.

Missouri.— Baker *v.* Kansas City, etc., R. Co., 91 Mo. 152, 3 S. W. 486; St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Byrd *v.* Fox, 8 Mo. 574.

Nebraska.— Pryor *v.* Hunter, 31 Nebr. 678, 48 N. W. 736.

New Hampshire.— Hutt *v.* Hickey, 67 N. H. 411, 29 Atl. 456; Troy Cong. Soc. *v.* Perry, 6 N. H. 164, 25 Am Dec. 455; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446.

New Jersey.— Buckingham *v.* Ludlum, 40 N. J. Eq. 422, 2 Atl. 265.

New York.— Coleman *v.* Eyre, 45 N. Y. 38; Briggs *v.* Sizer, 30 N. Y. 647; Billings *v.* Vanderbeck, 23 Barb. 546; Rowland *v.* Phalen, 1 Bosw. 43; White *v.* Demilt, 2 Hall 405; Bruce *v.* Carter, 7 Daly 37; Norris *v.* Tiffany, 6 Misc. 380, 26 N. Y. Suppl. 750, 26 N. Y. St. 406; American Boiler Co. *v.* Fontham, 50 N. Y. Suppl. 351; Myers *v.* Morse, 15 Johns. 425; Tucker *v.* Woods, 12 Johns. 190, 7 Am. Dec. 305; Ferris *v.* Draper, 5 N. Y. Leg. Obs. 227.

North Carolina.— Puffer *v.* Lucas, 101 N. C. 281, 7 S. E. 734; Forney *v.* Shipp, 49 N. C. 527; Abrams *v.* Suttles, 44 N. C. 99; Whitehead *v.* Potter, 26 N. C. 257; Howe *v.* O'Mally, 5 N. C. 287, 3 Am. Dec. 693.

Ohio.— Breslin *v.* Brown, 24 Ohio St. 565, 15 Am. Rep. 627; Nott *v.* Johnson, 7 Ohio St. 270; Canal Fund Com'rs *v.* Perry, 5 Ohio 56; Wade *v.* Pollock, 1 Cinc. Super. Ct. 453.

Pennsylvania.— Berger's Appeal, 96 Pa. St. 443; Dickey's Appeal, 73 Pa. St. 218.

Rhode Island.— Burrough *v.* Hill, 14 R. I. 225.

South Carolina.— Norwood *v.* Faulkner, 22 S. C. 367, 55 Am. Rep. 717.

Tennessee.— Seward *v.* Mitchell, 1 Coldw. 87.

Texas.— Flanders *v.* Wood, 83 Tex. 277, 18 S. W. 572; James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743; Pullman Palace-Car Co. *v.* Booth, (Tex. Civ. App. 1894) 28 S. W. 719.

Vermont.—Missisquoi Bank *v.* Sabin, 48 Vt. 239; Davis *v.* Petit, 27 Vt. 216; Patchin *v.* Swift, 21 Vt. 292.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901; Hawes *v.* Woolcock, 26 Wis. 629.

Wyoming.— Cramer *v.* Redman, (1902) 68 Pac. 1003.

England.— Higgins *v.* Hill, 56 L. T. Rep. N. S. 426; Harrison *v.* Cage, 5 Mod. 411; Holt *v.* Ward Clarencieux, 2 Str. 937.

See 11 Cent. Dig. tit. "Contracts," § 344 *et seq.*

Illustrations of mutual promises.— A promise to make an offset which is compellable only in chancery in consideration of a promise to pay the interest of the debt (Punderson *v.* Fanning, 1 Root (Conn.) 193); a promise to contribute to the expense of an enterprise in consideration of a promise to give a share of the proceeds (Britenstool *v.* Michaels, 56 N. Y. 607); a promise that if defendants would hire of plaintiff two negroes as boathands he would deliver to them his cotton crop to be carried to market (Rice *v.* Sims, 8 Rich. (S. C.) 416); the promise of a judgment creditor to grind corn at a fair price in payment of the judgment, in consideration of the creditor's promise to deliver him sufficient corn for that purpose (Oldham *v.* Kerchner, 79 N. C. 106, 28 Am. Rep. 302); a promise by one who holds a judgment constituting a paramount lien on land to assign the same to another encumbrancer whose lien is subject to judgment, and also to an intervening mortgage in consideration of a promise of the proposed assignee to pay therefor one third of the amount of such judgment (Winberry *v.* Koonce, 83 N. C. 351); a promise by a member of a firm to act as a director of a bank, and to cause the firm to do business with the bank in consideration of a promise by the bank to transfer to such member certain shares of the bank's stock (Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382); the promise of A to accept goods and pay for them in consideration of B's promise to deliver them (White *v.* Demilt, 2 Hall (N. Y.) 405); a promise by one not to remove property seized by him on execution in consideration of the promise by the other to keep it safely and have it forthcoming at a certain time (Ames *v.* Taylor, 49 Me. 381); an agreement between two indorsers of a note that they will divide the loss between them (Phillips *v.* Preston, 5 How. (U. S.) 278, 12 L. ed. 152); a subscription for a book in course of publication (Kinder *v.* Brink, 82 Ill. 376; Western Historical Co. *v.* Schmidt, 56 Wis. 681, 14 N. W. 822); and mutual promises to marry (see *supra*, IV, 8).

Exchange of notes.— Where two persons exchange their promissory notes each note is supported by the other. Cohu *v.* Husson, 57 N. Y. Super. Ct. 238, 6 N. Y. Suppl. 897.

Promises to cancel contract.— Mutual promises of the parties to a contract to can-

and there is no proof of additional or different dealings between the parties one will be held to have been executed in consideration of the other.[97] But a written contract between several parties, in which the various covenants form mutually the several considerations, is invalid unless executed by all the parties.[98]

b. Promises Must Be Concurrent. The promises must be concurrent, that is, they must become obligatory at the same time; otherwise each is a *nudum pactum* at the time it is made and neither will support the other.[99]

c. Promise Must Impose Legal Liability. A promise is a good consideration for a promise, provided always that it imposes some legal liability on the person making it. If it imposes none then it cannot be a consideration. For example at common law a married woman's promise, being void, would not constitute a legal consideration.[1] It seems, however, that the liability need not be perfect. If the promise is merely voidable, as for instance an infant's promise, it is a sufficient consideration.[2] The same is true of a promise which is valid but unenforceable, as for instance an oral promise requiring written proof under the statute of frauds.[3] In other words mutuality of agreement may exist and mutuality of evidence or of remedy be absent.[4]

d. Promise Must Be Certain. A promise may be too vague and uncertain to amount to a consideration for the promise made by the other party.[5] Illustrations of such promises have been given in a former section.[6]

cel the same and deliver up obligations held by each are binding. Leach *v.* Keach, 7 Iowa 232.

An agreement generally to divide or share in profits or losses is binding on both parties.
Alabama.— Walke *v.* McGehee, 11 Ala. 273.
California.— Wilson *v.* Samuels, 100 Cal. 514, 35 Pac. 148.
Georgia.— Fulton *v.* Smith, 27 Ga. 413.
Maine.— Frost *v.* Paine, 12 Me. 111.
Massachusetts.— Humphrey *v.* Haskell, 7 Allen 497.
Michigan.— Jones *v.* Shaw, 56 Mich. 332, 23 N. W. 33.
New York.—Coleman *v.* Eyre, 45 N. Y. 38; McLaughlin *v.* Barnard, 2 E. D. Smith 372.
Pennsylvania.— Ralston's Estate, 172 Pa. St. 104, 33 Atl. 273; John *v.* John, 122 Pa. St. 107, 15 Atl. 675; Young *v.* Snyder, 2 Phila. 315, 14 Leg. Int. 228.
Rhode Island.— Supreme Assembly, etc. *v.* Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601.
Vermont.— Reed *v.* Reed, 56 Vt. 492; Lyman *v.* Dow, 25 Vt. 405.
Virginia.— Price *v.* Winston, 4 Munf. 63.
See 11 Cent. Dig. tit. "Contracts," § 352.

97. Campbell *v.* Harrison, 3 Litt. (Ky.) 292.

98. Tewksbury *v.* O'Connell, 21 Cal. 60.

99. *Maryland.*—Howard *v.* Baltimore First Independent Church, 18 Md. 451.
New Jersey.— Buckingham *v.* Ludlum, 40 N. J. Eq. 422, 2 Atl. 265.
New York.—Utica, etc., R. Co. *v.* Brinckerhoff, 21 Wend. 139, 34 Am. Dec. 220; Efner *v.* Shaw, 2 Wend. 567; Keep *v.* Goodrich, 12 Johns. 397; Tucker *v.* Woods, 12 Johns. 190, 7 Am. Dec. 305.
Texas.— Flanders *v.* Wood, 83 Tex. 277, 18 S. W. 572.
England.— Nichols *v.* Raynbred, Hob. 121.
Promises on same day.— They will not be sufficient if alleged to have been made at different times on the same day. Macedon, etc., Plank Road Co. *v.* Snediker, 18 Barb. (N. Y.) 317; Keep *v.* Goodrich, 12 Johns. (N. Y.) 397; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583; James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

1. Shaver *v.* Bear River, etc., Water, etc., Co., 10 Cal. 396; Howe *v.* Wildes, 34 Me. 566; Warner *v.* Crouch, 14 Allen (Mass.) 163; Andriot *v.* Lawrence, 33 Barb. (N. Y.) 142. And see HUSBAND AND WIFE.

2. Chicago, etc., R. Co. *v.* Lammert, 19 Ill. App. 135; Baldwin *v.* Van Deusen, 37 N. Y. 487; Holt *v.* Ward Clarencieux, 2 Str. 937. And see INFANTS.
Promise of infant to marry is a good consideration for the promise of the other party. Willard *v.* Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

3. Getchell *v.* Jewett, 4 Me. 350; Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Wilkinson *v.* Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; Justice *v.* Lang, 42 N. Y. 493, 1 Am. Rep. 576. See FRAUDS, STATUTE OF.

4. Robinson Consol. Min. Co. *v.* Johnson, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769; Grove *v.* Hodges, 55 Pa. St. 504.

5. Blaisdell *v.* Lewis, 32 Me. 515; Ballou *v.* March, 133 Pa. St. 64, 19 Atl. 304; White *v.* Bluett, 2 C. L. R. 301, 23 L. J. Exch. 36, 2 Wkly. Rep. 75.

6. See *supra*, II, C, 2, c.
In the leading case of White *v.* Bluett, 2 C. L. R. 301, 23 L. J. Exch. 36, 37, 2 Wkly. Rep. 75, in an action on a note given by a son to his father the son pleaded a promise made by his father to discharge him from liability on the note in consideration of his ceasing to make certain complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the

e. Promise Must Be Legal. The consideration must not be illegal, either because it is in violation of a statute, or because it is immoral or contrary to public policy.[7]

f. Performance Must Be Possible — (I) *In General.* If the consideration is obviously and on the face of the contract impossible, it is no consideration and will not support an agreement. If the impossibility is not obvious it is not void as a consideration, although it may avoid the contract on the ground of mistake,[8] or may be in certain cases a valid ground of discharge.[9] Impossibility is either (1) physical or (2) legal.

(II) *Physical Impossibility.* Physical impossibility means here practical impossibility according to the state of knowledge of the day,[10] as for example a promise to go from New York to London in one day or to discover treasure by magic or to go round the world in a week.[11] If the promise be within the range of possibility, however absurd or impossible the idea of its execution may be, it will be upheld; as where one covenants that it shall rain to-morrow or that the pope shall be at Westminster on a certain day. To bring the case within the rule of impossibility it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable or out of the power of the obligor it is not in law deemed impossible.[12]

(III) *Legal Impossibility.* A *prima facie* legal impossibility, that is, an impossibility in law apparent when the agreement is made, is illustrated by the promise in an old case by one person, without authority from another, to discharge a debt due the latter, because no one without authority from the creditor could release a debt due to him.[13] So of an undertaking "that plaintiff's tract of land shall sell for a certain sum by a given day," for no man can force the sale of another's property by a given day or by any day as of his own act;[14] of a promise

other children. The court held that the son's promise was no more than a promise "not to bore his father" and was too vague to constitute a consideration for the father's promise. "A man," said the court, "might complain that another person used the public highway more than he ought to do, and that other might say, "do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding." The contrary seems to have been held in Sharon *v.* Sharon, 68 Cal. 29, 8 Pac. 614 [*criticized* in 22 Centr. L. J. 6]. See also Little *v.* McCarter, 89 N. C. 233, where it was held that a promise to pay a part of the price of land to be purchased by another, made for the purpose of ridding the promisor of a disagreeable neighbor residing on the land, and not to acquire any interest in the land, was supported by a sufficient consideration.

7. See *infra*, VII.

8. See *infra*, VI, B.

9. See *infra*, IX, D.

10. In Clifford *v.* Watts, L. R. 5 C. P. 577, 588, 40 L. J. C. P. 36, 22 L. T. Rep. N. S. 717, 18 Wkly. Rep. 925, where the lessee of land had covenanted to take from it not less than one thousand or more than two thousand tons of potter's clay in each year and to pay the lessee an agreed royalty upon it, Brett, J., while holding the lessee discharged by impossibility of performance because there was not that amount of clay in the land, said: "I think it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted. But here both parties might well have supposed that there was clay under the land."

11. The B. L. Harriman *v.* Emerick, 9 Wall. (U. S.) 161, 19 L. ed. 629. Or a covenant made on March 15 that a ship should sail on February 12. Hall *v.* Cazenove, 4 East 477, 1 Smith K. B. 272, 7 Rev. Rep. 611.

A covenant by an applicant for life insurance that he will not die by his own hand while insane has been held void on the ground that it is one impossible to observe, and known to be so by both parties. Kelley *v.* New York Mut. L. Ins. Co., 109 Fed. 56.

12. Watson *v.* Blossom, 4 N. Y. Suppl. 489, 18 N. Y. St. 726; Beebe *v.* Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; The B. L. Harriman *v.* Emerick, 9 Wall. (U. S.) 161, 19 L. ed. 629; Thornborow *v.* Whitacre, 2 Ld. Raym. 1164.

13. Harvy *v.* Gibbons, 2 Lev. 161. *Contra*, as to an agreement to procure the release of a mortgage. Waterman *v.* Dutton, 6 Wis. 265.

14. Stevens *v.* Coon, 1 Pinn. (Wis.) 356; Specht *v.* Collins, 81 Tex. 213, 16 S. W. 934. But an agreement to convey property not belonging to the promisor at the time it is made has been held valid. Trask *v.* Vinson, 20 Pick. (Mass.) 105; Stearns *v.* Foote, 20 Pick. (Mass.) 432.

to transfer a license, when the law did not allow such transfers;[15] of a promise to marry by one already married and known to be so by the promisee;[16] or of a promise to pay usurious interest where such a promise is void;[17] and other like cases.[18]

g. Promise May Be Conditional. The fact that the promise given for a promise is dependent upon a condition does not affect its validity as consideration.[19]

h. Mutuality — (i) *In General.* There are many cases in which, although the offer is definite enough, yet the accepter by merely accepting has really himself promised nothing in return, has not made himself liable for anything, so that, although one is bound the other is not, and the engagement lacks what is called mutuality. In such a case there is not an enforceable agreement.[20] The most

15. Pierce *v.* Pierce, 17 Ind. App. 107, 46 N. E. 480.

16. Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112; Haviland *v.* Halstead, 34 N. Y. 643.

17. Beauchamp *v.* Leagan, 14 Ind. 401. And see COMMERCIAL PAPER, 7 Cyc. 902.

18. Specht *v.* Collins, 81 Tex. 213, 16 S. W. 934, holding that a promise by a husband to convey his deceased wife's land "as soon as administration could be had upon the estate" is no consideration, since the husband can neither bind the estate nor the course of administration. See also Providence Albertype Co. *v.* Kent, etc., Co., 19 R. I. 561, 35 Atl. 152, where an insolvent corporation agreed to pay part of its indebtedness with stock in a proposed new corporation, and the balance in cash and the notes of the new corporation, the promisee agreeing to subscribe for its proportion of the stock and to accept the same, with the cash and notes, in full satisfaction of its claim. It was held that as the insolvent corporation had no power to bind the new corporation, there was no consideration, and the contract was revocable at any time before actual performance. For other cases see Bennett *v.* Morse, 6 Colo. App. 122, 39 Pac. 582; Anthony *v.* Household Sewing Mach. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; Faulkner *v.* Lowe, 2 Exch. 595. *Compare* Beebe *v.* Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.

19. *Alabama.*— Morris *v.* Lagerfelt, 103 Ala. 608, 15 So. 895.

California.— Southern Pac. R. Co. *v.* Allen, 112 Cal. 455, 44 Pac. 796 [*affirming* (1895) 40 Pac. 752]; Rodgers *v.* Wittenmyer, 88 Cal. 553, 26 Pac. 369.

Iowa.— Nowlin *v.* Pyne, 40 Iowa 166.

Massachusetts.— Gutlon *v.* Marcus, 165 Mass. 335, 42 N. E. 125; Grant *v.* Wood, 12 Gray 220.

Michigan.— Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

Minnesota.— McMullan *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663.

New York.— Gray *v.* Bowen, 10 Bosw. 67; Briggs *v.* Tillotson, 8 Johns. 304.

Texas.— Rose *v.* San Antonio, etc., R. Co., 31 Tex. 49.

Vermont.— Faulkner *v.* Hebard, 26 Vt. 452.

Wisconsin.— Lenz *v.* Brown, 41 Wis. 172.

England.— Cook *v.* Field, 15 Q. B. 460, 14 Jur. 951, 19 L. J. Q. B. 441, 69 E. C. L. 460.

See 11 Cent. Dig. tit. "Contracts," § 346 *et seq.*

Illustrations.— As for example an agreement to assign a claim upon the delivery of certain notes by a certain day (Cutting *v.* Dana, 25 N. J. Eq. 265); an agreement by A to act as sole agent and sell all of B's mineral water that he can in a certain territory, B agreeing to furnish the water and pay a certain part of A's advertising bill if the sales reach a certain amount in a given time (Mueller *v.* Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319); a promise by A to discharge a judgment due to B on B's delivering to him certain property at a time or place specified (Givan *v.* Swadley, 3 Ind. 484); a promise by B to A that if A will buy certain land of B's debtor, B will pay a certain judgment against the debtor if the judgment proves to be a lien on the land (Patton *v.* Mills, 21 Kan. 163); a promise to pay a sum certain in consideration of a promise to contribute a larger sum toward a contingent liability (Aldrich *v.* Lyman, 6 R. I. 98); and a promise to refund in case of deficiency as a consideration for a promise to pay for any excess over what is called for in a deed (Seward *v.* Mitchell, 1 Coldw. (Tenn.) 87).

20. *Alabama.*— Chambliss *v.* Smith, 30 Ala. 366; Huntsville Branch Bank *v.* Steele, 10 Ala. 915. See also Davis *v.* Walker, 131 Ala. 204, 31 So. 554.

Arkansas.— Hershy *v.* Clark, 35 Ark. 17, 37 Am. Rep. 1. See St. Louis, etc., R. Co. *v.* Matthews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467, where a railroad company employed an engineer and promised (1) to pay him according to specified rates, (2) not to discharge him without just cause, (3) to promote him according to specified grades of service, and (4) when discharges of engineers should be made, to discharge them in the order of juniority of service; but by the contract the engineer did not bind himself to remain in the service of the company for any definite or special time. It was held that the company could discharge him at any time because of the want of mutuality.

California.— Doe *v.* Culverwell, 35 Cal. 291.

Colorado.— Beulah Marble Co. *v.* Mattice, 22 Colo. 547, 45 Pac. 432; Stiles *v.* McClellan, 6 Colo. 89.

District of Columbia.— Fallon *v.* Chronicle Pub. Co., 1 MacArthur 485.

frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may "wish" during a cer-

Georgia.— Morrow *v.* Southern Express Co., 101 Ga. 810, 28 S. E. 998.

Illinois.— Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Smith *v.* Weaver, 90 Ill. 392; McKinley *v.* Watkins, 13 Ill. 140; Chicago, etc., R. Co. *v.* Jones, 53 Ill. App. 431. *Compare* Bates Machine Co. *v.* Bates, 192 Ill. 138, 61 N. E. 518 [*affirming* 87 Ill. App. 225].

Indiana.— Hickman *v.* Glazebrook, 18 Ind. 210; Jordan *v.* Indianapolis Water Co., (Ind. App. 1901) 61 N. E. 12.

Iowa.— Barrett *v.* Dean, 21 Iowa 423.

Kansas.— Barker *v.* Critzer, 35 Kan. 459, 11 Pac. 382.

Kentucky.— Stembridge *v.* Stembridge, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; Allen *v.* Roberts, 2 Bibb 98.

Louisiana.—Vicksburg, etc., R. Co. *v.* Terry, 13 La. Ann. 419.

Maine.— Bean *v.* Burbank, 16 Me. 458, 33 Am. Dec. 681.

Maryland.— Benjamin *v.* Bruce, 87 Md. 240, 39 Atl. 810; Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; King *v.* Warfield, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384; Baltimore, etc., R. Co. *v.* Potomac Coal Co., 51 Md. 327, 34 Am. Rep. 316; Berry *v.* Harper, 4 Gill & J. 467.

Massachusetts. — Abbott *v.* Hapgood, 150 Mass. 248, 22 N. E. 907, 15 Am. St. Rep. 193, 5 L. R. A. 586; Harper *v.* Hassard, 113 Mass. 187; Thayer *v.* Burchard, 99 Mass. 508.

Michigan.— Davie *v.* Lumberman's Min. Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Wilkinson *v.* Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. St. Rep. 720; Finley Shoe, etc., Co. *v.* Kurtz, 34 Mich. 89; Michigan Cent. R. Co. *v.* Edwards, 33 Mich. 16; Chambers *v.* Livermore, 15 Mich. 381.

Minnesota.— Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; Bolles *v.* Carli, 12 Minn. 113.

Missouri.— Steffen *v.* Mississippi River, etc., R. Co., 156 Mo. 322, 56 S. W. 1125; Warren *v.* Costello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; Mers *v.* Franklin Ins. Co., 68 Mo. 127; Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34.

Nebraska.— State *v.* Holcombe, 46 Nebr. 612, 65 N. W. 800.

Nevada.— Mitchell *v.* O'Neale, 4 Nev. 504.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444; Crawford *v.* Parsons, 18 N. H. 293.

New York.— Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524; Collier *v.* Trow's Printing, etc., Co., 49 Hun 147, 1 N. Y. Suppl. 844, 16 N. Y. St. 1014; Lester *v.* Jewett, 12 Barb. 502; Townsend *v.* Fisher, 2 Hilt. 47; Utica, etc., R. Co. *v.* Brinckerhoff, 21 Wend. 139, 34 Am. Dec. 220; Wood *v.* Edwards, 19 Johns. 205; Keep *v.* Goodrich, 12 Johns. 397; Burnet *v.* Bisco, 4 Johns. 235; Thorne *v.* Deas, 4 Johns. 84. See Slee *v.* Bloom, 19 Johns. 456, 10 Am. Dec. 273, where persons became subscribers to the stock of a corporation upon a promise by the president to take their stock off of their hands when they should require it. It was held that there was no mutuality and that the subscribers could not, after retaining the stock until the concern proved disastrous, call upon the president to fulfil his promise. And see Baylies *v.* Automatic Fire Alarm Co., 70 N. Y. App. Div. 557, 75 N. Y. Suppl. 555.

Ohio.— Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 339, 41 Am. Rep. 517; Andrews *v.* Campbell, 36 Ohio St. 361; Dayton, etc., Turnpike Co. *v.* Coy, 13 Ohio St. 84.

Oregon.— Corbitt *v.* Salem Gas Light Co., 6 Oreg. 405, 25 Am. Rep. 541.

Pennsylvania.— Coffin *v.* Landis, 46 Pa. St. 426; Hill *v.* Rodcrick, 4 Watts & S. 221; Ames *v.* Pierson, 4 Pa. Dist. 392.

South Carolina.— Cool *v.* Cunningham, 25 S. C. 136.

Tennessee.— Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421.

Texas.— East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 753; Houston, etc., R. Co. *v.* Mitchell, 38 Tex. 85; Cobb *v.* Beall, 1 Tex. 342; Kraft *v.* Sims, 1 Tex. App. Civ. Cas. § 404.

Virginia.— Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133; Shenandoah Valley R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239.

Wisconsin.— Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; Greve *v.* Ganger, 36 Wis. 369; Dodge *v.* Hopkins, 14 Wis. 630; Bradley *v.* Denton, 3 Wis. 557.

United States.— Dorsey *v.* Packwood, 12 How. 126, 136, 13 L. ed. 921. In this case the purchaser of a plantation bound himself to transfer to his son-in-law one half of the plantation, slaves, cattle, and stock, as soon as the son-in-law should pay for one half of the cost of said property, either with his own private means, or with one half of the profits of the plantation. It was held not enforceable, the court saying: "It is signed by both parties in presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one half the land. Packwood could not support a suit upon it to compel Dorsey to do anything." See also Rutland Marble Co. *v.* Ripley, 10 Wall. 239, 19 L. ed. 955; Cold Blast Transp. Co. *v.* Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Arnold *v.* Scharbauer, 116 Fed. 492; Harvester King Co. *v.* Mitchell, etc., Co., 89 Fed. 173.

England.— Cooke *v.* Oxley, 3 T. R. 653, 1 Rev. Rep. 783.

tain time and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything and has incurred no legal liability at all.[21] The correct view of the case is that there is no agreement binding on the promisor, but simply an offer on his part which may be accepted by giving an order until such time as it is actually withdrawn[22] or expires by limitation of time.[23] Where, however, the acceptance does really impose any obligation on the accepter, then a consideration is present and a binding contract results; and this is so wherever the accepter's freedom of action is in any way limited. It is not limited at all where he simply assents to the seller's offer to sell him all the goods he may order or "desire" during a certain time, for he has not promised to order any nor is he bound to do so; but it is limited where the offer is to supply him with all the goods of a particular kind which he may "require" or which he may need during a certain time, for here, although it may be that he will neither need nor require any, yet if he does he has bound himself to buy them of the proposer, and has hence parted with his right to buy them from whom he pleases.[24] A promise lacking mutuality

See 11 Cent. Dig. tit. "Contracts," § 344 *et seq.*

Specific performance.—Want of mutuality as a defense in suit for specific performance see SPECIFIC PERFORMANCE.

21. *Colorado.*— Stiles *v.* McClellan, 6 Colo. 89.

Georgia.— Morrow *v.* Southern Express Co., 101 Ga. 810, 28 S. E. 998.

Illinois.— Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. See Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491, holding that a contract to employ a person to work "from time to time," the service to continue "only so long as satisfactory" to the employer, and which provides a forfeit if the servant quits without specified notice, is void for want of mutuality, and such forfeit cannot be set off against wages due.

Maryland.— Baltimore, etc., R. Co. *v.* Potomac Coal Co., 51 Md. 327, 34 Am. Rep. 316.

Massachusetts.— Thayer *v.* Burchard, 99 Mass. 508.

Michigan.— Hickey *v.* O'Brien, 123 Mich. 611, 82 N. W. 241, 81 Am. St. Rep. 227, 48 L. R. A. 396.

Minnesota.— Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

New York.— Barrow Steamship Co. *v.* Mexican Cent. R. Co., 134 N. Y. 15, 31 N. E. 261, 45 N. Y. St. 379, 17 L. R. A. 359; Rafolovitz *v.* American Tobacco Co., 73 Hun 87, 25 N. Y. Suppl. 1036, 56 N. Y. St. 886; East *v.* Cayuga Lake Ice Co., 21 N. Y. Suppl. 887, 50 N. Y. St. 362.

Texas.— Houston, etc., R. Co. *v.* Mitchell, 38 Tex. 85.

Wisconsin.— Teipel *v.* Meyer, 106 Wis. 41, 81 N. W. 982; Hoffman *v.* Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; Wells *v.* Milwaukee, etc., R. Co., 30 Wis. 605.

United States.— Cold Blast Transp. Co. *v.* Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Columbia Wire Co. *v.* Freeman Wire Co., 71 Fed. 302; American Cotton Oil Co. *v.* Kirk, 68 Fed. 791, 15 C. C. A. 540.

22. In a leading English case the defendant sent to the plaintiff, a railroad company, a tender to supply iron for a certain period at certain fixed prices "in such quantities as the company's store-keeper might order from time to time." The plaintiff accepted the tender, and under it several orders were given by the company which were duly filled by the defendant; but finally the plaintiff gave an order which the defendant refused to fill. Thereupon the plaintiff sued for the breach. It was held that the action would lie. The consideration for the defendant's offer, the court said, was not the acceptance of the defendant's tender, as that did not bind the plaintiff to anything. It was the actual sending of the order for a definite quantity of iron while the tender or offer was in force. Accepting the tender imposed no obligation on the plaintiff, but ordering a definite quantity of iron did, for it bound the company to take and pay for what it had ordered. Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16, 43 L. J. C. P. 1, 29 L. T. Rep. N. S. 471, 22 Wkly. Rep. 48. And see the following cases:

Alabama.— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148; Davis *v.* Robert, 89 Ala. 402, 8 So. 114, 18 Am. St. Rep. 126; Moses *v.* McClain, 82 Ala. 370, 2 So. 741.

California.— Keller *v.* Ybarru, 3 Cal. 147.

Iowa.— Wisconsin, etc., R. Co. *v.* Braham, 71 Iowa 484, 32 N. W. 392.

Maryland.— Damberman *v.* Lorentz, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364.

New York.— Holtz *v.* Schmidt, 59 N. Y. 253; Willetts *v.* Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524.

United States.—Johnston *v.* Trippe, 33 Fed. 530.

And see *supra*, II, C, 5, a, (III).

23. Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240. And see *supra*, II, C, 6, b, (I).

24. *Alabama.*— Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672.

Illinois.—National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427; Warden Coal Co. *v.* Meyer, 98 Ill. App. 640; Hercules Coal & Min. Co. *v.* Central Inv. Co., 98 Ill. App. 427.

Kentucky.— Yellow Poplar Lumber Co. *v.* Rule, 50 S. W. 685, 20 Ky. L. Rep. 2006,

at its inception becomes binding on the promisor after performance by the promisee.[25]

(II) *Subscriptions* — (A) *Mutual Promises.* The case of promises to or subscriptions to carry out some public or charitable object or common enterprise raises an interesting question as to consideration, and three views on the subject obtain in the courts. It is held in some cases that the promises of the subscribers mutually support each other, and being for the benefit of a common beneficiary

where a corporation agreed to employ the plaintiff so long as it was engaged in business at a certain place.

Louisiana.— Smith *v.* Morse, 20 La. Ann. 220. But see Campbell *v.* Lambert, 36 La. Ann. 35, 51 Am. Rep. 1.

Massachusetts.—Burgess Sulphite Fibre Co. *v.* Bloomfield, 180 Mass. 283, 62 N. E. 367.

Michigan.— Dailey Co. *v.* Clark Can Co., 128 Mich. 591, 87 N. W. 761; Hickey *v.* O'Brien, 123 Mich. 611, 82 N. W. 241, 81 Am. St. Rep. 227, 49 L. R. A. 594. See however the case of Cooper *v.* Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341, where it was held that the offer of a manufacturer to deliver to plaintiff all the goods of a specified class, at specified prices, that plaintiff may need during the season is a mere offer by the manufacturer to furnish the goods, which he has a right to withdraw at any time before it is acted on, even though accepted by plaintiff; but after he has filled an order at the prices specified, and has thus had the benefit of a sale, the entire contract becomes valid and binding, and he cannot thereafter decline to fill further orders. This decision is clearly wrong on both points. On the first, because we have seen that the promise to buy all the wheels he needed limited the plaintiff's freedom of choice and was a good consideration for the promise; on the second, because if it was simply an offer the order for a certain quantity of the goods was a contract to deliver the quantity ordered and not all that the plaintiff might order in the future.

Minnesota.— McMullan *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663; Minneapolis Mill Co. *v.* Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202. *Compare* Bailey *v.* Austrian, 19 Minn. 535 [*followed* in Tarbox *v.* Gotzian, 20 Minn. 139], where the court reasoned that, as the accepter might go out of business when he pleased, there was no engagement on his part to "want" any of the goods offered, a plainly erroneous view, for the accepter did at least part with his right to buy goods of persons other than the offerer. This is enough; and it is not necessary to require in addition to this a warranty that he will remain in the business for any length of time. In a subsequent case the Minnesota court seems to have practically overruled Bailey *v.* Austrian, 19 Minn. 535. See Ames-Brooks Co. *v.* Ætna Ins. Co., 83 Minn. 346, 350, 86 N. W. 344, where it is said: "Plaintiff was engaged in an established business, of which the insurance of its cargoes was a part; and the plaintiff, as the evidence tends to show, absolutely promised the defendants that they should have such insurance for the year 1899 on all of its cargoes to Buffalo and lower lake ports, and they in turn promised to write the insurance upon the terms of the 1898 contract. This presupposes the continuance of the plaintiff in the business for the year 1899, and included by necessary intendment a promise on its part not to give such insurance to any other party. This was a sufficient consideration for the defendants' promise."

Missouri. — Laclede Const. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384.

New York.— Wells *v.* Alexandre, 130 N. Y. 642, 29 N. E. 142, 41 N. Y. St. 334, 15 L. R. A. 218; Holtz *v.* Schmidt, 59 N. Y. 253; East *v.* Cayuga Lake Ice Line Co., 21 N. Y. Suppl. 877, 50 N. Y. St. 362; Levey *v.* New York Cent., etc., R. Co., 4 Misc. 415, 24 N. Y. Suppl. 124, 53 N. Y. St. 579.

Ohio.— Cincinnati, etc., R. Co. *v.* Consolidated Coal, etc., Co., 8 Ohio Dec. (Reprint) 365, 7 Cinc. L. Bul. 200.

Wisconsin.— McCall Co. *v.* Icks, 107 Wis. 232, 83 N. W. 300; Lenz *v.* Brown, 41 Wis. 172.

United States.— Lobenstein *v.* U. S., 91 U. S. 324, 23 L. ed. 410; Cold Blast Transp. Co. *v.* Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Manhattan Oil Co. *v.* Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553; American Cotton Oil Co. *v.* Kirk, 68 Fed. 791, 15 C. C. A. 540.

Compare Drake *v.* Vorse, 52 Iowa 417, 3 N. W. 465.

Distinction where need may be approximately determined and where not.—In Crane *v.* Crane, 105 Fed. 869, the federal court distinguishes between a contract to furnish another with such supplies as may be needed during a specified period of time for some certain business or manufacture, or with such commodities as the purchaser has already contracted to furnish to others, the quantity in such cases being capable of at least approximate estimation when the contract is made, and an agreement by a wholesale dealer to supply a retailer during a certain time, at stated prices, with so much of a commodity as the purchaser may require for his trade. The former in the opinion of the court is good; but the latter is not, for the reason that it leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantage of the seller. Hence in the opinion of the court there is no mutuality.

25. Willetts *v.* Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31.

the latter may sue on the promise as one made for his special benefit.[26] This view would seem correct in those states where a stranger to the consideration is permitted to enforce the promise;[27] but it cannot obtain where there is but a single subscriber or donor, as the case may be, for there is no difference in respect to the necessity for a consideration to support a promise made in behalf of a charitable institution and a promise for any other purpose. All simple contracts must be based upon a sufficient legal consideration.[28]

(B) *Implied Agreement to Perform.* A second view is that the person to whom the subscription is made impliedly promises to appropriate the funds subscribed in conformity with the terms and effects of the subscription, and that this implied promise is a sufficient consideration in the absence of any other to support the promise of the subscriber.[29] But this view is open to the criticism, in the case of a subscription to a public or charitable purpose, that the implied promise by the trustees would be nothing more than a promise on their part to do their duty, and doing or promising to do what one is already legally bound to do is not a

26. *California.*— Christian College *v.* Hendley, 49 Cal. 347.

Delaware.— Norton *v.* Janvier, 5 Harr. 346.

Georgia.— Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

Illinois.— Willard *v.* Rockville Centre M. E. Church, 66 Ill. 55.

Indiana.— Petty *v.* Christ Church, 95 Ind. 278; Higert *v.* Indiana Asbury University, 53 Ind. 326; Northwestern Universalists Conference *v.* Myers, 36 Ind. 375; Pierce *v.* Riley, 5 Ind. 69.

Iowa.— McDonald *v.* Gray, 11 Iowa 508, 78 Am. Dec. 509.

Maine.— Parsonage Fund *v.* Ripley, 6 Me. 442.

Massachusetts.— Mirick *v.* French, 2 Gray 420; Watkins *v.* Eames, 9 Cush. 537; Ives *v.* Sterling, 6 Metc. 310; Williams College *v.* Danforth, 12 Pick. 541.

Michigan.— Waters *v.* Union Trust Co., (1902) 89 N. W. 687; First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235; Conrad *v.* La Rue, 52 Mich. 83, 17 N. W. 706; Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Comstock *v.* Howd, 15 Mich. 237; Underwood *v.* Waldron, 12 Mich. 73.

Minnesota.— Culver *v.* Banning, 19 Minn. 303.

Missouri.— Pitt *v.* Gentle, 49 Mo. 74.

Nebraska.— Armann *v.* Buel, 40 Nebr. 803, 59 N. W. 515; Homan *v.* Steele, 18 Nebr. 652, 26 N. W. 472.

New Hampshire.— Osborn *v.* Crosby, 63 N. H. 583, 3 Atl. 429; Troy Cong. Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446.

New York.— Reformed Protestant Dutch Church *v.* Brown, 4 Abb. Dec. 31, 24 How. Pr. 76; Stewart *v.* Hamilton College, 2 Den. 403.

Ohio.— Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239; Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20.

Pennsylvania.— Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421; Ryerss *v.* Blossbury Presb. Congregation, 33 Pa. St. 114; Hart's Estate, 13 Phila. 226, 36 Leg. Int. 175.

Texas.— Doyle *v.* Glasscock, 24 Tex. 200; Buchel *v.* Lott, (Tex. App. 1890) 15 S. W. 413.

Vermont.— Troy Conference Academy *v.* Nelson, 24 Vt. 189; State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

Wisconsin.— Lathrop *v.* Knapp, 27 Wis. 214.

See SUBSCRIPTIONS.

27. See *infra*, V, C, 4.

28. Montpelier Seminary *v.* Smith, 69 Vt. 382, 38 Atl. 66.

29. *Connecticut.*—North Ecclesiastical Soc. *v.* Matson, 36 Conn. 26.

Illinois.— Illiopolis M. E. Church *v.* Garvey, 53 Ill. 401, 5 Am. Rep. 51.

Indiana.—North-Western Universalists Conference *v.* Myers, 36 Ind. 375.

Iowa.— McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509.

Kentucky.— Collier *v.* Baptist Education Soc., 8 B. Mon. 68.

Maine.— Maine Cent. Institute *v.* Haskell, 73 Me. 140.

Massachusetts.— Williams College *v.* Danforth, 12 Pick. 541.

New York.— Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. 325; Barnes *v.* Perine, 12 N. Y. 18.

Pennsylvania.— *In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449; Ryerss *v.* Blossburg Presb. Cong., 33 Pa. St. 114; Caul *v.* Gibson, 3 Pa. St. 416.

Texas.—Cooper *v.* McCrimmin, 33 Tex. 383, 7 Am. Rep. 268.

Vermont.— Troy Conference Academy *v.* Nelson, 24 Vt. 189.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

Wisconsin.— Lathrop *v.* Knapp, 27 Wis. 214.

See SUBSCRIPTIONS.

Civil law.— See Louisiana College *v.* Keller, 10 La. 164, where it seems that by the civil law on contracts of beneficence the intention to confer a benefit is a sufficient consideration.

sufficient consideration to uphold a contract, whether the previous obligation arises by contract or by law independently of it.[30]

(c) *Actual Performance.* A third and the prevailing view is that a subscription like any other promise or offer requires a consideration to support it either of profit to the party promising or of loss to the other party, and that it is only where some obligation is incurred or labor or money is expended on the faith of it that the subscriber is bound, up to which time the subscription may be revoked by the subscriber and is revoked by his death or insanity; but the subscription becomes binding as soon as a consideration is furnished by incurring an obligation or expending labor or money on the faith of it.[31] So where the subscription is

30. Montpelier Seminary *v.* Smith, 69 Vt. 382, 38 Atl. 66; Stewart *v.* Hamilton College, 2 Den. (N. Y.) 403. And see *infra*, IV, D, 12.

31. *California.*— Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

Idaho.— Broadbent *v.* Johnson, 2 Ida. 300, 13 Pac. 83.

Illinois.— Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125; Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; Illiopolis M. E. Church *v.* Garvey, 53 Ill. 401, 5 Am. Rep. 51; McClure *v.* Wilson, 43 Ill. 356; Pryor *v.* Cain, 25 Ill. 292; Friedline *v.* Carthage College, 23 Ill. App. 494.

Iowa.— United Presb. Church *v.* Baird, 60 Iowa 237, 14 N. W. 303; Des Moines University *v.* Livingston, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; Burlington University *v.* Barrett, 22 Iowa 60, 92 Am. Dec. 376; McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509.

Kentucky.— Brown *v.* Anderson, 1 T. B. Mon. 198.

Maine.— Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712.

Massachusetts.— Sherwin *v.* Fletcher, 168 Mass. 413, 47 N. E. 197; Cottage St. Me. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286; Phillips Limerick Academy *v.* Davis, 11 Mass. 113, 6 Am. Dec. 162; Bridgewater Academy *v.* Gilbert, 2 Pick. 579, 13 Am. Dec. 457; Farmington Academy *v.* Allen, 14 Mass. 172, 7 Am. Dec. 201. See Martin *v.* Meles, 179 Mass. 114, 60 N. E. 397, where defendant and eight other leather manufacturers agreed to contribute a certain sum to defray expenses to be incurred by a committee in defending certain suits growing out of letters patent for a system of tanning, and plaintiffs were appointed the committee and incurred obligations in conducting the litigation. It was held that defendant's promise to contribute was not void as without consideration, since either plaintiffs' promise to conduct the litigation or their subsequent acts were sufficient to support the promise.

Michigan.— Underwood *v.* Waldron, 12 Mich. 73.

Minnesota.— Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164, 47 N. W. 652.

Mississippi.— Whitworth *v.* Harris, 40 Miss. 483.

Missouri.— Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406; McClanahan *v.* Payne, 86 Mo. App. 284; Methodist Orphans' Home Assoc. *v.* Sharp, 6 Mo. App. 150. *Compare* New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7.

New York.— Twenty-third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 28 N. Y. St. 482, 6 L. R. A. 807; Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 21 N. Y. St. 503, 8 Am. St. Rep. 767, 3 L. R. A. 468; Roberts *v.* Cobb, 103 N. Y. 600, 9 N. E. 500; Barnes *v.* Perine, 12 N. Y. 18; Hamilton College *v.* Stewart, 1 N. Y. 581; Wilson *v.* Baptist Education Soc., 10 Barb. 308; Stewart *v.* Hamilton College, 2 Den. 403.

Ohio.— Wallace *v.* Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; Johnson *v.* Otterbein University, 41 Ohio St. 527; Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20; Durrell *v.* Belding, 9 Ohio Cir. Ct. 74.

Oregon.— Philomath College *v.* Haitless, 6 Oreg. 158, 25 Am. Rep. 510.

Pennsylvania.— Ryerss *v.* Blossburg Presb. Congregation, 33 Pa. St. 114; Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708; Thum's Estate, 5 Pa. Dist. 739.

Tennessee.—Macon *v.* Sheppard, 2 Humphr. 335.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

Washington.— Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Wisconsin.— Superior Consol. Land Co. *v.* Bickford, 93 Wis. 220, 67 N. W. 45; La Fayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761.

See SUBSCRIPTIONS.

In a leading Massachusetts case the court said: "In every case, in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building in accordance with the terms of the contract, and upon the faith of the defendant's promise." The court goes on to say that the suggestion in several earlier cases in the same state (Watkins *v.* Eames, 9 Cush. (Mass.) 537; Ives *v.* Sterling, 6 Metc. (Mass.) 310; Pembroke Second Precinct Church *v.* Stetson,

on condition that a certain amount shall be obtained, on the obtaining the amount the subscription is recoverable.[32]

(III) *Mutuality May Be Implied.* To show mutuality, the obligation may be implied as well as express. Although on its face and by its express terms the contract is obligatory on one party only, yet if the intention of the parties and the consideration upon which the obligation is assumed is that there shall be a correlative obligation on the other side the law will imply it.[33]

(IV) *Executed Contracts.* Want of mutuality is no defense in the case of an executed contract.[34]

(V) *Mutuality Subsequently Present.* Although there is a lack of mutuality in the beginning, this may be cured by the other party subsequently binding himself also by promise or act. Thus if A promise B to pay him a sum of money if he will do a particular act or make a particular promise and B does the act the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act or make the promise. In the intermediate time the obligation of the promise is suspended, for until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise, and it then becomes

5 Pick. (Mass.) 506), that "it is a sufficient consideration, that others were led to subscribe by the very subscription of the defendant" was in each case mere *obiter dictum* and inconsistent with elementary principles. "Similar promises of third persons to the plaintiff," it was said, "may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him." Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 530, 23 Am. Rep. 286.

Revocation of offer see *supra*, II, C, 5, a.

Lapse of offer by death or insanity see *supra*, II, C, 6, c.

32. Kentucky Baptist Education Soc. *v.* Carter, 72 Ill. 247.

Subscriptions for stock in corporation to be formed see CORPORATIONS.

33. *Colorado.*— Miller *v.* Weld County, (Colo. App. 1902) 67 Pac. 347.

Georgia.—Jernigan *v.* Wimberly, 1 Ga. 220.

Illinois.— Bangor Furnace Co. *v.* Magill, 108 Ill. 656.

Maine.— Jones *v.* Binford, 74 Me. 439, holding that a contract between a canning company and B, providing that B should plant a certain quantity of corn and deliver it to said company when in proper condition for packing and on reasonable notice from the company, as wanted by it, the company agreeing to pay a certain amount per can for all corn so received, was not invalid for want of mutuality.

Massachusetts.— Newmarket Mfg. Co. *v.* Coon, 150 Mass. 566, 23 N. E. 380.

Minnesota.— Minneapolis Mill Co. *v.* Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202.

Missouri.— Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534.

New York.— Stilwell *v.* Ocean Steamship Co., 5 N. Y. App. Div. 212, 39 N. Y. Suppl. 131; Hadden *v.* Dimick, 31 How. Pr. 196 (holding that an agreement that a person should for a certain number of years consign to others all the blankets of his manufacture to be sold by them on commission was not invalid for want of mutuality).

Washington.— McCartney *v.* Glassford, 1 Wash. 579, 20 Pac. 423.

United States.— Butler *v.* Thomson, 92 U. S. 412, 23 L. ed. 684; Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400 (holding that an agreement providing that one party should take control of logs delivered to it by the other and prepare them for transportation was not void for absence of an express agreement by the latter party to furnish logs).

Contract for carriage of goods.— Where a common carrier contracts to carry produce for a certain price, which the other party agrees to pay, the contract is not void for want of an express agreement by the other party to furnish the produce for carriage. Such an obligation is implied. Bangor Furnace Co. *v.* Magill, 108 Ill. 656; Minneapolis Mill Co. *v.* Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202; Stilwell *v.* Ocean Steamship Co., 5 N. Y. App. Div. 212, 39 N. Y. Suppl. 131; McCartney *v.* Glassford, 1 Wash. 579, 20 Pac. 423.

34. Varney *v.* Bradford, 86 Me. 510, 30 Atl. 115; Grove *v.* Hodges, 55 Pa. St. 504; Wheeler, etc., Mfg. Co. *v.* Lyon, 71 Fed. 374.

Illustration.—Thus if A promise to pay B a sum of money to do a particular act and B does the act A is liable, although B did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee the contract is clothed with a valid consideration which relates back and the promise at once becomes obligatory. Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99, 1 Am. Rep. 256. See *supra*, II, C, 2, b, (IV); II, C, 3, c, (III); II, C, 5, a, (III).

obligatory.[35] Therefore a contract to pay a certain sum upon the performance of certain acts by another becomes a binding obligation upon the promisor on the performance of said acts before the revocation of the contract, although it express no consideration past or present and contain no promises that such acts shall be performed.[36]

(VI) *Options Founded on Consideration.* When there is an agreement founded on a consideration, it is not invalid for want of mutuality because one party has an option while the other has not, or in other words because it is obligatory on one and optional with the other.[37] Thus a person for a sufficient consideration may bind himself to buy at a fixed price all the wheat that another may bring to his warehouse during a certain time.[38] So want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right.[39] Such contracts, however, although good at law are not favored by and will not always be enforced in a court of equity.[40]

35. *Alabama.*— Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672. In this case an agreement for the sale and shipment of coke was expressly conditioned on the ability of the seller to induce operators to build ovens and make the coke, and provided for notice by the seller to the buyer at specified times as to how much of the entire quantity of coke could be supplied during certain periods. It was held that the seller was bound thereby as soon as he induced operators to build ovens and make the coke.

California.— Sayward *v.* Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

Georgia.— Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015.

Iowa.— Des Moines Valley R. Co. *v.* Graff, 27 Iowa 99, 1 Am. Rep. 256.

Massachusetts.— Goward *v.* Waters, 98 Mass. 596.

Missouri.— Jones *v.* Durgin, 16 Mo. App. 370, holding that a written agreement signed only by B, by which he agreed to pay A for the insertion of his advertisement in a book to be published by him one cent for each printed page of such advertisement in every volume which might be disposed of, was not enforceable by A, for lack of mutuality, save to the extent that it had been executed by the insertion of the advertisement before B countermanded it.

New Hampshire.—Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New York.— Marie *v.* Garrison, 83 N. Y. 14; Willetts *v.* Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31.

Ohio.— Swan *v.* Shahan, 1 Ohio Cir. Ct. 216.

Tennessee.— Cherry *v.* Smith, 3 Humphr. 19, 39 Am. Dec. 150.

United States.—Wilson *v.* Clonbrock Steam-Boiler Co., 105 Fed. 846; Johnson *v.* Staenglen, 85 Fed. 603, 29 C. C. A. 369; Robson *v.* Mississippi River Logging Co., 61 Fed. 893; Gray *v.* Hinton, 2 McCrary 167, 7 Fed. 81.

36. Jones *v.* Snow, 64 Cal. 456, 2 Pac. 28; Andreas *v.* Holcombe, 22 Minn. 339; Morgenstern *v.* Davis, 59 Hun (N. Y.) 626, 14 N. Y. Suppl. 31, 37 N. Y. St. 819; Storm *v.* U. S., 94 U. S. 76, 24 L. ed. 42.

37. *Illinois.*— Brown *v.* Rounsavell, 78 Ill. 589.

Indiana.— Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 303, 51 Am. St. Rep. 289, holding that an agreement whereby one, in consideration of the release of a claim of damages against him, employs another at certain wages so long as the works of the first are kept running or until the other shall see fit to quit is not void for lack of mutuality.

Minnesota.— Staples *v.* O'Neal, 64 Minn. 27, 65 N. W. 1083, holding that where a person by one entire contract purchased of another a certain quantity of logs at an agreed price and also another quantity at a certain price, but reserved the right to refuse to accept the latter unless they arrived at the boom at a certain time, the option was not void for lack of mutuality.

Missouri.— Mason *v.* Payne, 47 Mo. 517.

Nebraska.— Carter White Lead Co. *v.* Kinlin, 47 Nebr. 409, 66 N. W. 536.

New York.— Tyler *v.* Barrows, 6 Rob. 104; Giles *v.* Bradley, 2 Johns. Cas. 253.

Pennsylvania.— Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

Tennessee.— Cherry *v.* Smith, 3 Humphr. 19, 39 Am. Dec. 150.

Virginia.— Seddon *v.* Rosenbaum, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337.

A provision in a lease giving the lessee the privilege of purchasing the land during the lease at its value is binding on the lessor, although the lessee is under no obligation to purchase.

38. De Rutte *v.* Muldrow, 16 Cal. 505; Crawford *v.* Paine, 19 Iowa 172; Williams *v.* Tiedeman, 6 Mo. App. 269. See Usher *v.* Livermore, 2 Iowa 117.

39. Waterman *v.* Waterman, 27 Fed. 827.

40. See Specific Performance.

Illustration.—Thus in a Pennsylvania case an agreement whereby one agreed to play base-ball for a club for a period of time which at the option of the club might equal the term of the player's life and which reserved to the club the right to discharge the player on ten days' notice, without cause, was held not enforceable by an injunction against its violation by the player. American Assoc.

(VII) *WRITINGS SIGNED BY ONE PARTY ONLY.* Although as a general rule an agreement signed by one party only is not binding,[41] yet if it is acted upon by the other a binding agreement may result.[42]

11. WAIVER OF LEGAL RIGHT AND FORBEARANCE — a. In General. The waiver of a right or forbearance to exercise the same is a sufficient consideration for a promise made on account of it.[43] The right may be legal or equita-

Base-Ball Club *v.* Pickett, etc., Nat. League Base-Ball Club, 8 Pa. Co. Ct. 232. *Contra*, where the agreement was for seven months. American Assoc. Base-Ball Club *v.* Pickett, etc., Nat. League Base-Ball Club, 8 Pa. Co. Ct. 232.

Willingness to perform.—In equity a party not bound by the agreement cannot call for performance by expressing his willingness to perform. "His right to the aid of the Court does not depend upon his subsequent offer to perform the contract on his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character." King *v.* Warfield, 67 Md. 246, 9 Atl. 539, 1 Am. St. Rep. 384; Duvall *v.* Myers, 2 Md. Ch. 401. See SPECIFIC PERFORMANCE.

41. *Michigan.*— McDonald *v.* Bewick, 51 Mich. 79, 16 N. W. 240.

Minnesota.—Stensgaard *v.* Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

New York.— De Beerski *v.* Paige, 47 Barb. 172; Briggs *v.* Smith, 4 Daly 110; Wood *v.* Edwards, 19 Johns. 205.

Pennsylvania.—Trenwith *v.* Meeser, 34 Leg. Int. 140; Gettysburg R. Co. *v.* Kohler, 3 Lanc. Bar 10.

Tennessee.— Officer *v.* Sims, 2 Heisk. 501.

Cases under the statute of frauds see FRAUDS, STATUTE OF.

42. See *supra*, III, C, 2.

43. *Alabama.*— Pollak *v.* Billing, 131 Ala. 519, 32 So. 639.

Arkansas.—Sykes *v.* Lafferry, 27 Ark. 407.

Connecticut.— Waters *v.* White, (1902) 52 Atl. 401, where in an action on a note signed by a husband and wife, the wife defended on the ground of want of consideration for her promise, and showed that she signed it after delivery to the payee under pressure of statements of the payee that he would make trouble for her husband if she did not sign, because he had obtained the loan by false representations. It was held that findings that the payee, after obtaining the wife's signature, in fact forbore to exercise his right to rescind the contract with the husband, and to enforce an immediate return of the money, and waited till the maturity of the note, were inconsistent with any other supposition than that the payee agreed to so forbear, which was a good consideration for the wife's promise.

Illinois.— Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209; Newlan *v.* Shafer, 38 Ill. 379; Leverenz *v.* Haines, 32 Ill. 357. And see McMicken *v.* Safford, 197 Ill. 540, 64 N. E. 540 [*affirming* 100 Ill. App. 102].

Iowa.— Marshalltown Stone Co. *v.* Des Moines Brick Mfg. Co., 114 Iowa 574, 87 N. W. 496, holding that an agreement between a party about to enter into a contract to furnish certain paving materials to a city, for use on a certain street, and another, whereby the latter is to pay the former a certain amount per cubic yard for material used in such street, on condition that the former will not enter into such contract nor sell any such material in that city for a certain period, is not void for want of consideration, since the former's forbearance is sufficient.

Kentucky.— Talbott *v.* Stemmons, 89 Ky. 222, 12 S. W. 297, 11 Ky. L. Rep. 451, 25 Am. St. Rep. 531, 5 L. R. A. 856.

Massachusetts.— Gunther *v.* Gunther, 181 Mass. 217, 63 N. E. 402, holding that the voluntary surrender by a widow of the watch, clothes, and all other personal property belonging to her husband's estate was a valid consideration for a promise by the recipient, even though the estate was insolvent, since the probate court could have allowed such property to her free of the claims of creditors.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593. And see Union Trust Co. *v.* Zynda, (Mich. 1901) 88 N. W. 407, holding that where a guardian converts the property of his wards, and is removed, and is ordered forthwith to pay the sum so converted, an extension of the time to make such payment is a sufficient consideration to support a bond given to secure such sum.

Missouri.— Lindell *v.* Rokes, 60 Mo. 249, 21 Am. Rep. 395; Vogel *v.* Meyer, 23 Mo. App. 427.

Nebraska.— Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542, holding that the release of a homestead right by a husband is a sufficient consideration to support a contract made between husband and wife for an equal division of the money derived from a sale of the family homestead.

New Hampshire.— Farmer *v.* Stewart, 2 N. H. 97.

New Jersey.— Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015, holding that an agreement between a holder of notes and the heirs of the deceased maker, grandsons of the former, that the heirs will pay interest on the principal during the life of the holder in consideration of the holder surrendering her claim to the principal and delivering the notes to the heirs to be destroyed, is founded on both a valuable and a good consideration, and is binding on the holder's administrator when fully executed by the delivery and destruction of the notes.

New York.— Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 36 N. Y. St. 888, 21 Am.

ble,[44] certain or doubtful,[45] provided it be not utterly groundless;[46] and it may exist against the promisor or against a third party.[47] But forbearance to do or a promise to forbear from doing that which the promisee cannot legally do is no consideration for a promise.[48]

b. Illustrations of Waiver of Right or Forbearance. The following are some illustrations which the cases furnish of such agreements: An agreement by a debtor not to go into bankruptcy and thereby be discharged from a certain debt, or at least imperil its collection;[49] an agreement by a son to remain with his father and assist him until his marriage;[50] relinquishment by a child or other

St. Rep. 693, 12 L. R. A. 463; Hartwig *v.* American Malting Co., 74 N. Y. App. Div. 140, 77 N. Y. Suppl. 533; Clark *v.* Lyons, 38 Misc. 516, 77 N. Y. Suppl. 967.

Pennsylvania.— Spangler *v.* Springer, 22 Pa. St. 454; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107.

Vermont.— Blake *v.* Peck, 11 Vt. 483.

West Virginia.— Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184.

But see as apparently *contra* Ashe *v.* De Rossett, 53 N. C. 240.

44. Noblet *v.* Green, 13 N. C. 517, 21 Am. Dec. 347; Price *v.* Seaman, 4 B. & C. 525, 10 E. C. L. 687; Baxter *v.* Connolly, 1 Jac. & W. 576; Thorpe *v.* Thorne, 1 Ld. Raym. 662; Mouldsdale *v.* Birchall, 2 W. Bl. 820.

Motive is immaterial.— Benner *v.* Van Norden, 27 La. Ann. 473.

45. See *infra*, IV, D, 11, c, (II).

46. Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Vertner *v.* Humphreys, 14 Sm. & M. (Miss.) 130; Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355; Crosby *v.* Wood, 6 N. Y. 369; Keim *v.* Doelger, 54 N. Y. Super. Ct. 510; Van Allen *v.* Jones, 10 Bosw. (N. Y.) 369. See *infra*, IV, D, 11, c, (II), (C).

Void contract.—Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103.

The claim need not be perfect; it is sufficient that it be reasonably doubtful. Field *v.* Weir, 28 Miss. 56; Palmer *v.* North, 35 Barb. (N. Y.) 282; Moore *v.* Powell, 1 Disn. (Ohio) 144, 12 Ohio Dec. (Reprint) 538; Cross *v.* Richardson, 30 Vt. 641. See *infra*, IV, D, 11, c, (II).

47. See *infra*, IV, D, 11, d.

48. *Alabama.*— Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Prater *v.* Miller, 25 Ala. 320, 60 Am. Dec. 521 (holding that it is no consideration to forbear to contest the probate of a will, when there are no reasonable grounds upon which to base a contest); Martin *v.* Black, 20 Ala. 309.

Illinois.— Hennessey *v.* Hill, 52 Ill. 281 (holding it no consideration to forbear to levy on property exempt from execution); Voorhees *v.* Reed, 17 Ill. App. 21 (holding that refraining from shipping diseased cattle is no consideration for a promise).

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29.

Kansas.— Price *v.* Atchison First Nat. Bank, 62 Kan. 743, 64 Pac. 639, holding that it is no consideration to agree to forbear and to forbear to issue execution upon a judgment which clearly has no legal existence, and upon which no execution could lawfully issue.

Kentucky.— Cline *v.* Templeton, 78 Ky. 550; Eblin *v.* Miller, 78 Ky. 371; Stitzel *v.* Hofheimer, 11 Ky. L. Rep. 330.

Maryland.— Schroeder *v.* Fink, 60 Md. 436; Ecker *v.* McAllister, 54 Md. 362.

Massachusetts.— Dunham *v.* Johnson, 135 Mass. 310; Palfrey *v.* Portland, etc., R. Co., 4 Allen 55.

Michigan.— Taylor *v.* Weeks, (Mich. 1901) 88 N. W. 466, 8 Detroit Leg. N. 911.

Minnesota.—Davis *v.* Mendenhall, 19 Minn. 149; Sharpe *v.* Rogers, 12 Minn. 174.

Mississippi.— Lindsey *v.* Sellers, 26 Miss. 169.

Missouri.— Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355.

New York.— Crosby *v.* Wood, 6 N. Y. 369, holding that a surrender of an instrument wrongfully obtained and held is no consideration for a promise.

Oregon.— Oregon, etc., R. Co. *v.* Potter, 5 Oreg. 228.

Pennsylvania.— Jacobs *v.* Curtis, 11 Leg. Int. 27.

Tennessee.— Shuder *v.* Newby, 85 Tenn. 348, 3 S. W. 438.

Texas.— Von Brandenstein *v.* Ebensberger, 71 Tex. 267, 9 S. W. 153.

Vermont.— Flagg *v.* Walker, Brayt. 24.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

Wisconsin.— Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269.

England.— Herring *v.* Dorell, 8 Dowl. P. C. 604; Barnard *v.* Simons, Rolle Abr. 26.

See 11 Cent. Dig. "Contracts," § 325.

Forbearance to bring groundless suit see *infra*, IV, D, 11, c, (II).

Discharge of a person from illegal arrest on execution or in a civil action is no consideration for a promise. Reg. *v.* Fox, 2 Q. B. 246, 1 G. & D. 566, 42 E. C. L. 658; Foster *v.* Dodd, L. R. 3 Q. B. 67, 8 B. & S. 842, 854, 37 L. J. Q. B. 28, 17 L. T. Rep. N. S. 614, 16 Wkly. Rep. 155; Smith *v.* Monteith, 2 D. & L. 358, 9 Jur. 310, 14 L. J. Exch. 22, 13 M. & W. 427; Butcher *v.* Steuart, 1 D. & L. 308, 7 Jur. 774, 12 L. J. Exch. 391, 11 M. & W. 857; Herring *v.* Dorell, 8 Dowl. P. C. 604; Jones *v.* Ashburnham, 4 East 455, 1 Smith K. B. 188; Atkinson *v.* Settree, Willes 482.

49. Dawson *v.* Beall, 68 Ga. 328.

50. Lafollett *v.* Kyle, 51 Ind. 446.

beneficiary of all claims on an estate;[51] an agreement not to contest a will,[52] to withdraw opposition to its probate,[53] to omit to make provision for another in a will,[54] or not to bid at a public auction or judicial sale;[55] relinquishment of dower or homestead rights[56] or other rights in real or personal property;[57] delivery up of property to which one has the right of possession;[58] canceling a written agreement;[59] waiver of the right to redeem property[60] or to assert a lien;[61] cancellation or release of a mortgage or other security;[62] release of contract rights generally which one has against another,[63] as the surrender of a

51. *Illinois.*— Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209 [*affirming* 23 Ill. App. 289].

Kentucky.— Fain *v.* Turner, 96 Ky. 634, 29 S. W. 628, 16 Ky. L. Rep. 719.

Maine.— Larrabee *v.* Larrabee, 34 Me. 477; Weston *v.* Hight, 18 Me. 281.

Massachusetts.—Loring *v.* Sumner, 23 Pick. 98.

Mississippi.— Calhoun *v.* Calhoun, 37 Miss. 668.

Missouri.— Mullanphy *v.* Reilly, 8 Mo. 675.

West Virginia.— Knight *v.* Watts, 26 W. Va. 175.

52. Palmer *v.* North, 35 Barb. (N. Y.) 282; Bellows *v.* Sowles, 57 Vt. 164, 52 Am. Rep. 118, 55 Vt. 391, 45 Am. Rep. 621. And See Clark *v.* Lyons, 38 Misc. 516, 77 N. Y. Suppl. 967. See also *infra*, VII, B, 3, f, (II), (I), 5. But see note 48, *supra*.

53. Prater *v.* Miller, 25 Ala. 320, 60 Am. Dec. 521; St. Mark's Church *v.* Tead, 120 N. Y. 583, 24 N. E. 1014, 31 N. Y. St. 908 [*affirming* 44 Hun (N. Y.) 349]; Seaman *v.* Seaman, 12 Wend. (N. Y.) 381.

54. Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Gaullaher *v.* Gaullaher, 5 Watts (Pa.) 200; Robinson *v.* Denson, 3 Head (Tenn.) 395.

55. Heim *v.* Butin, (Cal. 1895) 40 Pac. 39; Jones *v.* Wilson, 104 N. C. 9, 10 S. E. 79; Rease *v.* Crowley, 4 Phila. (Pa.) 97, 17 Leg. Int. (Pa.) 229; Noyes *v.* Day, 14 Vt. 384.

56. *Alabama.*— Andrews *v.* Andrews, 28 Ala. 432.

Illinois.— Pool *v.* Docker, 92 Ill. 501; Clay *v.* Clay, 23 Ill. App. 109.

Indiana.— Worley *v.* Sipe, 111 Ind. 238, 12 N. E. 385.

Kentucky.— Harrow *v.* Johnston, 3 Metc. 578.

Michigan.— Farrell *v.* Johnston, 34 Mich. 342.

Nebraska.—Racek *v.* North Bend First Nat. Bank, 62 Nebr. 669, 87 N. W. 542, holding that the release of a homestead right by a husband was a sufficient consideration to support a contract made between the husband and wife for an equal division of the money derived from a sale of the homestead.

New York.— Hart *v.* Young, 1 Lans. 417.

Virginia.— Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

United States.— U. S. Bank *v.* Lee, 13 Pet. 107, 10 L. ed. 81 [*affirming* 5 Cranch C. C. 319, 2 Fed. Cas. No. 922].

57. Harms *v.* Aufield, 79 Ill. 257; McIntyre *v.* Robinson, 8 Ill. App. 115; Bradbury *v.* Blake, 25 Me. 397; Plumer *v.* Reed, 38 Pa. St. 46; Shoenberger *v.* Zook, 34 Pa. St. 24; Williams *v.* Lewis, 5 Leigh (Va.) 686.

58. Etheridge *v.* Thompson, 29 N. C. 127. See *supra*, IV, D, 2, note 98.

59. Call *v.* Calef, 13 Metc. (Mass.) 362; Weld *v.* Nichols, 17 Pick. (Mass.) 538.

60. Watkins *v.* Turner, 34 Ark. 663; Shade *v.* Creviston, 93 Ind. 591.

61. *Arkansas.*— Buckner *v.* McIlroy, 31 Ark. 631.

Illinois.— St. Clair *v.* Perrine, 75 Ill. 366.

Indiana.— Luask *v.* Malone, 34 Ind. 444.

Kentucky.— Sharp *v.* Carmody, 32 S. W. 749, 17 Ky. L. Rep. 827.

Missouri.— Rippey *v.* Friede, 26 Mo. 523.

New York.— Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433, 74 N. Y. St. 865.

Ohio.— Nicholson *v.* May, Wright 660.

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884; Griswold *v.* Wright, 61 Wis. 195, 21 N. W. 44.

United States.— Mason Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. ed. 1072.

62. *Indiana.*— Smith *v.* Boruff, 75 Ind. 412.

Kentucky.—Gaines *v.* Fitch, 14 Ky. L. Rep. 620.

Massachusetts.— Stebbins *v.* Smith, 4 Pick. 97.

Michigan.— Norris *v.* Vosburgh, 98 Mich. 426, 57 N. W. 264; Bradshaw *v.* McLoughlin, 39 Mich. 480; Chanter *v.* Reardon, 32 Mich. 162.

Nebraska.— Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

United States.— Mason Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. ed. 1072.

63. *Alabama.*— Carpenter *v.* Murphree, 49 Ala. 84.

Iowa.— Mansfield *v.* Watson, 2 Iowa 111.

Kentucky.— Murray *v.* Meagher, 8 Bush 574.

Maryland.— Gunby *v.* Sluter, 44 Md. 237.

Massachusetts.— Scott *v.* McKinney, 98 Mass. 344.

Nebraska.—Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

New York.— Wile *v.* Wilson, 93 N. Y. 255.

North Dakota.— Kvello *v.* Taylor, 5 N. D. 76, 63 N. W. 889.

Ohio.— Smith *v.* McKinney, 22 Ohio St. 200.

Texas.— Deuschman *v.* Battaile, (Tex. Civ. App. 1896) 36 S. W. 489.

Vermont.— Perry *v.* Buckman, 33 Vt. 7; Hawkins *v.* Barney, 27 Vt. 392.

Wisconsin.— Buechel *v.* Buechel, 65 Wis. 532, 27 N. W. 318.

lease;[64] resignation of a corporate office;[65] release of an option to purchase,[66] of a power of attorney,[67] or of a right to sue for damages to person or property;[68] forbearance to prefer creditors in an assignment;[69] refraining from the use of liquor or tobacco.[70]

c. Forbearance to Sue — (1) *In General.* Refraining from bringing a suit may furnish a consideration. The actual forbearance or the promise to forbear to prosecute a claim upon which one has a right to sue is universally held to be a sufficient consideration.[71] Thus the following have been held sufficient: Extension of time for the payment of a debt or the performance of an agreement[72]

Release from a contract to marry.— Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14.

Release by wife of husband from all obligation under a contract for her separate maintenance. Jones *v.* Jones, 1 Colo. App. 28, 27 Pac. 85.

Return of an unused passage ticket to the general agent of a steamship company. Coggins *v.* Murphy, 121 Mass. 166.

64. Runnion *v.* Beard, 6 Blackf. (Ind.) 401.

65. Peck *v.* Requa, 13 Gray (Mass.) 407.

66. McKeen *v.* Harwood, 15 Ala. 792.

67. Call *v.* Calef, 4 Cush. (Mass.) 388.

68. *Alabama.*—Boggs *v.* Price, 64 Ala. 514.

California.— Dunton *v.* Niles, 95 Cal. 494, 30 Pac. 762.

Georgia.— Crusselle *v.* Pugh, 71 Ga. 744, where A lost his eyesight from the negligence of the lessee of B's rock quarry, and B to prevent a suit and to compensate for the injury put A into possession of a house and lot, telling him that he should hold it for life. It was held that the consideration was sufficient.

Illinois.— White *v.* Walker, 31 Ill. 422. And see Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484, where a person had been injured by the negligence of a carrier, and it was held that a promise by the carrier to pay for his nursing and medical attendance was on a sufficient consideration.

Louisiana.—Beckley *v.* Clark, 8 La. Ann. 8.

Ohio.— Shanklin *v.* Madison County, 21 Ohio St. 575.

Pennsylvania.— Saalfield *v.* Manrow, 165 Pa. St. 114, 30 Atl. 823.

Tennessee.— McCormick *v.* Oliver, 7 Yerg. 24.

Texas.— Spaulding *v.* Crawford, 27 Tex. 155. And see New York, etc., Steamship Co. *v.* Island City Boating, etc., Assoc., 2 Tex. Civ. App. 490, 21 S. W. 1007, holding that damage to goods while in the hands of a common carrier was a sufficient consideration to support a promise to pay damages to the consignee.

69. Hind *v.* Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107, where persons in failing circumstances and about to make an assignment to the defendant for the benefit of creditors expressed a wish to prefer their workmen, but did not carry it into effect in consequence of a promise by the defendant that they should be paid at any rate. It was held that the defendant was liable on this promise.

70. See *supra*, IV, D, 3, note 31.

71. *Alabama.*— Pollak *v.* Billing, 131 Ala. 519, 32 So. 639.

Georgia.— Hargroves *v.* Cooke, 15 Ga. 321.

Illinois.— White *v.* Walker, 31 Ill. 422; Morgan *v.* Park Nat. Bank, 44 Ill. App. 582.

Louisiana.— Benner *v.* Van Norden, 27 La. Ann. 473.

Massachusetts.— Call *v.* Calef, 4 Cush. 388; Drury *v.* Fay, 14 Pick. 326.

Nebraska.— Matthews *v.* Seaver, 34 Nebr. 592, 52 N. W. 283.

New York.— Jeroms *v.* Jeroms, 18 Barb. 24.

Ohio.— Muskingum Bank *v.* Carpenter, Wright 729; Ford *v.* Rehman, Wright 434; Williamson *v.* McGill, 8 Ohio Dec. (Reprint) 185, 6 Cinc. L. Bul. 202.

Pennsylvania.— Saalfield *v.* Manrow, 165 Pa. St. 114, 35 Wkly. Notes Cas. 463, 30 Atl. 823; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387.

Tennessee.—Turney *v.* Denham, 4 Baxt. 569.

United States.— Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934; Lonsdale *v.* Brown, 4 Wash. 148, 15 Fed. Cas. No. 8,494.

England.— Leask *v.* Scott, 2 Q. B. D. 376; Willatts *v.* Kennedy, 8 Bing. 5, 1 Moore & S. 35, 21 E. C. L. 421; Mather *v.* Maidstone, 18 C. B. 273, 25 L. J. C. P. 310, 86 E. C. L. 273; Alliance Bank *v.* Brown, Dr. & Sm. 289, 10 Jur. N. S. 1121, 34 L. J. Ch. 256, 11 L. T. Rep. N. S. 332, 13 Wkly. Rep. 127.

See 11 Cent. Dig. "Contracts," § 319.

Motive in pursuing right.— One who has made a contract in consideration that another will forbear to enforce a legal right which he is pursuing cannot have relief from his contract on the ground that the motives of the second person in pursuing his right were blameworthy. Benner *v.* Van Norden, 27 La. Ann. 473.

72. *Alabama.*—Robinson *v.* Tipton, 31 Ala. 595.

Connecticut.— Raymond *v.* Smith, 5 Conn. 555.

Georgia.— Taylor *v.* Thomas, 61 Ga. 472.

Illinois.— Resseter *v.* Waterman, 151 Ill. 169, 37 N. E. 875; Austin *v.* Bainter, 50 Ill. 308; Underwood *v.* Hossack, 38 Ill. 208; Schoonhoven *v.* Pratt, 25 Ill. 457.

Indiana.—Brown *v.* Indianapolis First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Sinker *v.* Green, 113 Ind. 264, 15 N. E. 266.

Iowa.— Sac County *v.* Hobbs, 72 Iowa 69, 33 N. W. 368.

Kentucky.— Lemaster *v.* Burkhart, 2 Bibb 25.

or payment of a judgment;[73] release of an attachment lien or an agreement to stay or forbear from an attachment or execution;[74] discharge of a debtor from the debt[75] or from lawful imprisonment for the debt;[76] surrender or cancellation of a note or mortgage;[77] withdrawing a prosecution for bastardy;[78] withdrawing opposition by a debtor to bankruptcy proceedings and consenting to amendments and an adjudication of bankruptcy;[79] an agreement to postpone the sale of mortgaged premises after an order or decree of sale[80] or a tax-sale;[81] forbearance to eject a tenant at will for non-payment of rent[82] or in closing an insolvent bank;[83] an agreement not to foreclose a mortgage or deed of trust;[84] and a

Massachusetts.— Boyd *v.* Freize, 5 Gray 553.

Michigan.— Fraser *v.* Backus, 62 Mich. 540, 29 N. W. 92.

Minnesota.— Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

Mississippi.— Sanders *v.* Smith, (1888) 5 So. 514.

Missouri.— Martin *v.* Nixon, 92 Mo. 26, 4 S. W. 503; Janis *v.* Roentgen, 59 Mo. App. 75; Webster *v.* Switzer, 15 Mo. App. 346.

New York.— Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226; Lippincott *v.* Ashfield, 4 Sandf. 611; Watson *v.* Randall, 20 Wend. 201.

North Carolina.— Lowe *v.* Weatherley, 20 N. C. 353.

Ohio.— Brainard *v.* Harris, 14 Ohio 107, 45 Am. Dec. 525; Muskingum Bank *v.* Carpenter, Wright 729; Nicholson *v.* May, Wright 660; Ford *v.* Rehman, Wright 434.

Pennsylvania.— Van Gorder *v.* Freehold Bank, (1886) 7 Atl. 144; Ament *v.* Sarver, 2 Grant 34; Silvis *v.* Ely, 3 Watts & S. 420; Clark *v.* Russel, 3 Watts 213, 27 Am. Dec. 348; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387; Hamaker *v.* Eberley, 2 Binn. 506, 4 Am. Dec. 477.

South Carolina.— Hutton *v.* Edgerton, 6 S. C. 485.

Tennessee.— Allen *v.* Morgan, 5 Humphr. 624.

Texas.— Knapp *v.* Mills, 20 Tex. 123.

Vermont.— Hill *v.* Smith, 34 Vt. 535; Templeton *v.* Bascom, 33 Vt. 132.

Wisconsin.— Hawes *v.* Woolcock, 26 Wis. 629.

United States.— Lipsmeier *v.* Vehslage, 29 Fed. 175; Lonsdale *v.* Brown, 4 Wash. 148, 15 Fed. Cas. No. 8,494.

England.— Fisher *v.* Richardson, Cro. Jac. 47.

See 11 Cent. Dig. tit. "Contracts," §§ 317, 318.

Illustration.— A agreed to pay what he owed to B and also the debt of another, the money to be sent by express within a week. B agreed to wait for a week. It was held that B's promise was upon a good consideration and that a suit brought by him was premature. Leslie *v.* Conway, 59 Cal. 442; Morgan *v.* Park Nat. Bank, 44 Ill. App. 582.

Extension as consideration for bill or note see COMMERCIAL PAPER, 7 Cyc. 721.

73. Brainard *v.* Harris, 14 Ohio 107, 45 Am. Dec. 525.

74. *Delaware.*— West *v.* Hosea, 5 Harr. 232.

Indiana.— Sandford *v.* Freeman, 5 Ind. 129.

Iowa.— Allen *v.* Platt, 79 Iowa 113, 44 N. W. 240; Barker *v.* Guilliam, 5 Iowa 510.

Massachusetts.— Foster *v.* Clark, 19 Pick. 329.

Minnesota.— Brewster *v.* Leith, 1 Minn. 56.

Mississippi.—Barnes *v.* Moody, 5 How. 636, 37 Am. Dec. 172.

Missouri.— Ashby *v.* Dillon, 19 Mo. 619; Given *v.* Corse, 20 Mo. App. 132.

New Hampshire.— Mandigo *v.* Healey, 69 N. H. 94, 45 Atl. 318.

New York.— Stern *v.* Drinker, 2 E. D. Smith 401; Smith *v.* Weed, 20 Wend. 184, 32 Am. Dec. 525.

North Carolina.— Oldham *v.* Kerchner, 79 N. C. 106, 28 Am. Rep. 302.

Pennsylvania.— Giles *v.* Ackles, 9 Pa. St. 147, 49 Am. Dec. 551; Brice *v.* Clark, 8 Pa. St. 301.

South Carolina.— Adkinson *v.* Barfield, 1 McCord 575.

England.—Smith *v.* Algaer, 1 B. & Ad. 603, 9 L. J. K. B. O. S. 79, 20 E. C. L. 616.

See 11 Cent. Dig. tit. "Contracts," § 320.

75. Fulton *v.* Loughlin, 118 Ind. 286, 20 N. E. 796; Whitney *v.* Clary, 145 Mass. 156, 13 N. E. 393; Carpenter *v.* Page, 144 Mass. 315, 10 N. E. 853.

76. Smith *v.* Monteith, 2 D. & L. 358, 9 Jur. 310, 14 L. J. Exch. 22, 13 M. & W. 427. And see *infra*, IV, D, 11, j, note 33.

77. Constant *v.* Rochester University, 111 N. Y. 604, 19 N. E. 631, 20 N. Y. St. 211, 7 Am. St. Rep. 769, 2 L. R. A. 734; Erie County Sav. Bank *v.* Coit, 104 N. Y. 532, 11 N. E. 54.

78. Ashburne *v.* Gibson, 9 Port. (Ala.) 549; Coleman *v.* Frum, 4 Ill. 378; Thompson *v.* Nelson, 28 Ind. 431; Ahshire *v.* Mather, 27 Ind. 381; Clarke *v.* McFarland, 5 Dana (Ky.) 45.

79. Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647.

80. Hancock *v.* Hodgson, 4 Ill. 329; Burr *v.* Wilcox, 13 Allen (Mass.) 269.

81. Gove *v.* Newton, 58 N. H. 359.

82. Vinal *v.* Richardson, 13 Allen (Mass.) 521.

83. Sickles *v.* Herold, 11 Misc. (N. Y.) 583, 32 N. Y. Suppl. 1083, 66 N. Y. St. 337.

84. *Iowa.*— Burke *v.* Dillin, 92 Iowa 557, 61 N. W. 370.

Michigan.— Burchard *v.* Frazer, 23 Mich. 224.

Minnesota.—Streeter *v.* Smith, 31 Minn. 52, 16 N. W. 460.

Missouri.— Chiles *v.* Wallace, 83 Mo. 84.

New York.— Prime *v.* Kochler, 77 N. Y.

promise by sureties on a guardian's bond not to institute legal proceedings to procure their discharge.[85] The cause of action need not exist at the time, but it is sufficient that it may come into existence.[86]

(II) *Different Views as to Existence of Right to Sue* — (A) *View That Right Must Be Perfect.* There is a difference of opinion in the courts as to when and under what circumstances one has a right to sue, so as to make his forbearance to sue a consideration. The early English cases were to the effect that one has a right to sue only when his claim is actually in law a valid claim, and that forbearance to sue upon an unfounded claim can never support a promise given therefor, for the reason that forbearance to sue a claim not legally enforceable can be no detriment.[87] This view has, as we shall see, been overruled in England by modern decisions, but there are a few American cases which seem to support it.[88]

(B) *View That Right Must Be Reasonably Doubtful.* The principle followed in other cases is that one has a right to sue where his claim is reasonably doubtful, and that forbearance to enforce a claim which might reasonably be thought doubtful is a sufficient consideration,[89] on the ground that "the reality of

91 [*affirming* 7 Daly 345]; Audas *v.* Nelson, 64 Barb. 362; Haggerty *v.* Allaire Works, 5 Sandf. 230.

Ohio.—Anderson *v.* Lanterman, 27 Ohio St. 104.

Virginia.— Colgin *v.* Henley, 6 Leigh 85.

See 11 Cent. Dig. tit. "Contracts," § 321.

85. Drury *v.* Fay, 14 Pick. (Mass.) 326.

86. Hamaker *v.* Eberley, 2 Binn. (Pa.) 506, 4 Am. Dec. 477.

87. Wade *v.* Simeon, 2 C. B. 548, 564, 3 D. & L. 587, 10 Jur. 412, 15 L. J. C. P. 114, 52 E. C. L. 548, where it was said: "Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain." See also Graham *v.* Johnson, L. R. 8 Eq. 36, 38 L. J. Ch. 374, 20 L. T. Rep. N. S. 77, 17 Wkly. Rep. 810; Tooley *v.* Windham, Cro. Eliz. 206; Stone *v.* Wythipol, Cro. Eliz. 126; Jones *v.* Ashburnham, 4 East 455, 1 Smith K. B. 188; Edwards *v.* Baugh, 11 M. & W. 641, 1 D. & L. 304, 7 Jur. 607, 12 L. J. Exch. 426; Barber *v.* Fox, 2 Saund. 136; Loyd *v.* Lee, 1 Str. 94; Rosyer *v.* Langdale, Styles 248; Hunt *v.* Swain, T. Raym. 127; Smith *v.* Jones, Yelv. 184.

88. *Alabama.*—Clark *v.* Jones, 85 Ala. 127, 4 So. 771; Prater *v.* Miller, 25 Ala. 320, 60 Am. Dec. 521; Martin *v.* Black, 20 Ala. 309.

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Sweitzer *v.* Heasley, 13 Ind. App. 567, 41 N. E. 1064.

Iowa.— Bower *v.* Deideker, 38 Iowa 418.

Kentucky.— Eblin *v.* Miller, 78 Ky. 371.

Maryland.— Emmittsburg R. Co. *v.* Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Schroeder *v.* Fink, 60 Md. 436; Ecker *v.* McAllister, 54 Md. 362.

Massachusetts.— Palfrey *v.* Portland, etc., R. Co., 4 Allen 55.

Minnesota.— Sharpe *v.* Rogers, 12 Minn. 174.

Mississippi.— Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504; Newell *v.* Fisher, 11 Sm. & M. 431, 49 Am. Dec. 66.

Missouri.— Long *v.* Towl, 42 Mo. 545.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

Oregon.— Oregon, etc., R. Co. *v.* Potter, 5 Oreg. 228.

Pennsylvania.— Bollinger *v.* Gallagher, 170 Pa. St. 84, 32 Atl. 569; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387.

Tennessee.—Shuder *v.* Newby, 85 Tenn. 348, 3 S. W. 438.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

89. *Alabama.*— Russell *v.* Wright, 98 Ala. 652, 13 So. 594; Ware *v.* Morgan, 67 Ala. 461; Martin *v.* Black, 20 Ala. 309.

Arkansas.— Matthews *v.* Morris, 31 Ark. 222.

Colorado.— Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125.

Connecticut.— Sage *v.* Wilcox, 6 Conn. 81; Tuttle *v.* Bigelow, 1 Root 108, 1 Am. Dec. 35.

Illinois.— Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Honeyman *v.* Jarvis, 79 Ill. 318; Mulholland *v.* Bartlett, 74 Ill. 58; Hund *v.* Geier, 72 Ill. 393; Scott *v.* White, 71 Ill. 287; Miller *v.* Hawker, 66 Ill. 185; McKinley *v.* Watkins, 13 Ill. 140.

Indiana.— U. S. Mortg. Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88.

Iowa.— Lucy *v.* Price, 39 Iowa 26; Adams *v.* Morton, 37 Iowa 255.

Kentucky.—Newton *v.* Carson, 80 Ky. 309; Cline *v.* Templeton, 78 Ky. 550; Fisher *v.* May, 2 Bibb 448, 5 Am. Dec. 626.

Louisiana.— Peirce *v.* New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448.

Maryland.— Emmittsburg R. Co. *v.* Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Ecker *v.* McAllister, 54 Md. 362; McClellan *v.* Kennedy, 8 Md. 230.

Massachusetts.— Prout *v.* Pittsfield Fire Dist., 154 Mass. 450, 28 N. E. 679; Abbott *v.* Fisher, 124 Mass. 414; Vinal *v.* Richardson, 13 Allen 521; Robinson *v.* Gould, 11 Cush.

the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." [90]

(c) *Claims Clearly Unenforceable.* From this it is clear that if the right is not doubtful there is no consideration, for there is neither benefit to the promisor nor detriment to the promisee, and therefore forbearance or a promise to forbear to insist on a claim clearly unenforceable cannot be a consideration.[91] This is

55; Adams *v.* Wilson, 12 Metc. 138, 45 Am. Dec. 240.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593; Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647; Gates *v.* Shutts, 7 Mich. 127; Van Dyke *v.* Davis, 2 Mich. 144; Weed *v.* Terry, 2 Dougl. 344, 45 Am. Dec. 257; Rood *v.* Jones, 1 Dougl. 188.

Missouri.— Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385; Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355; Mullanphy *v.* Riley, 10 Mo. 489; Valle *v.* Picton, 16 Mo. App. 178.

New Hampshire.— Flannagan *v.* Kilcome, 58 N. H. 443.

New Jersey.—Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157; Meyers *v.* Hockenbury, 34 N. J. L. 346; Rue *v.* Meirs, 43 N. J. Eq. 377, 12 Atl. 369.

New York.— White *v.* Hoyt, 73 N. Y. 505; Crans *v.* Hunter, 28 N. Y. 389; Scott *v.* Warner, 2 Lans. 49; Beadle *v.* Whitlock, 64 Barb. 287; Keeler *v.* Salisbury, 27 Barb. 485.

Ohio.— Ford *v.* Rehman, Wright 434.

Pennsylvania.— Gormly *v.* Gormly, 130 Pa. St. 467, 18 Atl. 727; Collins *v.* Barnes, 83 Pa. St. 15; Spangler *v.* Springer, 22 Pa. St. 454; Logan *v.* Mathews, 6 Pa. St. 417; Silvis *v.* Ely, 3 Watts & S. 420; Perkins *v.* Gay, 3 Serg. & R. 327, 7 Am. Dec. 653; Hamaker *v.* Eberley, 2 Binn. 506, 4 Am. Dec. 477.

Rhode Island.— Anthony *v.* Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Vermont.— Bellows *v.* Sowles, 55 Vt. 391, 45 Am. Rep. 291; Blake *v.* Peck, 11 Vt. 483.

West Virginia.—Korne *v.* Korne, 30 W. Va. 1, 3 S. E. 17.

Wisconsin.— Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14.

England.— Wilby *v.* Elgee, L. R. 10 C. P. 497, 44 L. J. C. P. 254, 32 L. T. Rep. N. S. 310; Bracewell *v.* Williams, L. R. 2 C. P. 196, 12 Jur. N. S. 215, 15 Wkly. Rep. 130; Skeate *v.* Beale, 11 A. & E. 983, 4 Jur. 766, 9 L. J. Q. B. 233, 3 P. & D. 587, 39 E. C. L. 516; Haigh *v.* Brooks, 10 A. & E. 309, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180; Longridge *v.* Dorville, 5 B. & Ald. 117, 7 E. C. L. 74; Cook *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; *Ex p.* Banner, 17 Ch. D. 480; Keenan *v.* Handley, 2 De G. J. & S. 283, 10 Jur. N. S. 906, 10 L. T. Rep. N. S. 800, 12 Wkly. Rep. 1021, 67 Eng. Ch. 221; Matter of Midland Union, etc., R. Co., 4 De G. M. & G. 356, 17 Jur. 1143, 22 L. J. Ch. 732, 53 Eng. Ch. 279; Llewellyn *v.* Llewellyn, 3 D. & L. 318, 9 Jur. 991, 15 L. J. Q. B. 4; Edwards *v.* Baugh, 1 D. & L. 304, 7 Jur. 607, 12 L. J. Exch. 426, 11 M. & W. 641; Atlee *v.* Backhouse, 1 H. & H. 135, 7 L. J. Exch. 234, 3 M. & W. 633; Orrell *v.* Coppock, 2 Jur. N. S. 1244, 26 L. J. Ch. 269, 5 Wkly. Rep. 185.

90. Bow, L. J., in Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 291, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669.

91. *Alabama.*— Martin *v.* Black, 20 Ala. 309.

Illinois.—McKinley *v.* Watkins, 13 Ill. 140; Bates *v.* Sandy, 27 Ill. App. 552.

Indiana.— Moon *v.* Martin, 122 Ind. 211, 23 N. E. 668.

Kansas.— Price *v.* Atchison First Nat. Bank, 62 Kan. 743, 64 Pac. 639.

Kentucky.— Cline *v.* Templeton, 78 Ky. 550; Fisher *v.* May, 2 Bibb 448, 5 Am. Dec. 626; Stitzel *v.* Hofheimer, 11 Ky. L. Rep. 330.

Maryland.—Schroeder *v.* Fink, 60 Md. 436; Smith *v.* Easton, 54 Md. 138.

Massachusetts.— Dunham *v.* Johnson, 135 Mass. 310.

Minnesota.— Demars *v.* Musser-Sauntry Land, etc., Co., 37 Minn. 418, 35 N. W. 1.

Mississippi.— Gunning *v.* Royal, 59 Miss. 45, 42 Am. Rep. 350; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

Missouri.— Winter *v.* Kansas City Cable R. Co., 160 Mo. 159, 61 S. W. 606; Baker *v.* Phœnix Assur. Co., 57 Mo. App. 559.

New Hampshire.—Haynes *v.* Thom, 28 N. H. 386; New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

New Jersey.— Rue *v.* Meirs, 43 N. J. Eq. 377, 12 Atl. 369.

New York.— Feeter *v.* Weber, 78 N. Y. 334; Gould *v.* Armstrong, 2 Hall 266; Russell *v.* Cook, 3 Hill 504.

Oklahoma.— Duck *v.* Antle, 5 Okla. 152, 47 Pac. 1056.

Oregon.— Oregon, etc., R. Co. *v.* Potter, 5 Oreg. 228.

Pennsylvania.— Luken's Appeal, 143 Pa. St. 386, 22 Atl. 892, 13 L. R. A. 581.

Texas.— Von Brandenstein *v.* Ebensberger, 71 Tex. 267, 9 S. W. 153.

Vermont.— Flagg *v.* Walker. Brayt. (Vt.) 24.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

England.— Graham *v.* Johnson, L. R. 8 Eq. 36, 38 L. J. Ch. 374, 20 L. T. Rep. N. S. 77, 17 Wkly. Rep. 810; Thomson *v.* Eastwood, 2 App. Cas. 215; Cook *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; Kaye *v.* Dutton, 2 D. & L. 291, 8 Jur. 910, 13 L. J. C. P. 183, 7 M. & G. 807, 8 Scott N. R. 495, 49 E. C. L. 807; Edwards *v.* Baugh, 1 D. & L.

true for example of a promise to forbear from claims under an illegal contract, such as a gambling contract or one involving the commission of a crime;[92] one which is unenforceable under the statute of frauds;[93] or one which is without consideration[94] or which is barred by the statute of limitations;[95] or the discontinuance of a vexatious lawsuit brought to harass the attorneys of an infant who have obtained a final judgment against a railroad company, and to delay the collection thereof.[96]

(D) *View That Claim Must Be Bona Fide.* A third view is that one has a right to sue when he believes that he has a good cause of action, that it is enough if the plaintiff can show that at the defendant's request he forbore to prosecute a claim which he believed to be well founded, and that it is no answer to show that the claim was not well founded or was not even reasonably doubtful.[97]

d. Right May Be Against Third Person. The waiver of a right or forbearance to sue may be in respect to a liability or debt of a third person and not of the promisor,[98] for as we have seen a benefit to a third person is sufficient considera-

304, 7 Jur. 607, 12 L. J. Exch. 426, 11 M. & W. 641; Herring *v.* Dorell, 8 Dowl. P. C. 604; Cowper *v.* Green, 10 L. J. Exch. 346, 7 M. & W. 633; Barber *v.* Fox, 2 Saund. 136.

92. North *v.* Forest, 15 Conn. 400; Voorhees *v.* Reed, 17 Ill. App. 21; Lindsey *v.* Sellers, 26 Misc. (N. Y.) 169; Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269.

Promise not to disclose matters defamatory to another.— Brown *v.* Brine, 1 Ex. D. 5, 45 L. J. Exch. 129, 33 L. T. Rep. N. S. 703, 24 Wkly. Rep. 177.

93. De Moss *v.* Robinson, 46 Mich. 62, 8 N. W. 712, 41 Am. Rep. 144; Silvernail *v.* Cole, 12 Barb. (N. Y.) 685; Allen *v.* Scarff, 1 Hilt. (N. Y.) 209; Cleves *v.* Willoughby, 7 Hill (N. Y.) 83; Nichols *v.* Mitchell, 30 Wis. 329; Hooker *v.* Knab, 26 Wis. 511. *Contra*, Farnham *v.* O'Brien, 22 Me. 475. And see FRAUDS, STATUTE OF.

94. Lang *v.* Johnson, 24 N. H. 302.

95. Taylor *v.* Weeks, (Mich. 1901) 88 N. W. 466.

96. Winter *v.* Kansas City Cable R. Co., 160 Mo. 159, 61 S. W. 606.

97. This is the latest English doctrine, dating from the case of Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 452, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127, decided in 1870, where it is said: "If he [a man] *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. . . . It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, obtained an advantage under it: in that case his conduct would be fraudulent." See also Cook *v.* Wright, 1 B. & S. 559, 7 Jur. N. S. 121, 30 L. J. Q. B. 321, 4 L. T. Rep. N. S. 704, 101 E. C. L. 559; Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266, 55 L. J. Ch. 801, 54 L. T. Rep. N. S. 582, 34 Wkly. Rep. 669; Ockford *v.* Barelli, 25 L. T. Rep. N. S. 504, 20 Wkly. Rep. 116; Kingsford *v.* Oxenden, 55 J. P. 789.

American cases.— This doctrine has been followed in a few American cases.

Georgia.— Morris *v.* Monroe, 30 Ga. 630.

Illinois.— Ostrander *v.* Scott, 161 Ill. 339; Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588.

Michigan.— Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Minnesota.— Hansen *v.* Gaar, 63 Minn. 94, 65 N. W. 254.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

New York.— Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 5 L. R. A. 623.

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 35 L. ed. 860; Union Bank *v.* Geary, 5 Pet. 99, 8 L. ed. 60; Llano Imp., etc., Co. *v.* Pacific Imp. Co., 66 Fed. 526, 13 C. C. A. 625.

98. *Alabama.*— Riddle *v.* Hanna, 25 Ala. 484; Martin *v.* Black, 20 Ala. 309.

Arkansas.— Logan *v.* Lee, 10 Ark. 585.

California.— Barringer *v.* Warden, 12 Cal. 311.

Indiana.— Worley *v.* Sipe, 111 Ind. 238, 12 N. E. 385.

Kentucky.— Newton *v.* Carson, 80 Ky. 309.

Maine.— Russell *v.* Babcock, 14 Me. 138; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266.

Maryland.— Webster *v.* Le Compte, 74 Md. 249, 22 Atl. 232; Bowen *v.* Tipton, 64 Md. 275, 1 Atl. 861; Cook *v.* Duvall, 9 Gill. 460.

Massachusetts.— Howe *v.* Taggart, 133 Mass. 284; Boyd *v.* Freize, 5 Gray 553; Jennison *v.* Stafford, 1 Cush. 168, 48 Am. Dec. 594; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593; Rood *v.* Jones, 1 Dougl. 188.

Nebraska.— Mathews *v.* Seaver, 34 Nebr. 592, 52 N. W. 283.

tion for a promise.[99] Thus an agreement to forbear to sue a debtor is a valid consideration for the promise of a third person to pay the debt.[1] The same is true of a promise not to institute bankruptcy proceedings against a third person,[2] of a promise to stay or discontinue, or the staying or discontinuing, of legal proceedings begun against a third party,[3] or the release of a claim against a third person.[4]

e. Promise to Forbear and Actual Forbearance. An agreement to forbear is sometimes necessary. Mere forbearance to sue without any agreement to that effect is not a sufficient consideration for a promise of another to pay the debt of the person liable, and it can make no difference that the act of forbearance was induced by the promise.[5] But actual forbearance without a promise to forbear is sufficient, if such forbearance be at the request of the promisor and in reliance on his promise.[6] And actual forbearance is evidence of an agreement to forbear.[7] An agreement to forbear bringing a suit which is not binding because it is for no definite time and for no valid consideration,[8] is not binding on the

New Jersey.— Meyers *v.* Hockenbury, 34 N. J. L. 346.

New York.— Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506 [*affirming* 55 Hun 608, 8 N. Y. Suppl. 683, 29 N. Y. St. 373]; Erie County Sav. Bank *v.* Coit, 104 N. Y. 532, 11 N. E. 54; Honsinger *v.* Mulford, 90 Hun 589, 35 N. Y. Suppl. 986, 70 N. Y. St. 561; Forrest *v.* Parker, 14 Daly 208, 6 N. Y. St. 274; Elting *v.* Vanderlyn, 4 Johns. 237.

North Carolina.— New Hanover Bank *v.* Bridgers, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317.

Pennsylvania.— Kuns *v.* Young, 34 Pa. St. 60; Shupe *v.* Galbraith, 32 Pa. St. 10; Cobb *v.* Page, 17 Pa. St. 469; Giles *v.* Ackler, 9 Pa. St. 147, 49 Am. Dec. 551; Brice *v.* Clark, 8 Pa. St. 301; Silvis *v.* Ely, 3 Watts & S. 420; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387.

South Carolina.— McCelvy *v.* Noble, 13 Rich. 330; Thomas *v.* Croft, 2 Rich. 113, 44 Am. Dec. 279; McElvee *v.* Story, 1 Rich. 9; Fyler *v.* Givens, Riley 56; Corbett *v.* Cochran, Riley 44, 30 Am. Dec. 348.

Tennessee.— Cathcart *v.* Thomas, 8 Baxt. 172; Tappan *v.* Campbell, 9 Yerg. 436; Randle *v.* Harris, 6 Yerg. 508.

Vermont.— Templeton *v.* Bascom, 33 Vt. 132; Barlow *v.* Smith, 4 Vt. 139.

Wyoming.— Bolen *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898.

United States.— *In re* Burchell, 4 Fed. 406.

See 11 Cent. Dig. tit. "Contracts," § 334 *et seq.*

99. See *supra*, IV, D, 4.

1. *Alabama.*—Martin *v.* Black, 20 Ala. 309.

Kentucky.— Newton *v.* Carson, 80 Ky. 309.

Maryland.— Bowen *v.* Tipton, 64 Md. 275, 1 Atl. 861.

Massachusetts.— Howe *v.* Taggart, 133 Mass. 284; Boyd *v.* Freize, 5 Gray 553.

Michigan.— Rood *v.* Jones, 1 Dougl. 188.

New York.— Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506; Watson *v.* Randall, 20 Wend. 201.

Pennsylvania.— Kuns *v.* Young, 34 Pa. St. 60; Shupe *v.* Galbraith, 32 Pa. St. 10; Silvis *v.* Ely, 3 Watts & S. 420; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387.

South Carolina.— McCelvy *v.* Noble, 13 Rich. 330; Thomas *v.* Croft, 2 Rich. 113, 44 Am. Dec. 279; Fyler *v.* Givens, Riley 56.

Tennessee.— Tappan *v.* Campbell, 9 Yerg. 436.

See 11 Cent. Dig. tit. "Contracts," § 337.

2. Ecker *v.* McAllister, 45 Md. 290, 54 Md. 362; Ecker *v.* Bohn, 45 Md. 278.

3. Bowen *v.* Tipton, 64 Md. 275, 1 Atl. 861; Van Campen *v.* Ford, 3 Silv. Supreme (N. Y.) 375, 6 N. Y. Suppl. 139, 25 N. Y. St. 464; Brownell *v.* Harsh, 29 Ohio St. 631; McKelvy *v.* Wilson, 9 Pa. St. 183.

4. *Alabama.*— Riddle *v.* Hanna, 25 Ala. 484.

Arkansas.— Logan *v.* Lee, 10 Ark. 585.

California.— Barringer *v.* Warden, 12 Cal. 311.

South Carolina.— Corbett *v.* Cochran, Riley Eq. 44, 30 Am. Dec. 348.

Tennessee.— Randle *v.* Harris, 6 Yerg. 508.

See 11 Cent. Dig. tit. "Contracts," § 334.

5. Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403; Manter *v.* Churchill, 127 Mass. 231; Cobb *v.* Page, 17 Pa. St. 469; Bieber *v.* Beck, 6 Pa. St. 198; Rix *v.* Adams, 9 Vt. 233, 31 Am. Dec. 619.

Future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors, made without reference to such forbearance. Steadman *v.* Guthrie, 4 Metc. (Ky.) 147.

Agreement to forbear without forbearance see Steadman *v.* Guthrie, 4 Metc. (Ky.) 147.

6. Edgerton *v.* Weaver, 105 Ill. 43; Crears *v.* Hunter, 19 Q. B. D. 341, 56 L. J. Q. B. 518, 57 L. T. Rep. N. S. 554, 35 Wkly. Rep. 821; Wilby *v.* Elgee, L. R. 10 C. P. 497, 44 L. J. C. P. 254, 32 L. T. Rep. N. S. 310; Morton *v.* Burn, 7 A. & E. 19, 34 E. C. L. 36; Alliance Bank *v.* Broom, 2 Dr. & Sm. 289, 10 Jur. N. S. 1121, 34 L. J. Ch. 256, 11 L. T. Rep. N. S. 332, 13 Wkly. Rep. 127.

7. Boyd *v.* Freize, 5 Gray (Mass.) 553.

8. See Reynolds *v.* Lofland, 3 Harr. (Del.) 366; Lovett *v.* King, 16 Ind. 464; Lemaster *v.* Burkhart, 2 Bibb (Ky.) 25.

person in whose favor it is made merely because it is fully complied with by the party making it.[9]

f. Mutual Promises to Forbear. Mutual promises[10] of forbearance are always sufficient to support each other,[11] as in the case of a promise not to sue in consideration of a promise not to plead the statute of limitations;[12] a promise to waive the right of appeal from a decree construing a will, in consideration of a promise to consent to the immediate distribution of the estate;[13] a promise to postpone an execution which has been issued on a judgment fraudulently entered in consideration of a promise that a motion shall not be made to set aside the judgment;[14] a promise by one who has appealed from a judgment in another's favor not to procure a supersedeas after a certain term of the court which rendered the judgment, or that he will pay the judgment at that time if he does not procure a supersedeas in the meantime, in consideration of a promise to return the execution issued under the judgment unsatisfied.[15]

g. Time of Forbearance. It is no objection to the validity of the defendant's agreement that there was no particular time specified as the period for forbearance. The law presumes that it was to be for a reasonable time.[16] If the forbearance is actually for a reasonable time it is a sufficient consideration.[17] And there is a consideration in case of forbearance to sue on a note until after the maker's death,[18] and in case of the guaranty of the payment of a debt on a stated day in consideration of forbearance, it being construed as meaning forbearance until the day stated for payment.[19] A note payable at a future date given for a present debt is evidence of an agreement to suspend the remedy for the debt until the note is due.[20] On the other hand a promise to forbear for such time as the plain-

9. Henry *v.* Gilliland, 103 Ind. 177, 2 N. E. 360.

10. Mutual promises generally see *supra*, IV, D, 10.

11. Stearns *v.* Barnett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Ware *v.* Langmade, 9 Ohio Cir. Ct. 85, 6 Ohio Cir. Dec. 43; Williams *v.* Poppleton, 3 Oreg. 139.

12. Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555.

13. Mackey *v.* Daniel, 59 Md. 484.

14. Read *v.* French, 28 N. Y. 285.

15. Given *v.* Corse, 20 Mo. App. 132.

16. *Alabama.*— Martin *v.* Black, 20 Ala. 309.

Kentucky.— Foard *v.* Grinter, (1892) 18 S. W. 1034.

Maine.— Moore *v.* McKenney, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266.

Maryland.— Bowen *v.* Tipton, 64 Md. 275, 1 Atl. 861.

Massachusetts.— Howe *v.* Taggart, 133 Mass. 284; Boyd *v.* Freize, 5 Gray 553.

Missouri.— Chiles *v.* Wallace, 83 Mo. 84.

Michigan.— Calkins *v.* Chandler, 36 Mich. 320, 24 Am. Rep. 593; Rood *v.* Jones, 1 Dougl. 188.

New York.— Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330, 63 N. Y. St. 701; Traders' Nat. Bank *v.* Parker, 130 N. Y. 415, 29 N. E. 1094, 42 N. Y. St. 506; Elting *v.* Vanderlyn, 4 Johns. 237.

Pennsylvania.— Downing *v.* Funk, 5 Rawle 69.

Vermont.— Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Hakes *v.* Hotchkiss, 23 Vt. 231.

England.— Alliance Bank *v.* Broom, 2 Dr. & Sm. 289, 10 Jur. N. S. 1121, 34 L. J. Ch. 256, 11 L. T. Rep. N. S. 332, 13 Wkly. Rep. 27; Oldershaw *v.* King, 2 H. & N. 399 [*reversed* in 2 H. & N. 517, 3 Jur. N. S. 1152, 27 L. J. Exch. 120, 5 Wkly. Rep. 753].

See 11 Cent. Dig. tit. "Contracts," § 335 *et seq.*

It was formerly held that a promise to forbear for an unspecified time was insufficient. Garnett *v.* Kirkman, 33 Misc. (N. Y.) 389; Clark *v.* Russell, 3 Watts (Pa.) 213, 27 Am. Dec. 348; Sidwell *v.* Evans, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 387; Payne *v.* Wilson, 7 B. & C. 423, 6 L. J. K. B. O. S. 107, 1 M. & R. 708, 14 E. C. L. 193; Simple *v.* Pink, 1 Exch. 74, 16 L. J. Exch. 237.

17. McMicken *v.* Safford, 197 Ill. 540, 64 N. E. 540 [*affirming* 100 Ill. App. 102]; Morgan *v.* Park Nat. Bank, 44 Ill. App. 582; Sidwell *v.* Evans, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 381. *Contra*, if it is not. Lonsdale *v.* Brown, 4 Wash. (U. S.) 148, 15 Fed. Cas. No. 8,494.

18. Williamson *v.* McGill, 8 Ohio Dec. (Reprint) 185, 6 Cinc. L. Bul. 202.

19. Payne *v.* Wilson, 7 B. & C. 423, 6 L. J. K. B. O. S. 107, 1 M. & R. 708, 14 E. C. L. 193; Rolt *v.* Cozens, 18 C. B. 673, 2 Jur. N. S. 1073, 25 L. J. C. P. 254, 86 E. C. L. 673. See Lonsdale *v.* Brown, 14 Wash. (U. S.) 148, 15 Fed. Cas. No. 8,494, where a promise to pay in consideration of forbearance when defendant should be able is construed until he is able.

20. Balfour *v.* Sea Fire L. Assur. Co., 3 C. B. N. S. 300, 3 Jur. N. S. 1304, 27 L. J. C. P. 17, 6 Wkly. Rep. 19, 91 E. C. L. 300;

tiff shall elect is not good, for it imposes no obligation to forbear for any length of time.[21] But the mere withdrawal of a petition or a caveat is sufficient, even though a new suit may be begun at once.[22]

h. Compromise of Claims. A distinction has been suggested between the compromise of a claim as consideration and forbearance to sue upon a claim of a definite amount;[23] but generally the text-writers and courts have made no such distinction, but have applied the same rule in both cases.[24] The compromise of a disputed claim may uphold a promise, although the demand was unfounded.[25] For example where an action has been commenced by a landlord against his tenant for damages for misuser and bad cultivation, an arrangement by which the

Baker *v.* Walker, 14 M. & W. 465, 3 D. & L. 46, 14 L. J. Exch. 371.

21. Strong *v.* Sheffield, 144 N. Y. 392, 39 N. E. 330, 63 N. Y. St. 701.

An agreement to forbear for a "short time" would not be a good consideration, as the promisor might bring suit in an hour after the promise was made. Gates *v.* Hackethal, 57 Ill. 534, 11 Am. Rep. 45; Sidwell *v.* Evans, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 387.

A promise to "wait awhile" with actual forbearance for five years was held sufficient in Cathcart *v.* Thomas, 8 Baxt. (Tenn.) 172. See also Cook *v.* Duvall, 9 Gill (Md.) 460, where the promise was to "wait a few days."

22. St. Mark's Church *v.* Teed, 120 N. Y. 583, 24 N. E. 1014, 31 N. Y. St. 908; Harris *v.* Venables, L. R. 7 Exch. 235, 41 L. J. Exch. 180, 26 L. T. Rep. N. S. 437, 20 Wkly. Rep. 974.

23. Anson Contr. (Huffcut ed.) 99 note.

24. Anson Contr. 83. And see the following cases:

Illinois.— McDole *v.* Kingsley, 163 Ill. 433, 45 N. E. 281; Mulholland *v.* Bartlett, 74 Ill. 58.

Kansas.—Price *v.* Atchison First Nat. Bank, 62 Kan. 743, 64 Pac. 639.

Mississippi.— Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642.

New York.— Russell *v.* Cook, 3 Hill 504.

Rhode Island.— Good Fellows *v.* Campbell, 17 R. I. 402, 22 Atl. 307.

Vermont.— Bellows *v.* Sowles, 57 Vt. 164, 52 Am. Rep. 118.

Wisconsin.— Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884.

See 11 Cent. Dig. tit. "Contracts," § 328 *et seq.*

Forbearance to sue see *supra*, IV, D, 11, c.

25. *Alabama.*— Bozeman *v.* Rushing, 51 Ala. 529; Allen *v.* Prater, 30 Ala. 458.

Arkansas.— Burton *v.* Baird, 44 Ark. 556; Mason *v.* Wilson, 43 Ark. 172; Richardson *v.* Comstock, 21 Ark. 69.

California.— McClure *v.* McClure, 100 Cal. 339, 34 Pac. 822.

District of Columbia.— Northern Liberty Market Co. *v.* Steubner, 4 Mackey 301.

Illinois.— Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295; Honeyman *v.* Jarvis, 79 Ill. 318; Miller *v.* Hawker, 66 Ill. 185; Knotts *v.* Preble, 50 Ill. 226, 99 Am. Dec. 514; Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270; Lawrence *v.* Coddington, 52 Ill. App. 133; Knowles *v.* Knowles, 29 Ill. App. 124 [*affirmed* in 128 Ill. 110, 21 N. E. 196]; Chicago, etc., R. Co. *v.* Lammert, 19 Ill. App. 135.

Indiana.— Jones *v.* Rittenhouse, 87 Ind. 348.

Iowa.— Richardson, etc., Co. *v.* Hampton Independent Dist., 70 Iowa 573, 31 N. W. 871; Adams *v.* Morton, 37 Iowa 255.

Kansas.— Finley *v.* Funk, 35 Kan. 668, 12 Pac. 15.

Kentucky.— Fisher *v.* May, 2 Bibb 448, 5 Am. Dec. 626; Taylor *v.* Patrick, 1 Bibb 168. And see U. S. Building Assoc. *v.* Denny, 66 S. W. 622, 23 Ky. L. Rep. 2109.

Maryland.— Hartle *v.* Stahl, 27 Md. 157.

Massachusetts.— Doyle *v.* Dixon, 97 Mass. 208, 93 Am. Dec. 80. And see Dunbar *v.* Dunbar, 180 Mass. 170, 62 N. E. 248.

Mississippi.— Long *v.* Shackleford, 25 Miss. 559.

New Hampshire.— Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Brown *v.* Brown, 43 N. H. 279; Burnham *v.* Dunn, 35 N. H. 556.

New Jersey.— Grandin *v.* Grandin, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; Grant *v.* Chambers, 30 N. J. L. 323.

New York.— Lawrence *v.* Church, 128 N. Y. 324, 28 N. E. 499, 40 N. Y. St. 406 [*reversing* 10 N. Y. Suppl. 566, 32 N. Y. St. 751]; White *v.* Hoyt, 73 N. Y. 505; Farmers' Bank *v.* Blair, 44 Barb. 641; Morey *v.* Newfane, 8 Barb. 645; Stewart *v.* Ahrenfeldt, 4 Den. 189; Russell *v.* Cook, 3 Hill 504; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. 1. See Innes *v.* Ryan, 37 Misc. 806, 76 N. Y. Suppl. 921.

North Carolina.— Mayo *v.* Gardner, 49 N. C. 359.

Pennsylvania.— Burkholder's Appeal, 105 Pa. St. 31; Fleming *v.* Ramsey, 46 Pa. St. 252; O'Keson *v.* Barclay, 2 Penr. & W. 531; McClure *v.* Mausell, 4 Brewst. 119; Paxson *v.* Hewson, 14 Phila. 174, 37 Leg. Int. 50; Knittle *v.* Compton, 4 C. Pl. 117.

Vermont.— Green *v.* Seymour, 59 Vt. 459, 12 Atl. 206. And see Brandon *v.* Jackson, 74 Vt. 78, 52 Atl. 114.

United States.— Union Bank *v.* Geary, 5 Pet. 99, 8 L. ed. 60; Robson *v.* Mississippi River Logging Co., 43 Fed. 364.

England.— Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127.

litigation is to be stopped and the lease surrendered carries with it a sufficient consideration to support it.[26] On the other hand if the party knows or ought to know that the claim has no foundation it is not a consideration.[27]

i. Abandonment or Discontinuance of Proceedings. In an English case it is said in substance that where an action has been commenced, a promise made in consideration of staying proceedings is presumed against the promisor to have been well founded as "suits are not presumed causeless, and the promise argues cause in that he desired to stay off the suit."[28] But it is clear nevertheless that forbearance to continue a suit, knowing that one has no cause of action, will not differ from not bringing suit at all, and staying or dismissing such proceedings can be no consideration.[29] The dismissal of suits palpably unjust, it is said, forms no consideration for a promise. To make the settlement of assumed rights a sufficient consideration there must be at least an appearance of right sufficient to raise a possible doubt in favor of the party asserting the claim.[30] At the same time the abandonment, dismissal, or discontinuance of pending judicial proceedings is sustained as a consideration in a number of decided cases,[31] although the defendant might have prevailed in the suit.[32]

j. Discharge From Custody Under Writ. An agreement to discharge or the actual discharge of the promisor from custody under a writ of attachment or execution which is not void is a sufficient consideration.[33]

k. Relinquishment of Defenses or Rights in Suit. It is a sufficient consideration to relinquish or agree to relinquish a defense in a suit,[34] to waive the right to a jury trial,[35] to forbear or agree to forbear from contesting a judgment,[36] or to

See 11 Cent. Dig. tit. "Contracts," § 329. And see COMPROMISE AND SETTLEMENT; RELEASE.

26. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

27. *Michigan.*— Headley *v.* Hackley, 50 Mich. 43, 14 N. W. 693.

New Hampshire.— Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218.

New York.— Feeter *v.* Weber, 78 N. Y. 334; Sherman *v.* Barnard, 19 Barb. 291.

Vermont.— Ormsbee *v.* Howe, 54 Vt. 182, 41 Am. Rep. 841.

England.— Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 Wkly. Rep. 1127; Wade *v.* Simeon, 2 C. B. 548, 3 D. & L. 587, 10 Jur. 412, 15 L. J. C. P. 114, 52 E. C. L. 548.

See COMPROMISE AND SETTLEMENT; RELEASE.

28. Bedwell *v.* Catton, Hob. 300 [*cited* in Smith *v.* Monteith, 13 M. & W. 427, 440]. See also Gould *v.* Armstrong, 2 Hall (N. Y.) 266; Crowther *v.* Farrer, 15 Q. B. 677, 15 Jur. 535, 20 L. J. Q. B. 298, 69 E. C. L. 677; Tempson *v.* Knowles, 7 C. B. 651, 62 E. C. L. 651.

29. Wade *v.* Simeon, 2 C. B. 548, 3 D. & L. 587, 10 Jur. 412, 15 L. J. C. P. 114, 52 E. C. L. 548; Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266; *Ex p.* Banner, 17 Ch. D. 480.

30. Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355; Pitkin *v.* Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218.

31. *Illinois.*— Booth *v.* Wiley, 102 Ill. 84.

Mississippi.— Bryne *v.* Cummings, 41 Miss. 192; Commercial Bank *v.* Bonner, 13 Sm. & M. 649.

Nebraska.— Weilage *v.* Abbott, (Nebr. 1902) 90 N. W. 1128.

New Hampshire.— Bell *v.* New England Malt Co., 65 N. H. 25, 17 Atl. 1059.

New York.— Downer *v.* Church, 44 N. Y. 647.

Pennsylvania.—Tatem *v.* Harkness, 1 Phila. 287, 9 Leg. Int. 3.

Vermont.— Lamson *v.* Lamson, 52 Vt. 595; Hammond *v.* Cook, 25 Vt. 295.

Virginia.— Braxton *v.* Harrison, 11 Gratt. 30.

West Virginia.— Barbour County Ct. *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

32. Flannagan *v.* Kilcome, 58 N. H. 443.

33. *Maine.*— Kavanagh *v.* Saunders, 8 Me. 422.

Massachusetts.— Grimes *v.* Briggs, 110 Mass. 446.

New York.— Graydon *v.* Stone, 1 Edm. Sel. Cas. 221; Hinman *v.* Moulton, 14 Johns. 466; Doty *v.* Wilson, 14 Johns. 378.

Pennsylvania.— Snevily *v.* Reed, 9 Watts 396.

Vermont.— Page *v.* Thrall, 2 Vt. 448; Stevens *v.* Webb, 2 Vt. 344.

England.— Smith *v.* Monteith, 2 D. & L. 358, 9 Jur. 310, 14 L. J. Exch. 22, 13 M. & W. 427.

34. *Indiana.*— Piper *v.* Fosher, 121 Ind. 407, 23 N. E. 269.

Massachusetts.—Whitney *v.* Haverhill Mut. F. Ins. Co., 9 Allen 35.

Mississippi.— Byrne *v.* Cummings, 41 Miss. 192.

New York.— Marie *v.* Garrison, 13 Abb. N. Cas. 210.

United States.— Union Bank *v.* Geary, 5 Pet. 99, 8 L. ed. 60.

35. Lanahan *v.* Heaver, 77 Md. 605, 26 Atl. 866, 2 L. R. A. 759.

36. Smith *v.* Rogers, 35 Vt. 140.

abandon an appeal.[37] So also it is a sufficient consideration to agree to the adjournment of a suit.[38]

12. Promise to Do or Doing What Promisor Is Bound to Do — a. In General. A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore as a general rule the performance of, or promise to perform, an existing legal obligation is not a valid consideration.[39] This legal obligation may arise from (1) the law independent of contract or it may arise from (2) a subsisting contract.

b. Subsisting Obligation in Law. Where a party is under a duty created or imposed by law to do what he does or promises to do his act or promise is clearly of no value and is not a sufficient consideration for a promise given in return.[40] Thus since a public officer is at law required to perform his duties for his salary or other stated compensation, a promise to pay him more than this is founded on

37. Matthews *v.* Merrick, 4 Md. Ch. 364; Case *v.* Hawkins, 53 Miss. 702.

38. Richardson *v.* Brown, 1 Cow. (N. Y.) 255; Stewart *v.* McGuin, 1 Cow. (N. Y.) 99.

39. *Alabama.*— Johnson *v.* Sellers, 33 Ala. 265.

California.— Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. 862; Ellison *v.* Jackson Water Co., 12 Cal. 542.

Georgia.— Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. 886.

Illinois.— Phœnix Ins. Co. *v.* Rink, 110 Ill. 538; Crossman *v.* Wohlleben, 90 Ill. 537; Stuber *v.* Schack, 83 Ill. 191; Hennessey *v.* Hill, 52 Ill. 281; Voorhees *v.* Reed, 17 Ill. App. 21.

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Holmes *v.* Boyd, 90 Ind. 332; Reynolds *v.* Nugent, 25 Ind. 328.

Iowa.— Ayres *v.* Chicago, etc., R. Co., 52 Iowa 478, 3 N. W. 522.

Kansas.— Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163.

Kentucky.— Eblin *v.* Miller, 78 Ky. 371.

Maine.— Jenness *v.* Lane, 26 Me. 475.

Massachusetts.— Warren *v.* Hodge, 121 Mass. 106; Harriman *v.* Harriman, 12 Gray 341.

Missouri.— Tucker *v.* Bartle, 85 Mo. 114; Peck *v.* Hawes, 57 Mo. App. 467; Swaggin *v.* Hancock, 25 Mo. App. 596.

Nebraska.— Allen *v.* Plasmeyere, (Nebr. 1902) 90 N. W. 1125.

New Jersey.— Watts *v.* Frenche, 19 N. J. Eq. 407.

New York.— Tolhurst *v.* Powers, 133 N. Y. 460, 31 N. E. 326, 45 N. Y. St. 665; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Crosby *v.* Wood, 6 N. Y. 369; Tilden *v.* New York, 56 Barb. 340; Geer *v.* Archer, 2 Barb. 420; Bickhart *v.* Hoffmann, 19 N. Y. Suppl. 472, 46 N. Y. St. 886; McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431; Bartlett *v.* Wyman, 14 Johns. 260.

North Dakota.— Gaar *v.* Green, 6 N. D. 48, 68 N. W. 318.

Ohio.— Sherwin *v.* Brigham, 39 Ohio St. 137.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

England.— Crowther *v.* Farrer, 15 Q. B. 677, 15 Jur. 535, 20 L. J. Q. B. 298, 69 E. C. L. 677; Jones *v.* Waite, 5 Bing. N. Cas. 341, 35 E. C. L. 188; Shadwell *v.* Shadwell, 9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. Rep. N. S. 628, 9 Wkly. Rep. 163, 99 E. C. L. 159; Dixon *v.* Adams, Cro. Eliz. 538; Jackson *v.* Cobbin, 1 Dowl. N. S. 96, 10 L. J. Exch. 389, 8 M. & W. 790; Smart *v.* Chell, 7 Dowl. P. C. 781; Kent *v.* Pratt, Rolle Abr. 23.

See 11 Cent. Dig. tit. "Contracts," § 273 *et seq.*

40. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Arkansas.— Gerson *v.* Simmons, 30 Ark. 50.

Kentucky.— Lucas *v.* Allen, 80 Ky. 681.

Missouri.— Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 58 Mo. App. 17; Kansas City, etc., R. Co. *v.* Morley, 45 Mo. App. 304 (holding that a contract between a city contractor for the construction of a sewer in a street and a railway company having a right of way over the street that the contractor will pay the company for supporting its tracks while he builds the sewer is without consideration and void, since the railroad right of way is subject to the paramount right of the city to build the sewer, and it is incumbent on the company to protect its own tracks).

New York.— Tolhurst *v.* Powers, 133 N. Y. 460, 31 N. E. 326, 45 N. Y. St. 665; Horton *v.* Erie R. Co., 65 N. Y. App. Div. 587, 72 N. Y. Suppl. 1018 (holding that where a statute provided that railroad companies, on application, should issue mileage books good for five hundred or one thousand miles, entitling the holder to the same rights and privileges to which the highest class ticket issued by such corporation would entitle him, and a railroad company, on issuing a book to plaintiff, required him to sign a contract that it would be accepted for transportation only for journeys wholly within the state, such stipulation was without consideration and void, since it was the duty of the company to issue the book without other conditions than those prescribed by the statute); Delamater *v.* Rider, 11 Johns. 533.

Pennsylvania.— Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec. 572.

England.— Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. 177, 18

no consideration, for he is simply promising in return to do or is actually doing what he is bound to do.[41] The rule does not apply of course where what is done or promised by the officer is outside of the scope of his duties.[42] The principle also applies to a promise to a witness to pay him more than his legal fees;[43] a promise

Wkly. Rep. 92; Bridge *v.* Cage, Cro. Jac. 103.

See 11 Cent. Dig. tit. "Contracts," § 273 *et seq.*

41. *Kentucky.*— Lucas *v.* Allen, 80 Ky. 681; Trundle *v.* Riley, 17 B. Mon. 396; Mitchell *v.* Vance, 5 T. B. Mon. 528, 17 Am. Dec. 96.

Minnesota.— Warner *v.* Grace, 14 Minn. 487.

New York.— Downs *v.* McGlynn, 2 Hilt. 14; Hatch *v.* Mann, 15 Wend. 44. See Bloodgood *v.* Wuest, 69 N. Y. App. Div. 356, 74 N. Y. Suppl. 913.

Pennsylvania.— Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec. 572.

England.— Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. 177, 18 Wkly. Rep. 92; Waterhouse *v.* Keene, 4 B. & C. 200, 6 D. & R. 257, 10 E. C. L. 542; Morgan *v.* Palmer, 2 B. & C. 729, 4 D. & R. 283, 2 L. J. K. B. O. S. 145, 26 Rev. Rep. 537, 9 E. C. L. 317; Hills *v.* Street, 5 Bing. 37, 6 L. J. C. P. O. S. 215, 2 M. & P. 96, 15 E. C. L. 459; Trahern *v.* Gardner, 5 E. & B. 913, 2 Jur. N. S. 394, 25 L. J. Q. B. 201, 4 Wkly. Rep. 281, 85 E. C. L. 913; Steele *v.* Williams, 8 Exch. 625, 17 Jur. 464, 22 L. J. Exch. 225; Barnes *v.* Braithwaite, 2 H. & N. 569.

See OFFICERS.

Promise of additional compensation to sheriff for executing writ (Royle *v.* Busby, 6 Q. B. D. 171; Dew *v.* Parsons, 2 B. & Ald. 563, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164; Bridge *v.* Cage, Cro. Jac. 103; Bissicks *v.* Bath Colliery Co., 2 Ex. D. 459) or taking care of property (Deal *v.* Tower, 1 Phila. (Pa.) 268, 8 Leg. Int. (Pa.) 238; Padden *v.* Tronson, 45 Wis. 126).

Additional compensation to police officer for arrest.— Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec. 572.

Offer of reward.— It is generally held that a reward cannot be claimed by a public officer whose duty it was to do what the offer of reward offered him a premium for doing.

Alabama.— Morrell *v.* Quarles, 35 Ala. 544.

Arkansas.— St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 66.

California.— Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355.

Connecticut.— *In re* Russell, 51 Conn. 577, 50 Am. Rep. 55.

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Iowa.— Means *v.* Hendershott, 24 Iowa 78.

Kentucky.— Marking *v.* Needy, 8 Bush 22; Riley *v.* Grace, 33 S. W. 207, 17 Ky. L. Rep. 1007.

Massachusetts.— Pool *v.* Boston, 5 Cush. 219.

Minnesota.— Day *v.* Putnam Ins. Co., 16 Minn. 408.

Mississippi.— *Ex p.* Gore, 57 Miss. 251.

Missouri.— Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Thornton *v.* Missouri Pac. R. Co., 42 Mo. App. 58.

New York.— Hatch *v.* Mann, 15 Wend. 44; City Bank *v.* Bangs, 2 Edw. 95.

Ohio.— Gilmore *v.* Lewis, 12 Ohio 281.

Tennessee.— Stamper *v.* Temple, 6 Humphr. 113, 44 Am. Dec. 296.

See REWARDS.

42. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

California.— Harris *v.* More, 70 Cal. 502, 11 Pac. 780.

Illinois.— Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181.

Kentucky.— Trundle *v.* Riley, 17 B. Mon. 396.

Louisiana.— Pilie *v.* New Orleans, 19 La. Ann. 274.

Massachusetts.— Studley *v.* Ballard, 169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286, a promise to pay deputy sheriffs for obtaining information respecting violation of the liquor law, this being outside of the line of such officers.

Minnesota.— Warner *v.* Grace, 14 Minn. 487.

New York.— Gregg *v.* Pierce, 53 Barb. 387; Hatch *v.* Mann, 15 Wend. 44.

Pennsylvania.— McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. St. 139, 25 Atl. 579.

Vermont.— Russell *v.* Stewart, 44 Vt. 170; Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315; Brown *v.* Godfrey, 33 Vt. 120.

England.— England *v.* Davidson, 11 A. & E. 856, 4 Jur. 1032, 3 P. & D. 594, 39 E. C. L. 453.

See OFFICERS.

A promise to pay a jailer for extraordinary attention and services to a prisoner in his sickness, which the law does not make it the duty of the jailer to perform, is binding. Trundle *v.* Riley, 17 B. Mon. (Ky.) 396.

Firemen.— A property-owner was held liable upon a promise to pay members of a city fire company for extinguishing embers which might have been as readily extinguished by others, the engineer having discharged the company in good faith, believing the fire to be subdued. Texas Cotton Press, etc., Co. *v.* Mechanics' Fire Co., 54 Tex. 319, 38 Am. Rep. 627. And a promise of a reward to a fireman for recovering at the peril of his life a body from a burning building has been held binding. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

43. Dodge *v.* Stiles, 26 Conn. 463; Sweany *v.* Hunter, 5 N. C. 181; Collins *v.* Godefroy, 1 B. & Ad. 950, 1 Dowl. P. C. 326, 9 L. J. K. B. O. S. 158, 20 E. C. L. 757; Willis *v.* Peckham, 1 B. & B. 515, 4 Moore P. C. 300, 21 Rev. Rep. 706, 5 E. C. L. 774.

Action pending in another state.— The at-

to a trustee in consideration of the performance by him of his trust duties;[44] a promise to an executor in consideration of his promise to look among the papers of deceased for one belonging to the promisor, and to surrender it to her;[45] a promise to pay a common carrier greater compensation than it is entitled to charge or to pay it for delivering goods which it is bound to deliver without such payment;[46] a promise to a mother in consideration of her supporting, or her promise to support, her illegitimate child;[47] a promise to a ward in consideration of his obeying, or promising to obey, his guardian;[48] a promise to a wife in consideration of her performing, or promising to perform, her marital duties;[49] a promise in consideration of payment of, or a promise to pay, a valid judgment;[50] and a promise to a finder of property in consideration of his returning it to the owner.[51] The voluntary restoration of, or promise to restore, that to which the promisor is entitled is not a good consideration;[52] nor is refraining, or a promise to refrain, from an illegal act.[53]

c. Subsisting Contractual Obligation — (i) *In General.* The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do and hence has sustained no detriment nor has the other party to the contract obtained any benefit.[54] Thus a promise to pay addi-

tendance as a witness in an action pending in another state is a sufficient consideration for a promise by the party to pay the witness a sum in excess of the legal witness fees, since such attendance could not be compelled by subpœna. Armstrong *v.* Prentice, 86 Wis. 210, 56 N. W. 742.

Experts.— The same is true of a promise of a witness to testify as an expert. Barrus *v.* Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619.

44. Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224, 26 N. Y. St. 387; Wildey *v.* Robinson, 85 Hun (N. Y.) 362, 32 N. Y. Suppl. 1018, 66 N. Y. St. 423.

45. Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. 862.

46. Ashmole *v.* Wainwright, 2 Q. B. 837, 2 G. & D. 217, 6 Jur. 729, 11 L. J. Q. B. 79, 42 E. C. L. 938; Parker *v.* Great Western R. Co., 7 M. & G. 253, 8 Jur. 194, 13 L. J. C. P. 105, 7 Scott N. R. 835, 49 E. C. L. 253.

47. Crowhurst *v.* Lavorack, 8 Exch. 208, 22 L. J. Exch. 57, 1 Wkly. Rep. 56.

48. Keith *v.* Miles, 39 Miss. 442, 77 Am. Dec. 685. See Lafollett *v.* Kyle, 51 Ind. 446.

49. Miller *v.* Miller, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431; Grant *v.* Green, 41 Iowa 88. See Adams *v.* Honness, 62 Barb. (N. Y.) 326.

50. Phœnix Ins. Co. *v.* Rink, 110 Ill. 538; Runnamaker *v.* Cordray, 54 Ill. 303.

51. De La O *v.* Pueblo, 1 N. M. 226. See Ellery *v.* Cunningham, 1 Metc. (Mass.) 112.

52. Worthen *v.* Thompson, 54 Ark. 151, 15 S. W. 192; Killough *v.* Payne, 52 Ark. 174, 12 S. W. 327; Domestic Sewing Mach. Co. *v.* Anderson, 23 Minn. 57; Davis *v.* Mendenhall, 19 Minn. 149 (where S agreed with M to cut, haul, and drive certain logs of M's to a certain point, and while they were being so driven and in charge of S's foreman the men in his employ threatened to detain them unless their wages in arrears were paid, and M promised, in consideration of their not detaining the logs, that he would pay them the amount owing to S; and it was held that as such logs were in S's possession, and detention by the men would have been illegal, their forbearance was no consideration for M's promise); Tolhurst *v.* Powers, 133 N. Y. 460, 31 N. E. 326, 45 N. Y. St. 665; McDonald *v.* Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431; Fink *v.* Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. Rep. 750.

53. Voorhees *v.* Reed, 17 Ill. App. 21.

54. *Alabama.*— Johnson *v.* Seller, 33 Ala. 265.

California.— Ellison *v.* Jackson Water Co., 12 Cal. 542.

Colorado.— Templin *v.* Hobson, 10 Colo. App. 525, 51 Pac. 1019.

Georgia.— Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. 886.

Illinois.— Phœnix Ins. Co. *v.* Rink, 110 Ill. 538; Crossman *v.* Wohlleben, 90 Ill. 537; Stuber *v.* Schack, 83 Ill. 191.

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Smith *v.* Boruff, 75 Ind. 412; Fensler *v.* Parthers, 43 Ind. 119; Reynolds *v.* Nugent, 25 Ind. 328; Peelman *v.* Peelman, 4 Ind. 612; Spencer *v.* McLean, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. Rep. 271. And see Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. 481.

Iowa.— McCarty *v.* Hampton Bldg. Assoc., 61 Iowa 287, 16 N. W. 114; Ayres *v.* Chicago, etc., R. Co., 52 Iowa 478, 3 N. W. 522.

Kansas.— Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163.

Kentucky.— Eblin *v.* Miller, 78 Ky. 371.

Maine.— Westcott *v.* Mitchell, 95 Me. 377, 50 Atl. 21; Jenness *v.* Lane, 26 Me. 475.

Massachusetts.— Warren *v.* Hodge, 121 Mass. 106; Harriman *v.* Harriman, 12 Gray 341.

Mississippi.— Keith *v.* Miles, 39 Miss. 442, 77 Am. Dec. 685.

Missouri.— Longenfelder *v.* Wainwright, 103 Mo. 578, 15 S. W. 844; Tucker *v.* Bartle,

tional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration.[55] So it has been held that there is no consideration for a promise by

85 Mo. 114; Peck *v.* Harris, 57 Mo. App. 467; Swaggard *v.* Hancock, 25 Mo. App. 596.

Nebraska.— Esterly Harvesting Mach. Co. *v.* Pringle, 41 Nebr. 265, 59 N. W. 804; Billings *v.* Filley, 21 Nebr. 511, 32 N. W. 567. See Allen *v.* Plasmeyere, (Nebr. 1902) 90 N. W. 1125.

New Jersey.— Watts *v.* Frenche, 19 N. J. Eq. 407.

New York.— Tolhurst *v.* Powers, 133 N. Y. 460, 31 N. E. 326; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Marfield *v.* Goodhue, 3 N. Y. 62; Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287 (holding that where a debtor gives his note to his creditor in payment of the amount due, a contemporaneous oral agreement that the note shall not be paid in cash according to its terms but in trade is without consideration and constitutes no defense to an action on a note); Schneider *v.* Heinsheimer, 26 Misc. 11, 55 N. Y. Suppl. 630; McComb *v.* Van Ellert, 7 Misc. 59, 27 N. Y. Suppl. 372, 57 N. Y. St. 501; Bartlett *v.* Wyman, 14 Johns. 260; Powell *v.* Brown, 3 Johns. 100. See also Jughardt *v.* Reynolds, 68 N. Y. App. Div. 171, 74 N. Y. Suppl. 152; Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433; Mendel *v.* Pickrell, 37 Misc. 813, 76 N. Y. Suppl. 937.

North Dakota.— Garr *v.* Green, 6 N. D. 48, 68 N. W. 318.

Ohio.— Sherwin *v.* Brigham, 39 Ohio St. 137.

Pennsylvania.— Wimer *v.* Overseers of Poor, 104 Pa. St. 317; Erb *v.* Brown, 69 Pa. St. 216.

South Carolina.— Ferguson *v.* Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731.

Vermont.— Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

Washington.— Lewis *v.* McReavy, 7 Wash. 294, 34 Pac. 832.

England.— Frazer *v.* Hatton, 2 C. B. N. S. 512, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 5 Wkly. Rep. 632, 89 E. C. L. 512; Harris *v.* Carter, 2 C. L. R. 1582, 3 E. & B. 559, 18 Jur. 1014, 23 L. J. Q. B. 295, 2 Wkly. Rep. 409, 77 E. C. L. 559; Clutterbuck *v.* Coffin, C. & M. 273, 41 E. C. L. 153, 1 Dowl. N. S. 479, 6 Jur. 131, 11 L. J. C. P. 65, 3 M. & G. 842, 42 E. C. L. 438, 4 Scott N. R. 509; Jackson *v.* Cobbin, 1 Dowl. N. S. 96, 10 L. J. Exch. 389, 8 M. & W. 790; Harris *v.* Watson, Peake 72.

See 11 Cent. Dig. tit. "Contracts," § 280 *et seq.*

Illustrations.— Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873 (holding that a license given by a promoter of a corporation to the corporation to use a patent owned by him, because another promoter declared that unless this was done he would not pay his subscription to the capital stock, was without consideration); Reynolds *v.* Nugent, 25 Ind. 328 (where a person agreed to go to the war for a bounty of two hundred and fifty dollars, and afterward, another steamship company offering him more, refused to carry out his agreement until the former offered him three hundred and fifty dollars, and the promise was held void); Esterly Harvesting Mach. Co. *v.* Pringle, 41 Nebr. 265, 59 N. W. 804 (holding that where a person had contracted to store and care for another's property for one year and to deliver the same to him on demand without claiming a lien on it, a new agreement to so store and care for the property for a lien for the services was without consideration); Billings *v.* Filley, 21 Nebr. 511, 32 N. W. 567 (holding that where a purchaser of chattels, who had agreed to weigh them in order to determine the price, weighed them on incorrect scales, a promise by the seller upon discovering the error to pay him a certain sum, if he would reweigh them on correct scales, was without consideration); Bayley *v.* Homan, 3 Bing. N. Cas. 915, 3 Hodges 184, 6 L. J. C. P. 309, 5 Scott 94, 32 E. C. L. 419 (holding that where a lessee was in default under a covenant to repair, a promise by him to repair at a future day was no consideration for a promise by the lessor to give time for the repairs and forbear bringing action until that day); Stilk *v.* Myrick, 2 Campb. 317, 11 Rev. Rep. 717 (where a sailor agreed to work a certain voyage for a certain sum, and on the voyage refused to work unless the captain would agree to pay him more, which he did, and the promise was held void).

55. In addition to the cases in the preceding note see the following:

Kentucky.— Ford *v.* Crenshaw, 1 Litt. 68.

Missouri.— Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844 (where an architect engaged in the erection of a brewery declined to proceed with his undertaking upon discovering that the contract for the refrigerating plant had been awarded to a business rival of the refrigerating company, of which he was president, took away his plans, and called off his superintendent in charge of the building, and a promise was made by the president of the brewery company, who was in great haste to have the building completed, to pay him a commission of five per cent upon the cost of the refrigerating plant, as an inducement to resume work); Storck *v.* Mesker, 55 Mo. App. 26.

New York.— Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433, 74 N. Y. St. 865.

Pennsylvania.— Moyer *v.* Kirby, 2 Pearson 64, 2 Leg. Chron. 331, 2 Leg. Op. 111, where it was agreed in writing that B should erect and finish a house for A before a certain

a creditor in consideration of the debtor paying or promising to pay his debt,[56] for a promise by a creditor after maturity of the debt to extend the time of payment, without any new consideration,[57] or to extend it in consideration of the debtor paying part of it,[58] or to pay interest, when there is already an obligation to pay the interest promised,[59] a promise by a lessee after the lease has been signed to pay rent in advance contrary to the terms of the lease,[60] a promise by a mortgagee in consideration of the surrender of the mortgaged premises by the mortgagor after condition broken "to save the mortgagee trouble in getting possession,"[61] or a landlord's promise to repair the premises before the term expires, in consideration that the tenant will not previously abandon them.[62]

(II) *Anomalous Views*—(A) *Right Either to Perform or Pay Damages.* In some courts anomalous views are taken of the case where one of the parties to a valid contract refuses to perform the same, and the other promises some additional consideration to induce him to do so. Some of the courts have held that a party to a contract has the right to elect whether he will perform the contract or abandon it and pay damages, and that his giving up of this right of election furnishes a consideration for the new promise.[63]

(B) *Evidence of Mutual Rescission.* In other courts it is held that the forming of the new contract is conclusive evidence that the parties have mutually

day, and A should make certain payments to B at various stages of the work, and before the work was completed the house was blown down and A promised B an additional sum for rebuilding it.

Texas.—Jones *v.* Risley, 91 Tex. 1, 32 S. W. 1027.

56. *Alabama.*— Overdeer *v.* Wiley, 30 Ala. 709.

Illinois.— Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873; Hodgen *v.* Kief, 63 Ill. 146.

Indiana.— Harris *v.* Cassady, 107 Ind. 158, 8 N. E. 29; Ford *v.* Garner, 15 Ind. 298.

Kentucky.— Gilmore *v.* Green, 14 Bush 772; Ogden *v.* Ried, 13 Bush 581.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655.

Missouri.— Tucker *v.* Bartle, 85 Mo. 114; Swaggard *v.* Hancock, 25 Mo. App. 596.

Montana.—Kinna *v.* Woolfolk, 4 Mont. 318, 1 Pac. 401.

New Jersey.— Snyder *v.* Merchants' Ins. Co., 59 N. J. L. 69, 34 Atl. 945.

New York.— Home Ins. Co. *v.* Watson, 59 N. Y. 390; Tilden *v.* New York, 56 Barb. 340.

Pennsylvania.— McNutt *v.* Loney, 153 Pa. St. 281, 25 Atl. 1088.

Vermont.— Merrill *v.* Pease, 51 Vt. 556; Cole *v.* Shurtleff, 41 Vt. 311, 98 Am. Dec. 587.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

England.— Jones *v.* Waite, 8 Bing. N. Cas. 341, 35 E. C. L. 188.

See Commercial Paper, 7 Cyc. 900; and 11 Cent. Dig. tit. "Contracts," § 282.

57. *Illinois.*— Stuber *v.* Schack, 83 Ill. 191.

Indiana.— Holmes *v.* Boyd, 90 Ind. 332.

Maryland.— Ives *v.* Bosley, 35 Md. 262, 6 Am. Rep. 411; Hoffman *v.* Coombs, 9 Gill 284; Planters' Bank *v.* Sellman, 2 Gill & J. 230.

New York.—Pfeiffer *v.* Campbell, 111 N. Y. 631, 19 N. E. 498, 20 N. Y. St. 482; Farrington *v.* Bullard, 40 Barb. 512.

Ohio.— Turnbull *v.* Brock, 31 Ohio St. 649.

Texas.— Austin Real Estate, etc., Co. *v.* Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430.

Vermont.— Russell *v.* Buck, 11 Vt. 166.

England.— Williams *v.* Stern, 5 Q. B. D. 409, 49 L. J. Q. B. 663, 42 L. T. Rep. N. S. 719, 28 Wkly. Rep. 901; Davis *v.* Dodd, 4 Taunt. 602.

See Commercial Paper, 7 Cyc. 900.

58. Hunt *v.* Knox, 34 Miss. 655; Turnbull *v.* Brock, 31 Ohio St. 649. And see *infra*, IV, D, 12, e; Commercial Paper, 7 Cyc. 900.

59. *Illinois.*— Stuber *v.* Schack, 83 Ill. 191.

Indiana.— Holmes *v.* Boyd, 90 Ind. 332; Hume *v.* Mazelin, 84 Ind. 574.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

Texas.— Helms *v.* Crane, 4 Tex. Civ. App. 89, 23 S. W. 392.

England.— Orme *v.* Galloway, 2 C. L. R. 480, 9 Exch. 544, 23 L. J. Exch. 118, 2 Wkly. Rep. 263.

See Commercial Paper, 7 Cyc. 900.

60. Hasbrouck *v.* Winkler, 48 N. J. L. 431, 6 Atl. 22.

61. Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918.

62. Eblin *v.* Miller, 78 Ky. 371.

63. *Connecticut.*— Connelly *v.* Devoe, 37 Conn. 570.

Illinois.— Bishop *v.* Busse, 69 Ill. 403.

Indiana.— Coyner *v.* Lynde, 10 Ind. 282.

Massachusetts.—Munroe *v.* Perkins, 9 Pick. 298, 20 Am. Dec. 475. See also Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122; Rollins *v.* Marsh, 128 Mass. 116; Peck *v.* Requa, 13 Gray 407.

Michigan.— Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

Minnesota.— Bryant *v.* Lord, 19 Minn. 396.

New Jersey.— Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209.

New York.—Lattimore *v.* Harsen, 14 Johns. 330.

agreed to rescind the old one and that the old one is thereby discharged; and the new one on the consideration of new rights and liabilities is mutually binding.[64]

(c) *Both Contracts in Force.* In one state it has been held that the new agreement is independent of the old one and is to be regarded as an effort on the part of the promisor to mitigate the damage he has suffered from the breach of the first, that both contracts are therefore in force, and that the party refusing to perform may sue on the other's promise contained in the second, and the other may sue on the former's promise contained in the first.[65]

(d) *Unforeseen Difficulties and Mistake.* In one state the court, while adopting the view that the obligation imposed by a contract is to perform the contract and not to pay damages, and that there is ordinarily no consideration for a promise of additional pay to induce performance, introduces the anomalous exception that where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulty in the performance of the contract, which was not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration.[66] In an Illinois case it was held that a mistake of the contractor which caused him to underestimate the price of the work was also an exception.[67]

(iii) *Exceptions*—(a) *Matters Outside of Contract.* The consideration in the above cases is good and sufficient if it is the doing or promising to do something which was not either expressly or impliedly a part of the subsisting contract or not contemplated by the parties as falling within the provisions.[68] Thus in a well-known case where a seaman had signed articles of agreement to help navigate a vessel to England from the Falkland Isles, and the vessel proved to be

Vermont.— Lawrence *v.* Davey, 28 Vt. 264.

Virginia.— See Rowland Lumber Co. *v.* Ross, 100 Va. 275, 40 S. E. 922.

United States.— Domenico *v.* Alaska Packers Assoc., 112 Fed. 554.

Compare King *v.* Duluth, etc., R. Co., 61 Minn. 482, 63 N. W. 1105, where these cases are ably criticized.

Duress.— A recent case in the federal court goes so far as to lay it down that where persons who have contracted to render services refuse without lawful excuse to perform the same unless paid a greater compensation, the employer has his election to sue for damages for breach of the contract or to enter into a new and substituted contract for the payment of the compensation demanded; and the fact that the former remedy is worthless because the employees are not able to respond in damages, and the employer is induced thereby, and to save himself from greater loss, to yield to the demands of the employees and agree to pay a higher compensation for the same services, does not constitute duress which will render the new contract invalid. Domenico *v.* Alaska Packers Assoc., 112 Fed. 554.

64. Coyner *v.* Lynde, 10 Ind. 282; Stewart *v.* Ketcltas, 36 N. Y. 388. But see the criticism of this doctrine in King *v.* Duluth, etc., R. Co., 61 Minn. 482, 63 N. W. 1105.

65. Endriss *v.* Belle Isle Ice Co., 49 Mich. 279, 13 N. W. 590. This case is criticized in Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844. And see Goebel *v.* Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723.

66. King *v.* Duluth, etc., R. Co., 61 Minn. 482, 487, 63 N. W. 1105, where the court said: "In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit." See also Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479; Meech *v.* Buffalo, 29 N. Y. 198.

67. Cooke *v.* Murphy, 70 Ill. 96.

68. Merchants' Bank *v.* Davis, 3 Ga. 112; Corrigan *v.* Detsch, 61 Mo. 290 (where money was subscribed to induce a contractor to complete the grading of a street begun under a contract with the city, and in consideration of that agreement the contractor made a settlement with the city for the work then done, and entered into engagements for its completion, which arrangements and expenditures he was not obliged, under his contract with the city, to make, and which were necessarily productive of loss and injury in case of non-payment of the subscription, it

unseaworthy, a promise of extra reward to induce him to abide by his contract was held to be binding on the ground that such a contract as that which the seaman had entered into contained an implied condition that the ship should be seaworthy.[69] This principle applies in a great variety of cases.[70]

(B) *Moral Obligation.* The doctrine just discussed applies only where the thing done or promised is that which the party is legally and not merely morally bound to do. If he is only under a moral obligation, as in case of the payment of or promise to pay a debt barred by the statute of limitations, or for services rendered at request in the past, he gives something he is not legally compellable to give, and there is a consideration for the promise given in return.[71]

(C) *Substituted Agreement.* The cases considered above must be distinguished from those in which the parties in carrying out a contract become involved in mutual difficulties and disputes as to their rights and liabilities, and thereupon, the contract being executory on both sides, enter into a new one, which is intended as a substitute for the old and to be a discharge of it by mutual agreement. Such agreements are binding.[72]

d. Existing Contractual Obligation to Third Person. According to the weight of authority in this country a promise to perform an existing contract with a

was held that the consideration was sufficient to support an action for the amounts pledged); Turner *v.* Owen, 3 F. & F. 176.

69. Turner *v.* Owen, 3 F. & F. 176.

70. **Railroad construction contracts.**—An agreement by a railroad company with a subcontractor for the construction of its road to pay him the amount owed him by the original contractor, who failed without paying him, made to induce the subcontractor to go on with the work, is supported by a consideration. McKeenan *v.* Thissel, 33 Me. 368; Grant *v.* Duluth, etc., R. Co., 61 Minn. 395, 63 N. W. 1026; Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184.

Payment of interest.—A promise to extend the time of payment of a debt in consideration of a promise of the debtor to pay interest where none was reserved in the original contract or to pay an increased interest is binding.

Georgia.— Taylor *v.* Thomas, 61 Ga. 472.

Illinois.—Austin *v.* Bainter, 50 Ill. 308.

Mississippi.— Moore *v.* Redding, 69 Miss. 841, 13 So. 849.

Ohio.— Fawcett *v.* Freshwater, 31 Ohio St. 637.

South Carolina.— Hutton *v.* Edgerton, 6 S. C. 485.

Texas.— Knapp *v.* Mills, 20 Tex. 123.

Payment of interest in advance is sufficient. Warner *v.* Campbell, 26 Ill. 282. See COMMERCIAL PAPER, 7 Cyc. 901, note 86.

Promise to pay interest monthly instead of yearly is a consideration. Royal *v.* Lindsay, 15 Kan. 591.

Promise to pay a greater rate of interest.— Smith *v.* Pearson, 52 Cal. 339; Huff *v.* Cole, 45 Ind. 300; Kittle *v.* Wilson, 7 Nebr. 76. See COMMERCIAL PAPER, 7 Cyc. 901, note 90.

Payment before debt is due.— A promise of a creditor in consideration of the debtor's promise to pay, or payment of the debt or a part thereof before it is legally due, is binding. Spann *v.* Balzell, 1 Fla. 301, 46 Am. Dec. 346; Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88; Simpson *v.* Evans, 44 Minn. 419, 46 N. W. 908; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524; Newsam *v.* Finch, 25 Barb. (N. Y.) 175; Righter *v.* Stall, 3 Sandf. Ch. (N. Y.) 608. See COMMERCIAL PAPER, 7 Cyc. 901, note 82.

Contractor's promise to finish work before the time for performance.— Brownlee *v.* Lowe, 117 Ind. 420, 20 N. E. 301.

Payment in a different medium from that required by the contract or a promise to pay in a different medium is a sufficient consideration. Huntsville Branch Bank *v.* Steele, 10 Ala. 915; Millaudon *v.* Arnous, 3 Mart. N. S. (La.) 596. See COMMERCIAL PAPER, 7 Cyc. 901, notes 83, 84.

Payment at a different place.— Shirly *v.* Harris, 3 McLean (U. S.) 330, 21 Fed. Cas. No. 12,798, where a contract was entered into after the execution of a note, whereby the maker agreed to pay the note in the state of Missouri, the residence of the payee, or if not paid to pay the expenses of the payee in coming to Indiana to collect the note.

71. Shreiner *v.* Cummins, 63 Pa. St. 374. See *infra*, IV, D, 14.

72. *Alabama.*— Stoudenmeier *v.* Williamson, 29 Ala. 558.

Connecticut.— Connelly *v.* Devoe, 37 Conn. 570.

Illinois.— Bishop *v.* Busse, 69 Ill. 403; Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656.

Indiana.— Coyner *v.* Lynde, 10 Ind. 282.

Maine.— Courtenay *v.* Fuller, 65 Me. 156.

Massachusetts.— Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122; Rollins *v.* Marsh, 128 Mass. 116; Holmes *v.* Downe, 9 Cush. 135.

Michigan.— Conkling *v.* Tuttle, 52 Mich. 630, 18 N. W. 391; Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

New Jersey.— Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209.

New York.— Stewart *v.* Keteltas, 36 N. Y. 388; Lattimore *v.* Harsen, 14 Johns. 330.

Pennsylvania.—Dreifus *v.* Columbian Expo-

third person or the performance of it does not constitute a valuable consideration.[73] The contrary is the law in England,[74] and it has been maintained recently by an American writer that in most of the American cases the English cases were not brought to the attention of the court, and that the latest decisions show a marked tendency toward the English rule.[75]

e. Part Payment of Debt and Agreement to Discharge Residue — (i) *In General.* Under the principles just discussed the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the residue.[76] This does not apply, however, where

sition Savage Co., 194 Pa. St. 475, 45 Atl. 370, 75 Am. St. Rep. 704; Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162; McNish *v.* Reynolds, 95 Pa. St. 483.

Vermont.— Lawrence *v.* Davey, 28 Vt. 264.

Washington.—Brodek *v.* Farnam, 11 Wash. 565, 40 Pac. 189.

Discharge by substituted agreement see *infra*, IX, B, 1, c.

73. *Alabama.*— Johnson *v.* Seller, 33 Ala. 265.

California.— Ellison *v.* Jackson Water Co., 12 Cal. 542.

District of Columbia.—Merrick *v.* Giddings, 1 Mackey 394.

Illinois.— Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873.

Indiana.— Beaver *v.* Fulp, 136 Ind. 595, 36 N. E. 418; Brownlee *v.* Lowe, 117 Ind. 420, 20 N. E. 301; Harrs *v.* Cassady, 107 Ind. 156, 8 N. E. 29; Ritenour *v.* Matthews, 42 Ind. 7; Reynolds *v.* Nugent, 25 Ind. 328; Ford *v.* Garner, 15 Ind. 298; Peelman *v.* Peelman, 4 Ind. 612.

Kansas.— Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163.

Maine.— Putnam *v.* Woodbury, 68 Me. 58.

Maryland.— Ecker *v.* McAllister, 54 Md. 362, 45 Md. 290.

New Hampshire.— Gordon *v.* Gordon, 56 N. H. 170.

New York.—Arend *v.* Smith, 151 N. Y. 502, 45 N. E. 872; Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. 224, 26 N. Y. St. 384; Vanderbilt *v.* Schreyer, 91 N. Y. 392; L'Amoreux *v.* Gould, 7 N. Y. 349, 57 Am. Dec. 524; Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433, 74 N. Y. St. 865.

Tennessee.—Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. 195.

Texas.— Kenigsberger *v.* Wingate, 31 Tex. 42, 98 Am. Dec. 512.

Wisconsin.— Davenport *v.* First Cong. Soc., 33 Wis. 387.

See 11 Cent. Dig. tit. "Contracts," §§ 280, 281.

Marriage.— In Maryland it was held that where a father promises A that if he will marry his daughter he will give a certain amount as a marriage portion, and A afterward marries the daughter, the father will be bound by the promise; but where, after A's engagement to be married to the daughter, the father in a letter to his brother expresses his approbation of the proposed marriage and states what amount he intends to bestow upon his daughter, this is not sufficient to entitle A to recover that amount of the father. Ogden *v.* Ogden, 1 Bland (Md.) 284. So in a New York case it was held that where at the time of a loan made by plaintiff to defendant, defendant was under a legal obligation to marry plaintiff's daughter, the performance of such obligation was not a sufficient consideration for plaintiff's promise, made after the loan, to forgive defendant the debt if he fulfilled his obligation to marry plaintiff's daughter. Gerlach *v.* Strinke, 22 Alb. L. J. 134.

74. Bagge *v.* Slade, 3 Bulstr. 162, Rolle 354; Shadwell *v.* Shadwell, 9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. Rep. N. S. 628, 9 Wkly. Rep. 163, 99 E. C. L. 159; Scotson *v.* Pegg, 6 H. & N. 295, 30 L. J. Exch. 225, 3 L. T. Rep. N. S. 753, 9 Wkly. Rep. 280; Chichester *v.* Cobb, 14 L. T. Rep. N. S. 433; Moore *v.* Bray, 1 Vin. Abr. 310, pl. 31; Anonymous, Shepp Action on the Case (2d ed.) 155, 156. *Contra,* Jones *v.* Waite, 5 Bing. N. Cas. 341, 35 E. C. L. 188; Westbie *v.* Cockaine, 1 Vin. Abr. 312, pl. 36.

75. Prof. Ames in 12 Harv. L. Rev. 520, citing the following cases:

Alabama.— Humes *v.* Decatur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368.

Massachusetts.— Monnahan *v.* Judd, 165 Mass. 93, 42 N. E. 555; Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197, 47 Am. St. Rep. 465, 34 L. R. A. 33.

Michigan.—Wilhelm *v.* Foss, 118 Mich. 106, 76 N. W. 308.

Minnesota.— Grant *v.* Duluth, etc., R. Co., 61 Minn. 395, 63 N. W. 1026.

New Jersey.— Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365.

Vermont.— Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133.

76. *Alabama.*— Barron *v.* Vandvert, 13 Ala. 232.

Arkansas.— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

California.— Liening *v.* Gould, 13 Cal. 598.

Georgia.— Carlton *v.* Western, etc., R. Co., 81 Ga. 531, 7 S. E. 623; Holliday *v.* Poole, 77 Ga. 159.

Illinois.— Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Phœnix Ins. Co. *v.* Rink, 110 Ill. 538.

Indiana.— Beaver *v.* Fulp, 136 Ind. 595, 36 N. E. 418; Longworth *v.* Higham, 89 Ind. 352.

the part payment is made before the debt is due, in a different medium than that required by the contract, by the note or check of a third person, or in pursuance of a *bona fide* compromise, and in like cases.[77] Nor does the rule apply where there is an executed gift of the residue,[78] or where the residue is released by an

Iowa.— Bendner *v.* Benn, 78 Iowa 283, 43 N. W. 216, 5 L. R. A. 596; Bryan *v.* Brazil, 52 Iowa 350, 3 N. W. 117; Rea *v.* Owens, 37 Iowa 262.

Kansas.— St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Maine.— Jenness *v.* Lane, 26 Me. 475; Bailey *v.* Day, 26 Me. 88.

Maryland.— Emmittsburg R. Co. *v.* Donoghue, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Rohr *v.* Anderson, 51 Md. 205.

Massachusetts.—Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360; Harriman *v.* Harriman, 12 Gray 341.

Michigan.— Leeson *v.* Anderson, 98 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Minnesota.— Lankton *v.* Stewart, 27 Minn. 346, 7 N. W. 360.

Missouri.— Willis *v.* Gammill, 67 Mo. 730; Helling *v.* United Order of Honor, 29 Mo. App. 309.

New Jersey.— Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Watts *v.* Frenche, 19 N. J. Eq. 407.

New York.— Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 35 N. Y. St. 108, 11 L. R. A. 710; Scymour *v.* Minturn, 17 Johns. 169, 8 Am. Dec. 380; Harrison *v.* Close, 2 Johns. 448, 3 Am. Dec. 444.

North Carolina.— Bryan *v.* Foy, 69 N. C. 45; McKenzie *v.* Culbreth, 66 N. C. 534.

Ohio.— Turnbull *v.* Brock, 31 Ohio St. 649.

Rhode Island.— Rose *v.* Daniels, 8 R. I. 381.

Vermont.— Goodwin *v.* Follett, 25 Vt. 386.

Virginia.— Smith *v.* Phillips, 77 Va. 548.

England.— Foakes *v.* Beer, 9 App. Cas. 605, 54 L. J. Q. B. 130, 51 L. T. Rep. N. S. 833, 33 Wkly. Rep. 233; Cumber *v.* Wane, 1 Str. 426.

See 11 Cent. Dig. tit. "Contracts," § 285; and, generally, ACCORD AND SATISFACTION, 1 Cyc. 311; RELEASE.

77. *Alabama.*— Sanders *v.* Decatur Branch Bank, 13 Ala. 353.

Iowa.— Hasted *v.* Dodge, (1887) 35 N. W. 462.

Kentucky.— Hardesty *v.* Graham, 3 S. W. 909, 8 Ky. L. Rep. 954.

Massachusetts.— Guild *v.* Butler, 127 Mass. 386; Brooks *v.* White, 2 Metc. 283, 37 Am. Dec. 95.

New Jersey.— Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365.

New York.— Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 35 N. Y. St. 106, 11 L. R. A. 710; Kellogg *v.* Richards, 14 Wend. 116.

England.— Pinnel's Case, 5 Coke 117*a*, where it is said that "the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."

See ACCORD AND SATISFACTION, 1 Cyc. 311.

Guaranty or indorsement.— There is a consideration where the payment of the smaller sum agreed to be taken is guaranteed or a note therefor is indorsed by a third person.

Alabama.— Singleton *v.* Thomas, 73 Ala. 205.

Maine.— Varney *v.* Conery, 77 Me. 527, 1 Atl. 683; Jenness *v.* Lane, 26 Me. 475.

Maryland.— Maddux *v.* Bevan, 39 Md. 485.

Minnesota.— Mason *v.* Campbell, 27 Minn. 54, 6 N. W. 405.

New York.— Boyd *v.* Hitchcock, 20 Johns. 76, 11 Am. Dec. 247.

England.— Steinman *v.* Magnus, 2 Campb. 124, 11 East 390.

Payment before due or at different place.— *Massachusetts.*— Brooks *v.* White, 2 Metc. 283, 37 Am. Dec. 95.

Minnesota.— Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202.

Mississippi.—Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

North Carolina.— McKenzie *v.* Culbreth, 66 N. C. 534.

Ohio.— Harper *v.* Graham, 20 Ohio 105.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

England.— Pinnel's Case, 5 Coke 117*a*.

Giving note secured by mortgage.— Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 35 N. Y. St. 106, 11 L. R. A. 710.

Payment of a certain sum, if accepted in satisfaction of a larger but unliquidated amount, is a good discharge, as there is a benefit in receiving a certain for an uncertain sum.

Colorado.— Berdell *v.* Bissell, 6 Colo. 162.

Connecticut.— Potter *v.* Douglass, 44 Conn. 541; Bull *v.* Bull, 43 Conn. 455.

Florida.— Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373.

Indiana.— Ogborn *v.* Hoffman, 52 Ind. 439.

Maryland.— Brooks *v.* Waring, 7 Gill 5.

Massachusetts.— Goss *v.* Ellison, 136 Mass. 503; Simmons *v.* Almy, 103 Mass. 33.

Minnesota.— Hinkle *v.* Minneapolis, etc., R. Co., 31 Minn. 434, 18 N. W. 275; Stearns *v.* Johnson, 17 Minn. 142.

Mississippi.— McCall *v.* Nave, 52 Miss. 494.

Missouri.— Riley *v.* Kershaw, 52 Mo. 224.

New York.— Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, 52 N. Y. St. 342, 20 L. R. A. 785.

United States.— Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703.

England.— Wilkinson *v.* Byers, 1 A. & E. 106, 3 L. J. K. B. 144, 3 N. & M. 853, 28 E. C. L. 72.

78. *Georgia.*— Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494.

instrument under seal, for as we have seen the use of a seal dispenses with the necessity for a consideration.[79]

(11) *Compositions With Creditors.* A composition with creditors is a notable exception to the general rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater, and such agreements are binding.[80]

13. Moral Obligation. It is settled as a general proposition in most jurisdictions that a promise made under a sense of moral obligation[81] is not made upon a sufficient consideration and is not legally binding.[82] Thus a son is under the

Maryland.— Linthicum *v.* Linthicum, 2 Md. Ch. 21.

Minnesota.—Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514.

Mississippi.— State *v.* Story, 57 Miss. 738.

New York.— Stafford *v.* Bacon, 1 Hill 532, 37 Am. Dec. 366.

79. Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322; Bender *v.* Sampson, 11 Mass. 42; Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514; Willing *v.* Peters, 12 Serg. & R. (Pa.) 177. See Release.

80. Perkins *v.* Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Fellows *v.* Stevens, 24 Wend. (N. Y.) 294; Paddleford *v.* Thacher, 48 Vt. 574; Good *v.* Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513, 19 E. C. L. 627, 9 L. J. K. B. O. S. 234. See Compositions with Creditors.

81. A moral obligation, says Bouvier, is a duty which one owes and which he ought to perform, but which he is not legally bound to fulfil. Bouvier L. Dict.

82. *Alabama.*— Turlington *v.* Slaughter, 54 Ala. 195.

Arkansas.— Osier *v.* Hobbs, 33 Ark. 215.

California.— Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

Georgia.— McElven *v.* Sloan, 56 Ga. 208.

Indiana.— Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Eakin *v.* Fenton, 15 Ind. 59.

Kentucky.— Gay *v.* Botts, 13 Bush 299; Blackburn *v.* Collier, 12 B. Mon. 16; Snead, etc., Iron Works *v.* Jefferson, 30 S. W. 883, 17 Ky. L. Rep. 250.

Maine.— Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406; Farnham *v.* O'Brien, 22 Me. 475.

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761; Schroeder *v.* Fink, 60 Md. 436; Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322; Ellicott *v.* Turner, 4 Md. 476.

Massachusetts.— Hale *v.* Rice, 124 Mass. 292; Cole *v.* Bedford, 97 Mass. 326 note; Shepherd *v.* Young, 8 Gray 152, 69 Am. Dec. 242; Dexter *v.* Snow, 12 Cush. 594, 59 Am. Dec. 206; Valentine *v.* Foster, 1 Metc. 520, 35 Am. Dec. 377; Dodge *v.* Adams, 19 Pick. 429; Williams *v.* Hathaway, 19 Pick. 387; Loomis *v.* Newhall, 15 Pick. 159; Mills *v.* Wyman, 3 Pick. 207.

Mississippi.—Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329.

Missouri.— Prise *v.* Kane, 112 Mo. 412, 20 S. W. 609; Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Greenabaum *v.* Elliott, 60 Mo. 25; Stockton *v.* Reed, 65 Mo. App. 605; Easley *v.* Gordon, 51 Mo. App. 637.

New Hampshire.— Gorden *v.* Gorden, 56 N. H. 170.

New Jersey.— Freeman *v.* Robinson, 38 N. J. L. 383; Updike *v.* Titus, 13 N. J. Eq. 151.

New York.— Goulding *v.* Davidson, 26 N. Y. 604; Geer *v.* Archer, 2 Barb. 420; Ehle *v.* Judson, 24 Wend. 97; Smith *v.* Ware, 13 Johns. 257.

North Carolina.— Patton *v.* Ganett, 116 N. C. 847, 21 S. E. 679; Wilcox *v.* Arnold, 116 N. C. 708, 21 S. E. 434; Oldham *v.* Wilmington First Nat. Bank, 85 N. C. 240; Johnson *v.* Johnson, 10 N. C. 556; Littlejohn *v.* Patillo, 9 N. C. 302.

Ohio.— Canal Fund Com'rs *v.* Perry, 5 Ohio 56.

Oregon.— Nine *v.* Starr, 8 Oreg. 49.

Rhode Island.— Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

South Carolina.— Hair *v.* Hair, 10 Rich. Eq. 163.

Vermont.— Hayward *v.* Barker, 52 Vt. 429, 36 Am. Rep. 762; Cobb *v.* Cowdry, 40 Vt. 25, 94 Am. Dec. 370; Boothe *v.* Fitzpatrick, 36 Vt. 681.

United States.— Philpot *v.* Gruninger, 14 Wall. 570, 20 L. ed. 743.

England.— Beaumont *v.* Reeve, 8 Q. B. 483, 10 Jur. 284, 15 L. J. Q. B. 141, 55 E. C. L. 483; Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245; Holliday *v.* Atkinson, 5 B. & C. 501, 8 D. & R. 168, 29 Rev. Rep. 299, 11 E. C. L. 558 [*overruling* Hawkes *v.* Saunders, Cowp. 289; Atkins *v.* Banwell, 2 East 505; Lee *v.* Muggeridge, 5 Taunt. 36, 1 E. C. L. 32].

See 11 Cent. Dig. tit. "Contracts," § 359.

Leading case.— This question was settled in England once for all in Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245, and a final blow given by Lord Denman to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor. "The doctrine," said Lord Denman, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." Anson Contr. 95.

There are decisions or dicta to the contrary

strongest moral obligation to support his infirm and indigent parents, but as he is under no legal obligation to do so, the law will not enforce a promise on his part to pay another who has done so without his request.[83] So a father may be under the strongest moral obligation to support his adult indigent child, but this moral obligation is not sufficient to support an express promise to pay expenses previously incurred on behalf of such a child.[84] The same is true of a promise by an executor in pursuance merely of a pious wish to carry out the intentions of the testator,[85] and of a promise by a husband to carry out what he believes to be the wishes of his deceased wife.[86] So by the weight of authority where services are rendered to another without any request and under circumstances which do not raise an implied contract on his part to pay for them, a promise founded on motives of honor or gratitude is not on a sufficient consideration.[87] And where a debt has been voluntarily released an express promise does not revive it or form a sufficient consideration to support a new promise.[88] The general rule that a moral

in some states and in some of the earlier cases:

Alabama.— See Turlington *v.* Slaughter, 54 Ala. 195.

Connecticut.— See Kilbourn *v.* Bradley, 3 Day 356, 3 Am. Dec. 273.

Georgia.— Gray *v.* Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72. And see Brown *v.* Lathan, 92 Ga. 280, 18 S. E. 421.

Illinois.— Lawrence *v.* Oglesby, 178 Ill. 122, 52 N. E. 945; Spear *v.* Griffith, 86 Ill. 552.

Indiana.— Sedgwick *v.* Tucker, 90 Ind. 271.

Kentucky.— Montgomery *v.* Lampton, 3 Metc. 519; Cardwell *v.* Strother, Litt. Sel. Cas. 429, 12 Am. Dec. 326.

Maine.— See Farnham *v.* O'Brien, 22 Me. 475.

Maryland.— Drury *v.* Briscoe, 42 Md. 154. And see Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761; State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

Michigan.— Edwards *v.* Nelson, 51 Mich. 121, 61 N. W. 261.

Missouri.— Elsworth Coal Co. *v.* Quade, 28 Mo. App. 421.

New York.— See Drake *v.* Bell, 26 Misc. 237, 55 N. Y. Suppl. 945; Cameron *v.* Fowler, 5 Hill 306; Bentley *v.* Morse, 14 Johns. 468.

North Carolina.— Howe *v.* O'Mally, 5 N. C. 287, 3 Am. Dec. 693.

Pennsylvania.— Holden *v.* Banes, 140 Pa. St. 63, 21 Atl. 239; Musser *v.* Ferguson Tp., 55 Pa. St. 475; Hemphill *v.* McClimans, 24 Pa. St. 367; Clark *v.* Herring, 5 Binn. 33; K. X. *v.* A. Y., 34 Wkly. Notes Cas. 145; Bently *v.* Lamb, 25 Am. L. Reg. N. S. 632.

South Carolina.— Fairchild *v.* Bell, 2 Brev. 129, 3 Am. Dec. 702.

Tennessee.— State *v.* Butler, 11 Lea 418; Allen *v.* McCullough, 2 Heisk. 174, 5 Am. Rep. 27; Scott *v.* Carruth, 9 Yerg. 418.

Texas.—Galveston *v.* Galveston City R. Co., 46 Tex. 435.

Vermont.— See Blodget *v.* Skinner, 15 Vt. 716; Glass *v.* Beach, 5 Vt. 172; Hawley *v.* Farrar, 1 Vt. 420.

United States.— *In re* Ekings, 6 Fed. 170.

See 11 Cent. Dig. tit. "Contracts," § 359.

Past consideration see *infra*, IV, D, 14.

83. Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79; Nixon *v.* Vanhise, 5 N. J. L. 619, 8 Am. Dec. 491; Edwards *v.* Davis, 16 Johns. (N. Y.) 281.

Promise to pay parent's debt.— There is no such obligation upon children to pay debts of their father, from whose estate they have not received any benefit, as will constitute a moral consideration which will sustain a new note given by a child for the principal of the father's note after it has been discharged in bankruptcy. McElven *v.* Sloan, 56 Ga. 208; Stoneburner *v.* Motley, 95 Va. 784, 30 S. E. 364.

84. *Massachusetts.*— Valentine *v.* Foster, 1 Metc. 520, 35 Am. Dec. 377; Loomis *v.* Newhall, 15 Pick. 159; Mills *v.* Wyman, 3 Pick. 207.

Michigan.— Robinson *v.* McAfee, 59 Mich. 375, 26 N. W. 643.

New Jersey.— Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399.

England.— Reg. *v.* Downes, 1 Q. B. D. 25, 13 Cox C. C. 111, 45 L. J. M. C. 8, 33 L. T. Rep. N. S. 675, 24 Wkly. Rep. 278; Mortimore *v.* Wright, 4 Jur. 465, 9 L. J. Exch. 158, 6 M. & W. 482.

85. A widow sued her husband's executor for breach of an agreement to allow her to occupy a house which had been the property of her husband on payment of a small portion of the ground-rent. The executor in making the agreement was carrying out a wish expressed by the deceased that his wife should have the use of the house. It was held that a desire on the part of an executor to carry out the wishes of the deceased did not amount to a consideration. Thomas *v.* Thomas, 2 Q. B. 851, 2 G. & D. 226, 6 Jur. 645, 11 L. J. Q. B. 104, 42 E. C. L. 945.

86. Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185; Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Gay *v.* Botts, 13 Bush (Ky.) 299.

87. Osier *v.* Hobbs, 33 Ark. 215; Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237. See *infra*, IV, D, 13, a, b, c.

88. Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

Where a mortgage of a homestead is void because the wife's acknowledgment is defective, the husband's agreement after default

obligation is not a sufficient consideration to support a promise does not apply to a moral obligation enforceable in equity. This has been said to be sufficient.[89]

14. Past Consideration — a. In General. By the great weight of authority a past consideration, if it imposed no legal obligation at the time it was furnished, will support no promise whatever.[90] A past consideration, it is said, is some act

to pay rent to the mortgagee is without consideration and void. Strauss *v.* Harrison, 79 Ala. 324.

Promise after seduction.—A promise by a man to a woman to pay her an annuity, made after he has seduced her and in consideration thereof, has been held unenforceable. Beaumont *v.* Reeve, 8 Q. B. 483, 10 Jur. 284, 15 L. J. Q. B. 141, 55 E. C. L. 483. *Compare* Wyant *v.* Lesher, 23 Pa. St. 338.

Other illustrations.—See Nixon *v.* Vanhise, 5 N. J. L. 491, 8 Am. Dec. 491 (holding that a promise by a son to indemnify a constable on the sale of goods levied on as the property of his father was not enforceable); Freeman *v.* Robinson, 38 N. J. L. 383, 20 Am. Rep. 399 (holding that where a minor child purchases goods on his father's credit, but without his knowledge, a subsequent promise by the latter to pay for them is without consideration and unenforceable); Gutheill *v.* Schmidt, 8 Colo. App. 71, 44 Pac. 853 (holding that a promise by a person to loan another money to enable him to pay off a debt is without consideration).

89. Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614; Stewart *v.* Eden, 2 Cai. (N. Y.) 150.

90. *Alabama.*— Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595.

Arkansas.— Osier *v.* Hobbs, 33 Ark. 215.

California.— Leverone *v.* Hildreth, 80 Cal. 139, 22 Pac. 72.

Connecticut.— Bulkley *v.* Landon, 2 Conn. 404, 407, holding that where persons gave a writing to the plaintiff, as follows: "In consideration of your having indorsed the under-mentioned notes, drawn by David Taylor, in your favour, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us," the consideration was past and therefore insufficient.

Georgia.—Shealy *v.* Toole, 56 Ga. 210, holding that a contract reciting that "in consequence of the attached note not being paid at maturity, I hereby promise and agree to pay," etc., is void for want of consideration.

Illinois.— Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79.

Indiana.— Summers *v.* Vaughan, 35 Ind. 323, 9 Am. Rep. 741; Goldsby *v.* Robertson, 1 Blackf. 247; Boston *v.* Dodge, 1 Blackf. 19, 12 Am. Dec. 205.

Iowa.— Carruthers *v.* McMurry, 75 Iowa 173, 39 N. W. 255 (holding that after the sale of an established business had been completed and a memorandum of the contract signed by the parties, a new agreement made by the vendor not to engage in the same business in that locality nor assist his sons in such business was not enforceable unless supported by a new consideration); Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; Handrahan *v.* O'Regan, 45 Iowa 298 (holding that where there was no road to premises which one had hired from another a promise by the latter to procure one to be made was not enforceable).

Kansas.— Dwelle *v.* Dwelle, 1 Kan. App. 473, 40 Pac. 825, holding that where A wrote to B: "Upon my own motion, and to show you my earnest desire for peace between us, having in view the great expense to which you have been put in recent litigation in which you were concerned, I voluntarily agree to assume part of that burden, and agree to pay you by the 1st day of October, A. D. 1889, the sum of six hundred dollars," the promise was not enforceable.

Kentucky.— Gaines *v.* Scott, 3 Ky. L. Rep. 418.

Maine.— Dexter Sav. Bank *v.* Copeland, 77 Me. 263.

Maryland.— Pool *v.* Horner, 64 Md. 131, 20 Atl. 1036.

Massachusetts.— Moore *v.* Elmer, 180 Mass. 15, 61 N. E. 259 (holding that a bill to enforce a contract to convey land, alleging that the contract was made upon consideration of certain "business and test sittings" given at the request of the defendant, without alleging an understanding that the sittings were to be paid for, stated no consideration); Morse *v.* Mason, 103 Mass. 560; Chamberlin *v.* Whitford, 102 Mass. 448; Shepherd *v.* Young, 8 Gray 152, 69 Am. Dec. 242; Dearborn *v.* Bowman, 3 Metc. 155; Williams *v.* Hathaway, 19 Pick. 287; Greene *v.* Malden First Parish, 10 Pick. 500; Mills *v.* Wyman, 3 Pick. 207.

Michigan.—Ludlow *v.* Hardy, 38 Mich. 690, holding that where liquor had been sold in violation of a statute which was afterward repealed a promise by the buyer to pay, made after the repeal, in consideration of the sale and of an extension of the time for payment originally agreed upon, was without consideration.

Minnesota.—Aultman *v.* Kennedy, 33 Minn. 339, 23 N. W. 528; Colter *v.* Greenhagen, 3 Minn. 126 (holding that a promise made after maturity of a note and without any new consideration that the note should be payable at a particular place was without consideration and void).

Missouri.— Woodburn *v.* Renshaw, 32 Mo. 197.

Montana.— Savage *v.* Burns, 3 Mont. 527.

New Hampshire.— Wilson *v.* Edmonds, 24 N. H. 517; Allen *v.* Woodward, 22 N. H. 544.

New Jersey.— State *v.* Hauser, 52 N. J. L. 125, 18 Atl. 775.

New York.—Arend *v.* Smith, 151 N. Y. 502, 45 N. E. 872 (holding that a promise to renew

or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterward, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.[91] Thus services rendered or money expended in the past, but not at the express or implied request of the person benefited by them, or at his request, but without an understanding that they were to be paid for, will not support a promise by him to pay for them.[92] So where a debt has been wholly or partially released a subsequent promise by the debtor to pay it or the balance unpaid is without consideration.[93] The principle also applies where the debt has

a note to be given by a debtor in payment of a past-due debt was without consideration); Chilcott *v.* Trimble, 13 Barb. 502; Parker *v.* Crane, 6 Wend. 647; Chaffee *v.* Thomas, 7 Cow. 358; Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237; Oatfield *v.* Waring, 14 Johns. 188; Comstock *v.* Smith, 7 Johns. 87 (holding that a promise by the defendant in consideration that the plaintiff had before that time sold and conveyed to him a certain farm, to pay for it, without an allegation that it was conveyed at the request of the defendant, was on a past consideration and void); Livingston *v.* Rogers, 1 Cai. 583.

North Carolina.— Bailey *v.* Rutjes, 86 N. C. 517; New Hanover Bank *v.* Kenan, 76 N. C. 340; Fulke *v.* Fulke, 52 N. C. 497; Hatchell *v.* Odom, 19 N. C. 302.

Pennsylvania.— Johnston *v.* Johnston, 1 Grant 468; Carroll *v.* Nixon, 4 Watts & S. 517; Whithall *v.* Morse, 5 Serg. & R. 358; Fisher *v.* Harrisburg Gas Co., 1 Pearson 118; Murphy's Estate, 11 Phila. 2, 32 Leg. Int. 28.

Rhode Island.— Shepard *v.* Rodes, 7 R. I. 470, 84 Am. Dec. 573.

South Carolina.— Mordecai *v.* Dawkins, 9 Rich. 262, holding that where a note given for money loaned for gaming was void by statute even in the hands of an innocent holder, a subsequent parol promise to pay the note to an indorsee was void for want of consideration.

Tennessee.— McCord *v.* Dodson, 10 Heisk. 440.

Texas.— Austin City R. Co. *v.* Swisher, 1 Tex. App. Civ. Cas. § 75.

Vermont.— Boothe *v.* Fitzpatrick, 36 Vt. 681; Jackson *v.* Bissonette, 24 Vt. 611; Bloss *v.* Kittridge, 5 Vt. 28; Hawley *v.* Farrar, 1 Vt. 420 (holding that where H purchased a quantity of tin in boxes for one F at his request and delivered it to him in the same condition, unopened, and afterward on opening the boxes it was found that the tin was materially damaged, of which H had reasonable notice, and thereupon promised F to make him an equitable allowance therefor, the promise was void).

Virginia.— Davis *v.* Anderson, 99 Va. 620, 39 S. E. 588; Jordan *v.* Katz, 89 Va. 628, 16 S. E. 866.

West Virginia.— Gerow *v.* Riffe, 29 W. Va. 462, 2 S. E. 104; Sturm *v.* Parish, 1 W. Va. 125.

Wisconsin.— Morehouse *v.* Comstock, 42 Wis. 626.

England.— Roscorla *v.* Thomas, 3 Q. B. 234, 2 G. & D. 508, 6 Jur. 929, 11 L. J. Q. B. 214, 43 E. C. L. 713; Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245; Lamphugh *v.* Brathwayt, Hob. 147.

See 11 Cent. Dig. tit. "Contracts," § 357 *et seq.*

91. Anson Contr. 114.

92. *Arkansas.*— Osier *v.* Hobbs, 33 Ark. 215.

Iowa.—Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358.

Maryland.— Ellicott *v.* Turner, 4 Md. 476.

Massachusetts.— Dearborn *v.* Bowman, 3 Metc. 155; Mills *v.* Wyman, 3 Pick. 207.

New York.— Myers *v.* Dean, 11 Misc. 368, 32 N. Y. Suppl. 237, 65 N. Y. St. 462; Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237.

See 11 Cent. Dig. tit. "Contracts," § 372.

Improvements on one's land by a trespasser.— Frear *v.* Hardenbergh, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356.

Improvements on public lands.— A promise made by one who enters public lands to pay a prior occupant for improvements made thereon by him is without consideration and void.

Alabama.— Duncan *v.* Hall, 9 Ala. 128; Shaw *v.* Boyd, 1 Stew. & P. 83.

Arkansas.— McFarland *v.* Mathis, 10 Ark. 560.

Florida.— See Taylor *v.* Baker, 1 Fla. 245.

Illinois.— Townsend *v.* Briggs, 2 Ill. 472; Roberts *v.* Garen, 2 Ill. 396; Hutson *v.* Overturf, 2 Ill. 170; Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79.

Indiana.— Carr *v.* Allison, 5 Blackf. 63.

Missouri.— Welch *v.* Bryan, 28 Mo. 30.

See 11 Cent. Dig. tit. "Contracts," § 374.

93. *Colorado.*— Rasmussen *v.* State Nat. Bank, 11 Colo. 301, 18 Pac. 28.

Kentucky.— Montgomery *v.* Lampton, 3 Metc. 519.

Maine.— Phelps *v.* Dennett, 57 Me. 491; Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406.

Maryland.— Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322.

Massachusetts.— Hale *v.* Rice, 124 Mass. 292; Vincent *v.* Gorham, 3 Metc. 343.

been discharged by a judgment;[94] where a marriage which is relied on as a consideration had taken place before the promise;[95] and where a warranty is given by a seller of property after a sale without a warranty, express or implied, and without any new consideration.[96]

b. Previous Request. In an early leading English case it was laid down broadly that a past consideration will support a subsequent promise if the consideration was given at the request of the promisor;[97] but this case is criticized by Anson, who declares it not supported by modern authority.[98] The correct rule according to this author is that if a request is made which is in substance an offer of a promise upon terms to be afterward ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction, or else as evidence to assist the jury in determining what would be a reasonable sum.[99] And such is the view of some of the American courts,[1] the court permitting the jury to imply a previous request from the fact that the service was beneficial to the promisor, when there is no evidence expressly negativing the request.[2] But if no promise could be

Minnesota.— Mason *v.* Campbell, 27 Minn. 54, 6 N. W. 405.

Mississippi.— Wright *v.* Clark, 34 Miss. 116.

New Hampshire.— Grant *v.* Porter, 63 N. H. 229; Merrimack County Bank *v.* Brown, 12 N. H. 320.

New York.— Zoebisch *v.* Von Minden, 47 Hun 213; Stafford *v.* Bacon, 1 Hill 532, 37 Am. Dec. 366.

Ohio.— Lewis *v.* Simonds, 1 Handy 82.

Pennsylvania.— McPherson *v.* Rees, 2 Penr. & W. 521; Baeder *v.* Barton, 11 Wkly. Notes Cas. 165; Callahan *v.* Ackley, 9 Phila. 99, 30 Leg. Int. 12. But see Willing *v.* Peters, 12 Serg. & R. 177.

Rhode Island.— Shepard *v.* Rodes, 7 R. I. 470, 84 Am. Dec. 573.

See *supra*, IV, D, 13; and 11 Cent. Dig. tit. "Contracts," § 364.

94. Tucker *v.* Haughton, 9 Cush. (Mass.) 350; McPherson *v.* Rees, 2 Penr. & W. (Pa.) 521. See Stebbins *v.* Crawford County, 92 Pa. St. 289, 37 Am. Rep. 687.

95. Albert *v.* Winn, 5 Md. 66; Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363.

Unless entered into at the promisor's request.—Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144.

96. Roscorla *v.* Thomas, 3 Q. B. 234, 2 G. & D. 508, 6 Jur. 929, 11 L. J. Q. B. 214, 43 E. C. L. 713. See also Hatchell *v.* Odom, 19 N. C. 302.

97. Lamphugh *v.* Brathwayt, Hob. 147.

98. Anson Contr. 118. See Wilkinson *v.* Oliveria, 1 Bing. N. Cas. 490, 1 Scott 461, 27 E. C. L. 733; *In re* Casey, [1892] 1 Ch. 104, 61 L. J. Ch. 61, 66 L. T. Rep. N. S. 93, 40 Wkly. Rep. 180; Kennedy *v.* Broun, 13 C. B. N. S. 677, 9 Jur. N. S. 119, 32 L. J. C. P. 137, 7 L. T. Rep. N. S. 626, 11 Wkly. Rep. 284, 106 E. C. L. 677; Elderton *v.* Emmens, 4 C. B. 478, 11 Jur. 612, 16 L. J. C. P. 209, 56 E. C. L. 478; Kaye *v.* Dutton, 2 D. & L. 291, 8 Jur. 910, 13 L. J. C. P. 183, 7 M. & G. 807, 8 Scott N. R. 495, 49 E. C. L. 807. And see Riggs *v.* Bullingham, Cro. Eliz. 715; Sidenham *v.* Worlington, 2 Leon. 224; Marsh *v.* Rainsford, 2 Leon. 111; Field *v.* Dale, Rolle Abr. 11; Bosden *v.* Thinne, Yelv. 40.

The only modern case in Great Britain, according to Anson, which directly sustains Lamphugh *v.* Brathwayt, Hob. 147, is the Irish one — Bradford *v.* Roulston, 8 Ir. C. L. 468.

99. Anson Contr. 117.

1. *Illinois.*— Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262. See Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79; Morse *v.* Crate, 43 Ill. App. 513.

Indiana.— See Goldsby *v.* Robertson, 1 Blackf. 247.

Maine.— See Adams *v.* Hill, 16 Me. 215.

Maryland.— See Pool *v.* Horner, 64 Md. 131, 20 Atl. 1036.

Massachusetts.— Moore *v.* Elmer, 180 Mass. 15, 61 N. E. 259; Dearborn *v.* Bowman, 3 Metc. 155.

Minnesota.— See Rogers *v.* Stevenson, 16 Minn. 68.

New Hampshire.— Wilson *v.* Edwards, 24 N. H. 517. And see Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329; Allen *v.* Woodward, 22 N. H. 544.

New York.— Hicks *v.* Burhans, 10 Johns. 243. See Parson *v.* Robinson, 59 N. Y. Super. Ct. 546, 15 N. Y. Suppl. 138, 39 N. Y. St. 376; St. Nichols Ins. Co. *v.* Howe, 7 Bosw. 450; Chaffee *v.* Thomas, 7 Cow. 358; Comstock *v.* Smith, 7 Johns. 87.

Pennsylvania.— Paul *v.* Stackhouse, 38 Pa. St. 302; Cornell *v.* Vanartsdalen, 4 Pa. St. 364; Carroll *v.* Nixon, 4 Watts & S. 517.

United States.— Lonsdale *v.* Brown, 4 Wash. 148, 15 Fed. Cas. No. 8,494.

See 11 Cent. Dig. tit. "Contracts," § 358.

2. *Michigan.*— O'Connor *v.* Beckwith, 41 Mich. 657, 3 N. W. 166.

New Hampshire.— Wilson *v.* Edmonds, 24 N. H. 517; Hatch *v.* Purcell, 21 N. H. 544.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 18 N. Y. St. 328, 1 L. R. A. 281; Davidson *v.* Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. 892; Sternbergh *v.* Provoost, 13 Barb. 365; Nixon *v.* Jenkins, 1 Hilt. 318; Doty *v.*

implied from the request, as where the services were understood to be gratuitous, then a subsequent express promise is without consideration.[3] And if the express promise is different from what the law would have implied it is not enforceable.[4]

c. Moral Obligation — (I) *In General.* There are some states, as we have seen, where without any evidence of previous request the promise will be sustained because founded on a moral obligation. But these decisions are anomalous and opposed to the weight of authority.[5]

(II) *Moral Obligation Founded on Previous Benefit to Promisor.* In some courts a modified doctrine of moral obligation is adopted, and it is held that a moral obligation founded on previous benefits, received by the promisor at the hands of the promisee, will support a promise by him.[6]

(III) *Moral Obligation Founded on Fraud or Duress.* Where a person has obtained a benefit through his duress or fraud he cannot take advantage of this to show that he had made no previous request.[7] Thus where services are rendered under these circumstances, one may recover their value, even though when they were rendered there was no intention or expectation that they should be paid for.[8]

d. Promise in Pursuance of Previous Understanding. The promise may be binding because executed in pursuance of a previous understanding. Thus while one who signs a note after it has been executed and delivered and after the consideration has passed between the original parties, incurs no liability unless there is proof of some new consideration,[9] yet where it appears that although a note or

Wilson, 14 Johns. 378; Oatfield *v.* Waring, 14 Johns. 188; Hicks *v.* Burhans, 10 Johns. 243.

Pennsylvania.— Paul *v.* Stackhouse, 38 Pa. St. 302.

Wisconsin.— Silverthorn *v.* Wylie, 96 Wis. 69, 71 N. W. 107; Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

See 11 Cent. Dig. tit. "Contracts," § 358.

3. *Arkansas.*— Osier *v.* Hobbs, 33 Ark. 213.

Iowa.—Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358.

Massachusetts.— Moore *v.* Elmer, 180 Mass. 15, 61 N. E. 259.

Minnesota.— Bond *v.* Corbett, 2 Minn. 248.

New Jersey.— Gardner *v.* Schooley, 25 N. J. Eq. 150; Updike *v.* Titus, 13 N. J. Eq. 151.

New York.— Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. Dec. 237.

4. Bailey *v.* Bussing, 29 Conn. 1; Merrick *v.* Giddings, 1 Mackey (D. C.) 394; Jackson *v.* Cobbin, 1 Dowl. N. S. 96, 10 L. J. Exch. 389, 8 M. & W. 790; Granger *v.* Collins, 6 M. & W. 458; Hopkins *v.* Logan, 7 Dowl. P. C. 360, 8 L. J. Exch. 218, 5 M. & W. 241; Lattimore *v.* Garrard, 1 Exch. 809; Kaye *v.* Dutton, 2 D. & L. 291, 8 Jur. 910, 13 L. J. C. P. 183, 7 M. & G. 807, 8 Scott N. R. 495, 49 E. C. L. 807; Brown *v.* Crump, 1 Marsh. 609, 6 Taunt. 300, 1 E. C. L. 623.

5. Landis *v.* Royer, 59 Pa. St. 95; Ridlon *v.* Davis, 51 Vt. 457. See *supra*, IV, C, 13.

6. *Indiana.*— Wolford *v.* Powers, 85 Ind. 294, 44 Am. Rep. 16.

Iowa.— Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582.

Kentucky.— Viley *v.* Pettit, 96 Ky. 576, 29 S. W. 438, 16 Ky. L. Rep. 650.

Louisiana.— Garland *v.* Lockett, 5 Mart. N. S. 40.

Massachusetts.— Gleason *v.* Dyke, 22 Pick. 390.

New Hampshire.— Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329.

New York.— Goulding *v.* Davidson, 26 N. Y. 604; Doty *v.* Wilson, 14 Johns. 378.

Pennsylvania.— Greaves *v.* McCallister, 1 Browne 109.

Vermont.— Seymour *v.* Marlboro, 40 Vt. 171; Boothe *v.* Fitzpatrick, 36 Vt. 681.

7. Jarrot *v.* Jarrot, 7 Ill. 1; Black *v.* Meaux, 4 Dana (Ky.) 188; Rickard *v.* Stanton, 16 Wend. (N. Y.) 25; Peter *v.* Steel, 3 Yeates (Pa.) 250.

8. In addition to the cases above cited see Patterson *v.* Crawford, 12 Ind. 241; Boardman *v.* Ward, 40 Minn. 399, 42 N. W. 202, 12 Am. St. Rep. 749; Hickam *v.* Hickam, 46 Mo. App. 496.

Services of wife during fraudulent marriage.— It has been held that where a married man by fraud induces a woman to marry him, and she lives with him until she finds that he was already married and then leaves him, she may maintain an action for her services. Fox *v.* Dawson, 8 Mart. (La.) 94; Higgins *v.* Breen, 9 Mo. 497. Such an action is, however, denied in some states, the remedy being an action by the woman for the deceit. Cooper *v.* Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; Morrell *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. There can be no implied promise if both parties were ignorant of the invalidity of the marriage (Cropsey *v.* Sweeney, 27 Barb. (N. Y.) 310, 7 Abb. Pr. (N. Y.) 129), or if the woman was the guilty party (Robbins *v.* Potter, 11 Allen (Mass.) 588).

9. McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; Williams *v.* Williams, 67 Mo. 661; Pfeiffer *v.* Kingsland, 25 Mo. 66.

other contract was signed after its delivery it was the original agreement that the further security was to be given, and it is so given pursuant to such original agreement, it relates back to the inception of the first contract and no new consideration is required.[10]

e. Subsidiary Promises. So the consideration of the principal contract will support subsidiary promises.[11]

f. Consideration Partly Past and Partly Present or Executory. A promise founded partly on a past consideration and partly on an executory one is enforceable.[12]

g. Preëxisting Liability.[13] A preëxisting liability is a good consideration for a new promise.[14] So where a debtor gives additional security to his creditor, or a principal to his surety, on a preëxisting debt, without any new consideration, there is a sufficient consideration.[15]

h. Former Promise Unenforceable by Act of Law — (i) *In General.* A moral obligation may be sufficient to sustain a promise where it is one which has been once a valuable consideration, but has ceased to be binding from some supervenient act of the law.[16] The principle upon which these cases rest is that where

10. Hawkes *v.* Phillips, 7 Gray (Mass.) 284; Montgomery *v.* Auchley, 92 Mo. 130, 4 S. W. 425 [*citing* Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179].

11. *Minnesota.*— Keller *v.* Smith, 59 Minn. 203, 60 N. W. 1102.

Missouri.— Luthy *v.* Woods, 6 Mo. App. 67.

New York.— Murray *v.* Judson, 9 N. Y. 73, 59 Am. Dec. 516; Cady *v.* Allen, 22 Barb. 388; Andrews *v.* Pontue, 24 Wend. 285.

North Carolina.— Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; Wiswall *v.* Potts, 58 N. C. 184.

Pennsylvania.— Ayers' Appeal, 28 Pa. St. 179.

South Carolina.— Haile *v.* Morgan, 25 S. C. 601.

United States.— De Wolf *v.* Rahaud, 1 Pet. 476, 7 L. ed. 227 [*affirming* 1 Paine 508, 20 Fed. Cas. No. 11,519].

12. Irwin *v.* Locke, 20 Colo. 148, 36 Pac. 898; Loomis *v.* Newhall, 15 Pick. (Mass.) 159. See Putnam *v.* Tennyson, 50 Ind. 456, 460, where it was held that a promise by a woman, after attorneys had procured a divorce and judgment for alimony for her, to pay them a certain sum in consideration of their services already rendered in the suit "and for such services as they would have to render thereafter in collecting said alimony" was supported by a consideration accruing after the disability of coverture was removed and was enforceable.

13. Liability implied from previous request see *supra*, IV, D, 14, b.

14. *Connecticut.*— Baily *v.* Bussing, 29 Conn. 1; Central Bank *v.* Curtis, 26 Conn. 533; Stamford Bank *v.* Ferris, 17 Conn. 259.

Illinois.— Stephens *v.* Thornton, 26 Ill. 323.

Iowa.— Duncan *v.* Miller, 64 Iowa 223, 20 N. W. 161.

Maine.— Bates *v.* Churchill, 32 Me. 31.

Maryland.— Ellicott *v.* Turner, 4 Md. 476.

Massachusetts.— Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 206.

Missouri.— Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

New Hampshire.— Haseltine *v.* Guild, 11 N. H. 390.

New York.— Warner *v.* Booge, 15 Johns. 233.

Texas.— Williams *v.* Silliman, 74 Tex. 626, 12 S. W. 534; Newton *v.* Newton, (Tex. Civ. App. 1894) 25 S. W. 159.

Vermont.— Seeley *v.* Bishee, 2 Vt. 105.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

Wisconsin.— Paine *v.* Benton, 32 Wis. 491.

15. Turner *v.* McFee, 61 Ala. 468, 471, where it is said: "No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from the debtor." And see the cases in the preceding note.

16. *California.*— Feeny *v.* Daly, 8 Cal. 84.

Louisiana.— Jamison *v.* Ludlow, 3 La. Ann. 492.

Maine.— Warren *v.* Whitney, 24 Me. 561, 41 Am. Dec. 406.

Maryland.— Katz *v.* Moore, 13 Md. 566.

New York.— Erwin *v.* Saunders, 1 Cow. 249, 13 Am. Dec. 520; Shippey *v.* Henderson, 14 Johns. 178, 7 Am. Dec. 458; Scouton *v.* Eislord, 7 Johns. 36.

South Carolina.— McKelvey *v.* Tate, 3 Rich. 339.

Virginia.— Davis *v.* Anderson, 99 Va. 620, 39 S. E. 588.

United States.— Lonsdale *v.* Brown, 4 Wash. 86, 15 Fed. Cas. No. 8,493.

See 11 Cent. Dig. tit. "Contracts," § 361 *et seq.*

Where there has been an antecedent valuable consideration.— *Connecticut.*— Cook *v.* Bradley, 7 Conn. 57, 18 Am. Dec. 79.

Maine.— Farnham *v.* O'Brien, 22 Me. 475.

Massachusetts.— Dodge *v.* Adams, 19 Pick. 429.

New York.— Geer *v.* Archer, 2 Barb. 420; Watkins *v.* Halstead, 2 Sandf. 311; Ehle *v.* Judson, 24 Wend. 97.

Pennsylvania.— Turner *v.* Patridge, 3 Penr. & W. 172; Clark *v.* Herring, 5 Binn. 33.

the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.[17] A promise, it is said, may be supported by a moral obligation, where the obligation grows out of an original legal obligation that has been extinguished without being performed.[18]

(II) *Statute of Limitations.* A debt barred by the statute of limitations may be revived by a new promise to pay it by the debtor but not by a third person who was not morally bound to pay it.[19]

(III) *Bankruptcy or Insolvency Laws.* The moral obligation of a debtor who has been discharged in bankruptcy or insolvency proceedings to pay his debts in full is a sufficient consideration for his promise to pay a debt discharged.[20]

17. Earle *v.* Oliver, 2 Exch. 71.

18. Parker *v.* Cowan, 1 Heisk. (Tenn.) 518.

Right of action extinguished by act of parties.—The rule that when the precedent original consideration is sufficient to sustain the promise, but the right of action is suspended or barred by some positive rule of statutory or common law, the debtor may by a subsequent promise waive the exemption which the law has interposed, indirectly for his benefit, but mainly from reasons of public policy, applies only to cases where the original right of action is extinguished by the act of the law and not to those extinguished by the act of the parties. Stafford *v.* Bacon, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

19. *Alabama.*— Grimball *v.* Mastin, 77 Ala. 553.

California.— Feeny *v.* Daly, 8 Cal. 84.

Georgia.— Pittman *v.* Elder, 76 Ga. 371; Brewster *v.* Hardeman, Dudley 138.

Illinois.— Keener *v.* Crull, 19 Ill. 189.

Kentucky.— Emmons *v.* Overton, 18 B. Mon. 643; Head *v.* Manners, 5 J. J. Marsh. 255.

Louisiana.— Jamison *v.* Ludlow, 3 La. Ann. 492.

Maryland.—Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355; Katz *v.* Moore, 13 Md. 566.

Massachusetts.— Ilsley *v.* Jewett, 3 Metc. 439; Little *v.* Blunt, 9 Pick. 488; Maxim *v.* Morse, 8 Mass. 127.

New York.— Erwin *v.* Saunders, 1 Cow. 249, 13 Am. Dec. 520; Shippey *v.* Henderson, 14 Johns. 178, 7 Am. Dec. 458; Scouton *v.* Eislord, 7 Johns. 36.

Pennsylvania.— Shreiner *v.* Cummins, 63 Pa. St. 374; Levy *v.* Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650.

Rhode Island.— Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

South Carolina.—McKelvey *v.* Tate, 3 Rich. 339.

Texas.— Pierce *v.* Wimberly, 78 Tex. 187, 14 S. W. 454; Flack *v.* Neill, 22 Tex. 253; Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119.

Vermont.— Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682.

West Virginia.— Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Wisconsin.— Pritchard *v.* Howell, 1 Wis. 131, 60 Am. Dec. 363.

United States.—Lonsdale *v.* Brown, 4 Wash. 86, 15 Fed. Cas. No. 8,493.

See 11 Cent. Dig. tit. "Contracts," § 362. And see Limitations of Actions.

20. *Alabama.*— Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809.

California.— Feeny *v.* Daly, 8 Cal. 84.

Georgia.— Ross *v.* Jordan, 62 Ga. 298.

Illinois.— Katz *v.* Moessinger, 110 Ill. 372; St. John *v.* Stephenson, 90 Ill. 82.

Indiana.—Willis *v.* Cushman, 115 Ind. 100, 17 N. E. 168; Carey *v.* Hess, 112 Ind. 398, 14 N. E. 235; Hubbard *v.* Farrell, 87 Ind. 215; Hunt *v.* Jones, 1 Ind. App. 545, 28 N. E. 98.

Iowa.— Knapp *v.* Hoyt, 57 Iowa 591, 10 N. W. 925.

Kentucky.— Eckler *v.* Galbraith, 12 Bush 71; Posey *v.* Mayer, 3 Ky. L. Rep. 613.

Louisiana.— Andrieu's Succession, 44 La. Ann. 103, 10 So. 388; Blanc *v.* Banks, 10 Rob. 115, 43 Am. Dec. 175.

Maryland.— Webster *v.* Le Compte, 74 Md. 249, 22 Atl. 232; Katz *v.* Moore, 13 Md. 566; Yates *v.* Hollingsworth, 5 Harr. & J. 216.

Massachusetts.— Way *v.* Sperry, 6 Cush. 238, 52 Am. Dec. 779; Maxim *v.* Morse, 8 Mass. 127.

Michigan.— Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347; Edwards *v.* Nelson, 51 Mich. 121, 16 N. W. 261.

Minnesota.— Higgins *v.* Dale, 28 Minn. 126, 9 N. W. 583.

Mississippi.— McWillie *v.* Kirkpatrick, 28 Miss. 802, 64 Am. Dec. 125. *Contra*, Rice *v.* Maxwell, 13 Sm. & M. (Miss.) 289, 53 Am. Dec. 85.

Missouri.— Wislizenus *v.* O'Fallon, 91 Mo. 184, 3 S. W. 837.

New Hampshire.— Wiggin *v.* Hodgdon, 63 N. H. 39; Nashua Second Nat. Bank *v.* Wood, 59 N. H. 407; Fletcher *v.* Neally, 20 N. H. 464.

New Jersey.— Briggs *v.* Sutton, 20 N. J. L. 581; Christie *v.* Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429.

New York.— Dusenbury *v.* Hoyt, 53 N. Y. 521, 13 Am. Rep. 543; Ingersoll *v.* Rhoades, Lalor 371; Erwin *v.* Saunders, 1 Cow. 249, 13 Am. Dec. 520; Shippey *v.* Henderson, 14 Johns. 178, 7 Am. Dec. 458; Scouton *v.* Eislord, 7 Johns. 36; Conover *v.* Brush, 2 N. Y. Leg. Obs. 289.

(IV) *CONTRACTS OF MARRIED WOMEN.* It has been held that a promise made by a woman during widowhood or after divorce to pay debts or perform contracts made during coverture, and not binding on her then, is enforceable.[21] The weight of authority, however, seems to be the other way, on the ground that her original promise was void and not like an infant's simply voidable.[22]

(V) *CONTRACTS OF INFANTS AND INSANE PERSONS.* A promise by one after coming of age to pay debts or perform contracts made during infancy, and which could not be enforced against him, is valid and binding on him.[23] So a promise by a person while sane to pay for goods furnished to himself and family while he was insane will bind him.[24]

(VI) *CONTRACTS UNENFORCEABLE UNDER LAW SINCE REPEALED.* It has been held that where bills, void for usury, are renewed after the usury laws have been repealed, the consideration for the renewal being the past loan, they are valid.[25] But this would seem contrary to the rule that the repeal of a statute which makes a contract void does not validate a contract entered into while the statute was in force.[26] And it has been expressly decided in Michigan that where

North Carolina.— Shaw *v.* Burney, 86 N. C. 331, 41 Am. Rep. 461; Kull *v.* Farmer, 78 N. C. 339.

Pennsylvania.— Murphy *v.* Crawford, 114 Pa. St. 496, 7 Atl. 142; Hobough *v.* Murphy, 114 Pa. St. 3 8, 7 Atl. 139; Osner *v.* Conrad, 1 Wkly. Notes Cas. 601.

Vermont.— Farmers', etc., Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351.

United States.—Allen *v.* Ferguson, 18 Wall. 1, 21 L. ed. 854.

England.— Trueman *v.* Fenton, Cowp. 544.

See 11 Cent. Dig. tit. "Contracts," § 361; and, generally, BANKRUPTCY, 5 Cyc. 407, note 87.

21. *Alabama.*— Vance *v.* Wells, 8 Ala. 399.

Arkansas.— Viser *v.* Bertrand, 14 Ark. 267.

Connecticut.— Craft *v.* Rolland, 37 Conn. 491.

Georgia.— Cleland *v.* Low, 32 Ga. 458.

New York.—Goulding *v.* Davidson, 26 N. Y. 604.

Pennsylvania.— Sharpless' Appeal, 140 Pa. St. 63, 21 Atl. 239; Brooks *v.* Merchants' Nat. Bank, 125 Pa. St. 394, 17 Atl. 418; Brown *v.* Bennett, 75 Pa. St. 420; Hemphill *v.* McClimans, 24 Pa. St. 367; Lyons *v.* Burns, 8 Pa. Co. Ct. 359.

Vermont.— Sherwin *v.* Sanders, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750.

England.— Lee *v.* Muggeridge, 5 Taunt. 36, 1 E. C. L. 32.

See 11 Cent. Dig. tit. "Contracts," § 366.

22. *Alabama.*— Thompson *v.* Hudgins, 116 Ala. 93, 22 So. 632.

Georgia.— Waters *v.* Bean, 15 Ga. 358.

Indiana.— Putnam *v.* Tennyson, 50 Ind. 456; Maher *v.* Martin, 43 Ind. 314; Davis *v.* Schmidt, (Ind. App. 1892) 31 N. E. 846.

Mississippi.—Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329.

Missouri.— Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Kennerly *v.* Martin, 8 Mo. 698.

New Hampshire.— Kent *v.* Rand, 64 N. H. 45, 5 Atl. 760.

New Jersey.— Condon *v.* Barr, 49 N. J. L. 53, 6 Atl. 614.

New York.— Watkins *v.* Halstead, 2 Sandf. 311.

North Carolina.—Wilcox *v.* Arnold, 116 N. C. 708, 21 S. E. 434.

Vermont.— Valentine *v.* Bell, 66 Vt. 280, 29 Atl. 251; Hayward *v.* Barker, 52 Vt. 429, 36 Am. Rep. 762.

United States.— Watson *v.* Dunlap, 2 Cranch C. C. 14, 29 Fed. Cas. No. 17,282.

England.— Meyer *v.* Haworth, 8 A. & E. 467, 7 L. J. Q. B. 211, 3 N. & P. 462, 35 E. C. L. 685; Loyd *v.* Lee, 1 Str. 94.

See 11 Cent. Dig. tit. "Contracts," § 366; and, generally, HUSBAND AND WIFE.

23. *Alabama.*— Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366.

Colorado.—Kendrick *v.* Niesz, 17 Colo. 506, 30 Pac. 245.

Illinois.— Bliss *v.* Perryman, 2 Ill. 484.

Indiana.— Heady *v.* Boden, 4 Ind. App. 475, 30 N. E. 1119.

Kentucky.— Stern *v.* Freeman, 4 Metc. 309.

Massachusetts.— Reed *v.* Batchelder, 1 Metc. 559.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

New Hampshire.— Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307.

England.— Williams *v.* Moor, 2 Dowl. N. S. 993, 7 Jur. 817, 12 L. J. Exch. 253, 11 M. & W. 256; Edmond's Case, 3 Leon. 164.

See INFANTS.

24. Westmoreland *v.* Davis, 1 Ala. 299.

25. Flight *v.* Reed, 1 H. & C. 703, 9 Jur. N. S. 1016, 32 L. J. Exch. 265, 8 L. T. Rep. N. S. 638, 12 Wkly. Rep. 53; Barnes *v.* Hendley, 2 Taunt. 184. And see Houser *v.* Planters' Bank, 57 Ga. 95; Hammond *v.* Hopping, 13 Wend. (N. Y.) 505; Early *v.* Mahon, 19 Johns. (N. Y.) 147, 10 Am. Dec. 204.

A new promise made after the war to repay money borrowed while it was in progress, by a resident of the Confederate states from one in the Union states, was held enforceable in Louisiana. Ledoux *v.* Buhler, 21 La. Ann. 130.

26. See *infra*, VII, D, 2.

liquor was sold in violation of a statute afterward repealed, a promise to pay therefor made after the repeal was without consideration.[27]

i. Incurring Legal Liability at Request. If one incurs a legal liability at the request of another, such liability is a sufficient consideration to support a promise of the person at whose request it is incurred.[28] So if one pays money at another's request.[29]

j. Voluntarily Doing What Promisor Is Bound to Do. It is laid down in some cases, both in England and America, that where the plaintiff voluntarily does that whereunto the defendant was legally compellable, and the defendant afterward in consideration thereof expressly promises he will be bound by such a promise.[30] Anson criticizes the rule thus stated as "if not non-existent resting at least on scanty and unsatisfactory authority."[31] Nevertheless there are American decisions supporting the doctrine.[32]

k. Consideration Expressed in Past Tense. The fact that the consideration is expressed in a written contract in the past tense does not necessarily show that it is a past consideration.[33]

E. Adequacy of Consideration — 1. In General. So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise is generally immaterial. The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.[34] The giving of a

27. Ludlow *v.* Hardy, 38 Mich. 690.

28. Mound City Land, etc., Assoc. *v.* Slauson, 65 Cal. 425, 4 Pac. 396; Callahan *v.* Linthicum, 43 Md. 97, 20 Am. Rep. 106; Skidmore *v.* Bradford, L. R. 8 Eq. 134, 21 L. T. Rep. N. S. 291, 17 Wkly. Rep. 1056.

29. Leake Contr. 55. And see *supra*, IV, D, 14, b.

30. See the cases in the notes following.

31. Anson Contr. 121, where it is said that the English cases which are cited to support this exception all turned upon the liability of parish authorities for medical attendance upon paupers who were settled in one parish but resident in another, it being held that a suit could be maintained for services rendered against the parish legally bound to render them, and which had after their rendition promised to pay for them. Watson *v.* Turner, Buller N. P. 147; Atkins *v.* Bauwell, 2 East 505; Wing *v.* Mill, 1 B. & Ald. 104; Paynter *v.* Williams, 1 Cr. & M. 810. The true ground of the decision in Watson *v.* Turner, Buller N. P. 129, says Anson [*quoting* from 1 Selw. N. P. 51], was that "the defendants being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants, and consequently sufficient to support a general *indebitatus assumpsit* for work and labor performed by the plaintiff for the defendants, at their request." Anson Contr. 102.

32. *Alabama.*—Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162.

Indiana.— Bevan *v.* Tomlinson, 25 Ind. 253.

Kentucky.— Price *v.* Towsey, 3 Litt. 423, 14 Am. Dec. 81.

Pennsylvania.—Hassinger *v.* Solms, 5 Serg. & R. 4.

Vermont.— Seymour *v.* Marlboro, 40 Vt. 171; Boothe *v.* Fitzpatrick, 36 Vt. 681.

Quasi-contract.— Some of the American cases appear to enforce the contract on the ground of quasi-contract, that is, on the ground that the defendant has been enriched at the expense of the plaintiff and ought to repay. Curtis *v.* Parks, 55 Cal. 106; Gleason *v.* Dyke, 22 Pick. (Mass.) 390; Doty *v.* Wilson, 14 Johns. (N. Y.) 378. And see McMorris *v.* Herndon, 2 Bailey (S. C.) 56, 21 Am. Dec. 515, where it is said that where a person is under a legal obligation to pay money and another pays it for him without request, the law raises an implied assumpsit to refund, without any express promise on his part.

Ratification.— It is intimated in one case that in such cases, the defendant "ratifies" the act of the plaintiff who represented him in the transaction, and the ratification is equivalent to a prior authority. Gleason *v.* Dyke, 22 Pick. (Mass.) 390.

33. Hurst *v.* Cresson, etc., Coal, etc., Co., 86 Hun (N. Y.) 189, 33 N. Y. Suppl. 313, 67 N. Y. St. 55; Winch *v.* Farmers' L. & T. Co., 11 Misc. (N. Y.) 390, 32 N. Y. Suppl. 244, 65 N. Y. St. 426; Haigh *v.* Brooks, 10 A. & E. 309, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180; Barber *v.* Morris, 1 M. & Rob. 62; Thornton *v.* Jenyns, 1 Scott N. R. 52.

34. *Arkansas.*— Woodruff *v.* McDonald, 33 Ark. 97; Buckner *v.* McIlroy, 31 Ark. 631.

Connecticut.— Clark *v.* Sigourney, 17 Conn. 511.

Florida.— Robinson *v.* Hyer, 35 Fla. 544,

receipt,[35] the surrender of an old note or other document on which there was no liability, and which was of no legal value,[36] the execution of a release, although the promisee had nothing to release,[37] the showing of a deed,[38] or parting with a letter[39] have been held a sufficient consideration.

2. EXCEPTIONS — a. In General. An exception exists in the case of a mere

17 So. 745; Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Georgia.— Sanders *v.* Carter, 91 Ga. 450, 17 S. E. 345; North Georgia Min. Co. *v.* Latimer, 51 Ga. 47.

Illinois.— Bryan *v.* Dyer, 28 Ill. 188; McArtee *v.* Engart, 13 Ill. 242.

Indiana.— Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Chicago, etc., R. Co. *v.* Derkes, 103 Ind. 520, 3 N. E. 239; Wolford *v.* Powers, 85 Ind. 294, 44 Am. Rep. 16; Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348; Givan *v.* Swadley, 3 Ind. 484; Hodges *v.* Truax, 19 Ind. App. 651, 49 N. E. 1079.

Iowa.— Blake *v.* Blake, 7 Iowa 46.

Kentucky.— Berry *v.* Graddy, 1 Metc. 553, where one promised the husband of a favorite niece that he would pay five thousand dollars toward the price of a farm, if the husband would buy it instead of removing to another state, and the husband did buy it and lived there. It was held a good consideration for the promise. See also Price *v.* Price, 64 S. W. 746, 23 Ky. L. Rep. 1086, 66 S. W. 529, 23 Ky. L. Rep. 1911.

Maine.— Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572.

Maryland.— Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Taylor *v.* Turley, 33 Md. 500; Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164; Shepherd *v.* Bevin, 9 Gill 32.

Massachusetts.— Nash *v.* Lull, 102 Mass. 60, 3 Am. Rep. 435; Newhall *v.* Paige, 10 Gray 366; Hubbard *v.* Coolidge, 1 Metc. 84.

Missouri.— Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Marks *v.* State Bank, 8 Mo. 316; Brownlow *v.* Wollard, 65 Mo. App. 636; Columbia Incandescent Lamp Co. *v.* American Electrical Mfg. Co., 64 Mo. App. 115.

New York.— Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 36 N. Y. St. 888, 21 Am. St. Rep. 693, 12 L. R. A. 463; Stettheimer *v.* Killip, 75 N. Y. 282; Earl *v.* Peck, 64 N. Y. 596; Worth *v.* Case, 42 N. Y. 362; Darrow *v.* Walker, 48 N. Y. Super. Ct. 6; Brooks *v.* Ball, 18 Johns. 337; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

Ohio.— Swan *v.* Shahan, 1 Ohio Cir. Ct. 216.

Oklahoma.— Mulhall *v.* Mulhall, 3 Okla. 304, 41 Pac. 109.

Pennsylvania.— Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885; McClurg's Appeal, 58 Pa. St. 51; Harlan *v.* Harlan, 20 Pa. St. 303; Davis *v.* Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107; Austyn *v.* McLure, 4 Dall. 226, 1 L. ed. 811.

Rhode Island.— Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

South Carolina.— Butler *v.* Haskell, 4 Desauss. 651.

Vermont.— Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682; Dorwin *v.* Smith, 35 Vt. 69, Troy Conference Academy *v.* Nelson, 24 Vt. 189.

Wisconsin.— Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

United States.— Eyre *v.* Potter, 15 How. 42, 14 L. ed. 592; Lawrence *v.* McCalmont, 2 How. 426, 11 L. ed. 326; Boggs *v.* Wann, 58 Fed. 681; Leavitt *v.* Connecticut Peat Co., 6 Blatchf. 139, 15 Fed. Cas. No. 8,170.

England.— Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659, 30 L. T. Rep. N. S. 863; Blackburn, J., in Bolton *v.* Madden, L. R. 9 Q. B. 55, 43 L. J. Q. B. 35, 29 L. T. Rep. N. S. 505, 22 Wkly. Rep. 207; Bainbridge *v.* Firmstone, 8 A. & E. 743, 744, 1 P. & D. 2, 1 W. W. & H. 600, 35 E. C. L. 822 (holding that a promise made in consideration of the promisee permitting the promisor to weigh two boilers was binding, the court saying: "The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for ever so short a time"); Hitchcock *v.* Coker, 6 A. & E. 438, 2 H. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241; Smith *v.* Alger, 1 B. & Ad. 603, 9 L. J. K. B. O. S. 79, 20 E. C. L. 616; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657.

See 11 Cent. Dig. tit. "Contracts," § 231.

Statute.—An adequate consideration is required by statute in California. Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190.

35. Sanders *v.* Carter, 91 Ga. 450, 17 S. E. 345.

36. Judy *v.* Louderman, 48 Ohio St. 562, 27 N. E. 181; Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; Begbie *v.* Phosphate Sewage Co., 1 Q. B. D. 679, 35 L. T. Rep. N. S. 350, 25 Wkly. Rep. 85; Haigh *v.* Brooks, 10 A. & E. 309, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180; Westlake *v.* Adams, 5 C. B. N. S. 248, 4 Jur. N. S. 1021, 27 L. J. C. P. 271, 94 E. C. L. 248.

An invalid will.— Smith *v.* Smith, 13 C. B. N. S. 418, 32 L. J. C. P. 149, 8 L. T. Rep. N. S. 425, 106 E. C. L. 418.

37. Sykes *v.* Chadwick, 18 Wall. (U. S.) 141, 21 L. ed. 824; Barnard *v.* Simons, 1 Rolle Abr. 26.

38. Stiurlyn *v.* Albany, Cro. Eliz. 67.

39. Wilkinson *v.* Oliveira, 1 Bing. N. Cas. 490, 1 Scott 461, 27 E. C. L. 733.

exchange of sums of money or coin whose value is exactly fixed.[40] Thus a promise to pay one cent will not support a promise to pay six hundred dollars, except under extraordinary circumstances.[41] And it was at one time considered that in the case of contracts in restraint of trade, courts would inquire into the adequacy of the consideration, but this idea is now exploded.[42]

b. In Equity. In equity inadequacy of consideration is often treated as corroborative evidence of fraud or undue influence, which will enable a promisor to resist a suit for specific performance or have his agreement set aside.[43] But mere inadequacy of consideration, unless it is so gross as "to shock the conscience and amount in itself to conclusive evidence of fraud," is not of itself a ground on which specific performance of a contract will be refused or on which a contract will be rescinded for fraud or undue influence.[44]

F. Necessity For Consideration to Appear on Writing. Except when

40. Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453; Shepard *v.* Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

41. Schnell *v.* Nell, 17 Ind. 29, 79 Am. Dec. 453, where it was said that had the one cent mentioned been some particular one cent, a family piece or ancient, remarkable coin possessing an indeterminate value extrinsic from its simple money value a different view might he taken.

42. *Alabama.*— McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 277.

Illinois.— Linn *v.* Sigsbee, 67 Ill. 75.

Indiana.— Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Massachusetts.— Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102.

Michigan.— Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

New York.— Lawrence *v.* Kidder, 10 Barb. 641.

Ohio.— Grasselli *v.* Lowden, 11 Ohio St. 349.

Pennsylvania.— McClurg's Appeal, 58 Pa. St. 51.

See *infra*, VII, B, 3, f, (VII), (I).

43. *Alabama.*— Burke *v.* Taylor, 94 Ala. 530, 10 So. 129; Cofer *v.* Moore, 87 Ala. 705, 6 So. 306; Judge *v.* Wilkins, 19 Ala. 765.

California.— Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

Florida.— Chaires *v.* Brady, 10 Fla. 133.

Georgia.— Maddox *v.* Simmons, 31 Ga. 512.

Illinois.— McMullen *v.* Gable, 47 Ill. 67.

Indiana.— Brown *v.* Budd, 2 Ind. 442.

Iowa.— Richardson *v.* Barrick, 16 Iowa 407; Blake *v.* Blake, 7 Iowa 46 (holding that it is the fraud and not the inadequacy which invalidates the contract).

Kansas.— Grindrod *v.* Wolf, 38 Kan. 292, 16 Pac. 691.

Kentucky.— Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610; Talbott *v.* Hooser, 12 Bush 408; Beard *v.* Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362; Hunter *v.* Owens, 9 S. W. 717, 10 S. W. 376, 10 Ky. L. Rep. 651.

Maryland.— Haines *v.* Haines, 6 Md. 435.

Missouri.— Holmes *v.* Fresh, 9 Mo. 201.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702.

North Carolina.—Potter *v.* Everitt, 42 N. C. 152; Green *v.* Thompson, 37 N. C. 365.

Ohio.—Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181; Hough *v.* Hunt, 2 Ohio 495, 15 Am. Dec. 569.

Pennsylvania.— Davidson *v.* Little, 22 Pa. St. 245, 60 Am. Dec. 81.

Tennessee.— Woodfolk *v.* Blount, 3 Hayw. 146; White *v.* Flora, 2 Overt. 426.

Vermont.— Mann *v.* Betterly, 21 Vt. 326.

Wisconsin.— Wheeler, etc., Mfg. Co. *v.* Laus, 62 Wis. 635, 23 N. W. 17.

United States.— St. Louis, etc., R. Co. *v.* Phillips, 66 Fed. 35, 13 C. C. A. 315; Bowman *v.* Patrick, 36 Fed. 138; Follett *v.* Rose, 13 McLean 332, 9 Fed. Cas. No. 4,900.

See CANCELLATION OF INSTRUMENTS, 6 Cyc. 286; SPECIFIC PERFORMANCE.

44. *California.*—Barry *v.* St. Joseph's Hospital, etc., (1897) 48 Pac. 68.

Kentucky.— Woollums *v.* Horsley, 93 Ky. 582, 20 S. W. 781, 14 Ky. L. Rep. 642; Cruise *v.* Christopher, 5 Dana 181; Beard *v.* Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

Missouri.— Harrison *v.* Town, 17 Mo. 237.

New Jersey.— Phillips *v.* Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Shaddle *v.* Disborough, 30 N. J. Eq. 370; Ready *v.* Noakes, 29 N. J. Eq. 497; Gifford *v.* Thorn, 9 N. J. Eq. 702.

Ohio.— Galloway *v.* Barr, 12 Ohio 354.

Pennsylvania.— Davidson *v.* Little, 22 Pa. St. 245, 60 Am. Dec. 81.

South Carolina.— Gasque *v.* Small, 2 Strobh. Eq. 72.

West Virginia.— Conaway *v.* Sweeney, 24 W. Va. 643.

Wisconsin.— Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885; Conrad *v.* Schwamb, 53 Wis. 372, 19 N. W. 395.

United States.— Erwin *v.* Parham, 12 How. 197, 13 L. ed. 952; Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120; Waterman *v.* Waterman, 27 Fed. 827.

England.— Harrison *v.* Guest, 6 De G. M. & G. 424, 2 Jur. N. S. 911, 25 L. J. Ch. 544, 4 Wkly. Rep. 585, 55 Eng. Ch. 331; Middleton *v.* Brown, 47 L. J. Ch. 411, 38 L. T. Rep. N. S. 334; Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167. And

required by some statute the consideration for a contract need not appear upon its face, but may be proved by parol or inferred from the terms of the agreement.[45] The words "for value received" in a written contract are *prima facie* evidence of a sufficient consideration;[46] but they do not necessarily import a consideration in money, for a promise to pay in the future may be shown to have been the consideration.[47] And notwithstanding the admission "for value received" the writing may show on its face a clearly past consideration, and hence no legal consideration.[48]

G. Contradicting Statement of Consideration. Most courts hold that the consideration may be shown by parol to be different from that expressed in the agreement.[49]

see Borell *v.* Dann, 2 Hare 440, 24 Eng. Ch. 440, where Wigram, V. C., says: "Mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, and still less can it be a ground for rescinding an executed contract. The only exception is where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case."

See SPECIFIC PERFORMANCE.

45. *Connecticut.*— Tingley *v.* Cutler, 7 Conn. 291.

Iowa.— Attix *v.* Pelan, 5 Iowa 336.

Kentucky.— Kelly *v.* Bradford, 3 Bibb 317, 6 Am. Dec. 656.

Louisiana.— Mouton *v.* Noble, 1 La. Ann. 192; Louisiana College *v.* Keller, 10 La. 164; Reguillo *v.* Lorente, 10 La. 23.

Maine.— Cummings *v.* Dennett, 26 Me. 397.

Massachusetts.— Arms *v.* Ashley, 4 Pick. 71.

Missouri.— Bartlett *v.* Watson, 1 Mo. App. 151.

New York.— Thompson *v.* Blanchard, 3 N. Y. 335; Allen *v.* Jaquish, 21 Wend. 628.

Pennsylvania.— Holmes' Appeal, 79 Pa. St. 279.

Vermont.— Troy Conference Academy *v.* Nelson, 24 Vt. 189; Patchin *v.* Swift, 21 Vt. 292.

United States.— Lafitte *v.* Shawcross, 12 Fed. 519.

See 11 Cent. Dig. tit. "Contracts," § 225.

Consideration sufficiently expressed in writing.— Where a writing recites that it was entered into in consideration of another agreement "executed" to the promisor on the same day, it shows *prima facie* a consideration, as the execution of an agreement to a party implies its delivery to him. Lee *v.* Davis, 70 Ind. 464.

Consideration not sufficiently expressed.— The word "agree" does not import a consideration. Newcomb *v.* Clark, 1 Den. (N. Y.) 226. Nor does the statement in a letter that "the boy William Walker tells me that he owes you some eighty dollars, and says that he has not got the money to pay you. If he and his brother go up with me according to contract, I will pay you the money through Howard & Johnson, as soon as they get up to my place." Barkley *v.* Hanlan, 55 Miss. 606, 609. Nor is the mere statement in a written guaranty of a promissory note that the guarantor has purchased the land mortgaged to secure the note. Parkman *v.* Brewster, 15 Gray (Mass.) 271. And see Frothingham *v.* Seymour, 118 Mass. 489; Grist *v.* Mundell, (Pa. 1888) 13 Atl. 319.

46. *Alabama.*— Watkins *v.* Canterberry, 4 Port. 415.

Maine.— Foss *v.* Norris, 70 Me. 117; Whitney *v.* Stearns, 16 Me. 394.

Minnesota.— Frank *v.* Irgins, 27 Minn. 43, 6 N. W. 380.

New York.— Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; Jerome *v.* Whitney, 7 Johns. 321.

Texas.— Jones *v.* Holliday, 11 Tex. 412, 62 Am. Dec. 487.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

See 11 Cent. Dig. tit. "Contracts," § 230.

47. Osgood *v.* Bringolf, 32 Iowa 265.

48. Hamor *v.* Moore, 8 Ohio St. 239.

49. *Alabama.*— Blum *v.* Mitchell, 59 Ala. 535; Mead *v.* Steger, 5 Port. 498.

Indiana.— Stewart *v.* Chicago, etc., R. Co., 141 Ind. 55, 40 N. E. 67; Brown *v.* Summers, 91 Ind. 151; Swope *v.* Forney, 17 Ind. 385; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289. *Compare*, however, Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737.

Louisiana.— Smith *v.* Conrad, 15 La. Ann. 579.

Maine.—Emmons *v.* Littlefield, 13 Me. 233; Tyler *v.* Carlton, 7 Me. 175, 20 Am. Dec. 357. *Compare* Emery *v.* Chase, 5 Me. 232.

Missouri.— Moore *v.* Ringo, 82 Mo. 468.

New York.— Rosboro *v.* Peck, 48 Barb. 92. But see Fuller *v.* Artman, 69 Hun 546, 24 N. Y. Suppl. 13, 53 N. Y. St. 339; Maigley *v.* Hauer, 7 Johns. 341; Schemerhorn *v.* Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304.

Ohio.— Cassily *v.* Cassily, 1 Ohio S. & C. Pl. Dec. 62, 2 Ohio N. P. 387.

Oregon.— Barbre *v.* Goodale, 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378.

Pennsylvania.— Holmes' Appeal, 79 Pa. St. 279.

Texas.— Taylor *v.* Merrill, 64 Tex. 494.

United States.— Phelps *v.* Clasen, Woolw. 204, 19 Fed. Cas. No. 11,074.

England.— Gully *v.* Exeter, 10 B. & C. 584, 21 E. C. L. 248; Kelson *v.* Kelson, 10 Hare 385, 44 Eng. Ch. 372.

H. Failure of Consideration[50] — **1. In General.** Strictly speaking, as has been well pointed out, there can be no such thing as a failure of consideration. The promisor either receives the consideration he has bargained for or he does not. If he does not, then there is no enforceable agreement, for there is no consideration; and if he does receive the consideration how can it afterward fail? It may become less valuable or of no value at all, but that does not affect the agreement. Failure of consideration is in fact simply want of consideration.[51] Nevertheless it is laid down in a number of cases that when the consideration for a promise wholly fails the promise is without consideration and unenforceable.[52] But this must mean that in a contract with an executory consideration, the execution of the consideration is a condition precedent to the liability on the promise, and the failure to execute the consideration discharges the promisor.[53] On a sale of personal property it is generally held that in the absence of fraud or warranty it is no ground for defeating the action for the price that the article proves so defective in quality as to be worthless.[54] The rule has been announced by other cases that if the article is wholly worthless and of no value there is an entire failure of consideration, without reference to whether there be fraud or a breach of warranty;[55] but the idea of an implied warranty or condition is probably at the bottom of this theory.[56] Where the consideration fails because of impossibility of performance the promise is unenforceable.[57] And it has been held that failure of consideration may be set up as a defense in an action for the price by the purchaser of a void patent.[58] It may also be set up by one who purchases a wholly valueless

See 11 Cent. Dig. tit. "Contracts," § 229. And, generally, as to parol evidence see Evidence.

50. Other uses of the term.— The expression "failure of consideration" is used in many cases to describe the non-enforceability of a contract where the subject-matter is, unknown to the parties, not in existence. But this topic belongs properly to the subject of mistake. See *infra*, VI, B, 8, e. It is also used to describe a failure to perform, which discharges the promisor, as in the case of a warranty or a condition precedent. See *infra*, IX, F.

51. Harriman Contr. 289.

52. *Arkansas.*— Sorrells *v.* McHenry, 38 Ark. 127.

Georgia.— Powell *v.* Subers, 67 Ga. 448; Morrow *v.* Hanson, 9 Ga. 398, 54 Am. Dec. 346.

Illinois.— Jones *v.* Buffum, 50 Ill. 277.

Indiana.— State *v.* Illyes, 87 Ind. 405; Jones *v.* Hathaway, 77 Ind. 14; Jeffries *v.* Lamb, 73 Ind. 202.

Iowa.— Snyder *v.* Kurtz, 61 Iowa 593, 16 N. W. 722; Simpson Centenary College *v.* Bryan, 50 Iowa 293.

Kansas.— Thompson *v.* Wheeler, etc., Mfg. Co., 29 Kan. 476; Dodge *v.* Oates, 27 Kan. 762.

Maryland.— Hopkins *v.* Hinkley, 61 Md. 584.

Massachusetts.— Hodgkins *v.* Moulton, 100 Mass. 309; Rice *v.* Goddard, 14 Pick. 293.

Michigan.— Gibson *v.* Pelkie, 37 Mich. 380.

Missouri.— Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; Hacker *v.* Brown, 81 Mo. 68.

New York.— Westervelt *v.* Fuller Mfg. Co., 13 Daly 352.

Texas.— House *v.* Kendall, 55 Tex. 40.

53. Leake Contr. 547. See *infra*, IX, F.

54. *California.*— Sutro *v.* Rhodes, 92 Cal. 117, 28 Pac. 98.

Massachusetts.— Hunting *v.* Downer, 151 Mass. 275, 23 N. E. 832.

Vermont.— Bryant *v.* Pember, 45 Vt. 487.

Virginia.— Mason *v.* Chappell, 15 Gratt. 572.

United States.— Otis *v.* Cullum, 92 U. S. 447, 23 L. ed. 496.

And see Sales.

55. Aultman, etc., Co. *v.* Trainer, 80 Iowa 451, 45 N. W. 757; Toledo Sav. Bank *v.* Rathmann, 78 Iowa 288, 43 N. W. 193; Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; Compton *v.* Parsons, 76 Mo. 455; Wright *v.* Hart, 18 Wend. (N. Y.) 449; Johnston *v.* Smith, 86 N. C. 498. And see Sales.

56. See Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804; Danforth *v.* Crookshanks, 68 Mo. App. 311.

57. Savage *v.* Whitaker, 15 Me. 24; Benson *v.* Ketchum, 14 Md. 331; Crozier *v.* Carr, 11 Tex. 376. See *infra*, IX, D.

58. *Georgia.*— Smith *v.* Hightower, 76 Ga. 629.

Indiana.— McClure *v.* Jeffrey, 8 Ind. 79.

Kansas.—Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660.

Massachusetts.— Bierce *v.* Stocking, 11 Gray 174; Dickinson *v.* Hall, 14 Pick. 217, 25 Am. Dec. 390.

New York.— Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646; Marston *v.* Swett, 82 N. Y. 526, 66 N. Y. 206, 23 Am. Rep. 43; Westervelt *v.* Fuller Mfg. Co., 13 Daly 352; Cross *v.* Huntly, 13 Wend. 385.

Pennsylvania.— Geiger *v.* Cook, 3 Watts & S. 266.

Vermont.— Clough *v.* Patrick, 37 Vt. 421.

See 11 Cent. Dig. tit. "Contracts," § 396.

But this is because the contract for the sale

patent,[59] or by one contracting for the right to sell a thing represented to be patented but not so.[60] It has also been held that failure of consideration may be pleaded as a defense in the case of a promise made under a supposed legal liability which did not in fact exist,[61] in case of the failure of title to a chattel sold,[62] and in case of total failure of the title to land sold.[63] It is not essential to a plea of failure of consideration that the purchaser of a worthless article shall return it.[64]

2. PARTIAL FAILURE OF CONSIDERATION. When there is a failure of a part of a lawful consideration[65] the part which failed is simply a nullity and imparts no taint to the residue. In such a case, as no particular amount of consideration is required, the promise may be enforced. In other words if there is a substantial consideration left it will still be sufficient to sustain the contract.[66] In some

of a patent implies the validity of the patent. Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

59. *Georgia.*— Smith *v.* Hightower, 76 Ga. 629.

Massachusetts.— Lester *v.* Palmer, 4 Allen 145; Bierce *v.* Stocking, 11 Gray 174; Dickinson *v.* Hall, 14 Pick. 217, 25 Am. Dec. 363.

New Hampshire.— Jenkins *v.* Abbotts, 54 N. H. 447.

New York.—Cross *v.* Huntly, 13 Wend. 385.

Vermont.— Clough *v.* Patrick, 37 Vt. 421.

Wisconsin.— Rowe *v.* Blanchard, 18 Wis. 441, 86 Am. Dec. 783.

Contra, Gloucester Isinglass, etc., Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 26 Am. St. Rep. 214, 12 L. R. A. 563; Chemical Electric Light, etc., Co. *v.* Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168; Edwards *v.* Smith, 63 Mo. 119.

See 11 Cent. Dig. tit. "Contracts," § 396.

Actual enjoyment of patent.—Where plaintiff, being joint owner with defendant of certain letters patent which both supposed to be valid, conveyed to defendant the exclusive right to manufacture the patented articles, and defendant agreed to pay plaintiff a certain royalty therefor, it was held in an action for the royalty that the invalidity of the patent was no defense for the time defendant had actually enjoyed the patent under the license unmolested. Jones *v.* Burnham, 67 Me. 93, 24 Am. Rep. 10; Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43.

60. Brown *v.* Wright, 17 Ark. 9; Shepherd *v.* Jenkins, 73 Mo. 510.

61. *Alabama.*— Maull *v.* Vaughan, 45 Ala. 134; Kenan *v.* Holloway, 16 Ala. 53, 58 Am. Dec. 162.

Illinois.— Kœnig *v.* Haddix, 21 Ill. App. 53.

Maine.— Andrews *v.* Andrews, 33 Me. 178.

Massachusetts.— Cabot *v.* Haskins, 3 Pick. 83.

United States.—Offutt *v.* Parrott, 1 Cranch C. C. 154, 18 Fed. Cas. No. 10,453; Curranel *v.* McQueen, 2 Paine 109, 6 Fed. Cas. No. 3,488.

See 11 Cent. Dig. tit. "Contracts," § 391.

62. Tobey *v.* Wareham Bank, 13 Metc. (Mass.) 440; Carleton *v.* Lombard, etc., Co., 149 N. Y. 137, 43 N. E. 422; Flandrow *v.* Hammond, 148 N. Y. 129, 42 N. E. 511; McGiffin *v.* Baird, 62 N. Y. 329; Ledwich *v.* McKim, 53 N. Y. 307; Bordman *v.* Collie, 45 N. Y. 494; Forgotston *v.* Cragin, 62 N. Y. App. Div. 243, 70 N. Y. Suppl. 295; Offutt *v.* Parrott, 1 Cranch C. C. (U. S.) 154, 18 Fed. Cas. No. 10,453. And see SALES.

63. *Georgia.*— Hall *v.* McArthur, 82 Ga. 572, 9 S. E. 534.

Illinois.— Anderson *v.* Armstead, 69 Ill. 452.

Indiana.— Julian *v.* Biel, 26 Ind. 220, 89 Am. Dec. 460; Murphy *v.* Jones, 7 Ind. 529.

Kansas.— Sunderland *v.* Bell, 39 Kan. 663, 18 Pac. 817.

Kentucky.— Baird *v.* Laevison, 91 Ky. 204, 15 S. W. 252, 12 Ky. L. Rep. 786.

Louisiana.— Lapene *v.* Delaporte, 27 La. Ann. 252.

Massachusetts.— Curtis *v.* Clark, 133 Mass. 509.

Michigan.— Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997; Stockham *v.* Cheney, 62 Mich. 10, 28 N. W. 692.

Mississippi.— Catlett *v.* Bacon, 33 Miss. 269.

Missouri.— Burns *v.* Hayden, 24 Mo. 215.

New York.— Frisbie *v.* Hoffnagle, 11 Johns. 50.

Virginia.— Ferguson *v.* Teel, 82 Va. 690.

West Virginia.— West *v.* Shaw, 32 W. Va. 195, 9 S. E. 81.

See 11 Cent. Dig. tit. "Contracts," § 393; and, generally, VENDOR AND PURCHASER.

Even where there were covenants of warranty by the vendor.— Rice *v.* Goddard, 14 Pick. (Mass.) 293. See Jenness *v.* Parker, 24 Me. 289; Bedel *v.* Loomis, 11 N. H. 9; Winslow *v.* Buel, 11 How. Pr. (N. Y.) 373.

64. Brown *v.* Weldon, 99 Mo. 654, 13 S. W. 342; Danforth *v.* Crookshank, 68 Mo. App. 311; Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

But if he retains the article and does not offer to return it, and such article is not wholly worthless, such plea can avail him only so far as to defeat a recovery to the extent of the difference between the value of the article had it been such as it was represented to be and its actual value. Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342.

65. Consideration partly legal and partly illegal see *infra,* VII, C, 10–12.

66. *Arkansas.*—Desha *v.* Robinson, 17 Ark. 228.

states, however, the statute makes a partial failure of consideration a ground for rescission.[67] Even in the absence of a statute if the diminution or failure is such as in effect and reality to take away all the value of the consideration it will be regarded as having wholly failed.[68] And a partial failure of consideration has been held a good defense *pro tanto* in some cases.[69]

3. Subsequent Depreciation in Value. If there is consideration, the fact that it subsequently diminishes in value or becomes of no value at all cannot relieve the promisor from liability on his promise,[70] as when a note sold afterward becomes of no value,[71] stock purchased becomes worthless,[72] a patent becomes worthless because of improvements,[73] or a house rented for a term is destroyed before the end of the term.[74]

V. PARTIES.[75]

A. Two or More Parties Essential. Since a person cannot enter into an agreement with himself nor maintain an action against himself, it follows that two or more parties are essential to every contract. One cannot enter into a contract with himself or with himself and others,[76] even though he acts in different

Indiana.— Case *v.* Guim, 77 Ind. 565.
Iowa.— Wilson *v.* Webster, Morr. 312, 41 Am. Dec. 230.
Maine.— Hodgdon *v.* Golder, 75 Me. 293.
Massachusetts.— Gilmore *v.* Aiken, 118 Mass. 94.
Michigan.— Wesleyan Seminary *v.* Fisher, 4 Mich. 515.
Mississippi.—Cotton *v.* McKensie, 57 Miss. 418.
Missouri.— Wilson *v.* Crosnoe, 53 Mo. App. 241.
New Jersey.— Allen *v.* U. S. Bank, 20 N. J. L. 620.
New York.— Payne *v.* Ladue, 1 Hill 116. And see Washburn *v.* Wilson, 48 N. Y. Super. Ct. 159.
North Carolina.— Johnston *v.* Smith, 86 N. C. 498; Evans *v.* Williamson, 79 N. C. 86.
Pennsylvania.— Martin *v.* Hist, 6 Phila. 236, 26 Leg. Int. 132.
Vermont.— Burton *v.* Schemerhorn, 21 Vt. 289.
See 11 Cent. Dig. tit. "Contracts," §§ 398, 402.

67. Smith *v.* Blandin, 133 Cal. 441, 65 Pac. 894; Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

68. Clark *v.* Continental Imp. Co., 57 Ind. 135; Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316; Stansberry *v.* Morgan, 6 T. B. Mon. (Ky.) 306, Corliss *v.* Putnam, 37 Vt. 119.

69. *Alabama.*— Evans *v.* Murphy, 1 Stew. & P. 226.
Connecticut.— Pacific Iron Works *v.* Newhall, 34 Conn. 67.
Georgia.— Doebler *v.* Waters, 30 Ga. 344; Tompkins *v.* Tigner, 17 Ga. 103.
Kentucky.— Baylor *v.* Morrison, 2 Bibb 103.
Maine.— Folsom *v.* Mussey, 8 Me. 400, 23 Am. Dec. 522.
Missouri.— Gamache *v.* Grimm, 23 Mo. 38; Smith *v.* Busby, 15 Mo. 387, 57 Am. Dec. 207; Barr *v.* Baker, 9 Mo. 850.
New York.— Marston *v.* Swett, 66 N. Y. 206, 23 Am. Rep. 43; Carter *v.* Hamilton, 11 Barb. 147.
Ohio.— Buckhardt *v.* Klein, 7 Ohio Dec. (Reprint) 100, 2 Cinc. L. Bul. 72.
Texas.— Marlow *v.* King, 17 Tex. 177.
Wisconsin.— Peterson *v.* Johnson, 22 Wis. 21, 94 Am. Dec. 581.
See 11 Cent. Dig. tit. "Contracts," § 398, 402.
Ground of rescission of a conveyance of land.— Payette *v.* Ferrier, 20 Wash. 479, 55 Pac. 629.

70. *Alabama.*— Blackman *v.* Dowling, 63 Ala. 304.
California.— Bean *v.* Proseus, (1892) 31 Pac. 49.
Georgia.— Daniel *v.* Tarver, 70 Ga. 203; Dowdy *v.* McLellan, 52 Ga. 408.
Indiana.— Smock *v.* Pierson, 68 Ind. 405, 34 Am. Rep. 269; Potter *v.* Earnest, 45 Ind. 416.
Kentucky.— Smith *v.* Gower, 2 Duv. 17.
Maine.— Varney *v.* Bradford, 86 Me. 510, 30 Atl. 115.
Mississippi.— Byrne *v.* Cummings, 41 Miss. 192.
South Carolina.— Kerchner *v.* Gettys, 18 S. C. 521.
Tennessee.— Topp *v.* White, 12 Heisk. 165; Taylor *v.* Mayhew, 11 Heisk. 596.
Vermont.— Perry *v.* Buckman, 33 Vt. 7.

71. Rice *v.* Grange, 131 N. Y. 149, 30 N. E. 46, 42 N. Y. St. 748.

72. Gore *v.* Mason, 18 Me. 84.

73. Harmon *v.* Bird, 22 Wend. (N. Y.) 113.

74. Diamond *v.* Harris, 33 Tex. 634. See Landlord and Tenant.

75. Parties to actions on contracts and joinder see *infra*, XII, F.
Construction of contracts to determine who are parties see *infra*, VIII.

76. *Illinois.*— Mayo *v.* Chenoweth, 1 Ill. 200.
Indiana.— Collins *v.* Tilton, 58 Ind. 374.
Kentucky.— Allin *v.* Shadburne, 1 Dana 68, 25 Am. Dec. 121.
Massachusetts.— Morley *v.* French, 2 Cush. 130; Eastman *v.* Wright, 6 Pick. 316.
Ohio.— Walker *v.* Springfield, 3 Ohio Dec. (Reprint) 567.

capacities.[77] It is not necessary, however, that both parties shall be ascertained or in existence at the time the offer is made, if the offer is accepted by one who is within its terms.[78]

B. Capacity to Contract. To render a contract binding the parties must have the capacity to contract. Some persons in the law are altogether incapable of contracting or of entering into particular contracts, while others are under a partial or qualified incapacity.[79]

C. Parties Entitled to Enforce Contract — 1. In General. The obligation and duty arising out of a contract are due only to those with whom it is made; and therefore an action for the breach of a contract can as a rule be brought only by one who is a party to the contract.[80] The reason for the rule that privity of

Pennsylvania.— Price *v.* Spencer, 7 Phila. 179.

Vermont.—Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

England.— Collinson *v.* Lister, 20 Beav. 356; Faulkner *v.* Lowe, 2 Exch. 595. And see De Tastet *v.* Shaw, 1 B. & Ald. 664; Moffatt *v.* Van Mullingen, 2 B. & P. 125, note *c*, 2 Chit. 539, 5 Rev. Rep. 557, 18 E. C. L. 776.

See 11 Cent. Dig. tit. "Contracts," § 45 *et seq.*

In the leading case of Faulkner *v.* Lowe, 2 Exch. 595, 597, the defendant borrowed money from a fund in which he and others were jointly interested and covenanted to repay the money to the joint account. It was held that he could not be sued upon the covenant. Pollock, C. B., said: "The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself."

77. Eastman *v.* Wright, 6 Pick. (Mass.) 316 (where it is said that it is a first principle that in whatever different capacities a person may act he never can contract with himself nor maintain an action against himself; that he can in no form be both obligor and obligee); Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 12 L. R. A. 676 (where an administrator, becoming indebted to the estate, to secure the debt made a note and mortgage payable to himself as administrator, and they were retained by him and found among his papers at his death, and it was held that the contract was invalid for want of two parties). See also Collins *v.* Tilton, 58 Ind. 374.

78. As in the case of the offer of a reward. See *supra*, II, C, 3, b, (II).

79. This question is treated under various other titles. See Aliens, 2 Cyc. 88; Convicts; Corporations; Counties; Drunkards; Husband and Wife; Infants; Insane Persons; Joint-Stock Companies; Municipal Corporations; Religious Societies; Spendthrifts; States; Towns; United States.

80. *Alabama.*— Foster *v.* Sykes, 23 Ala. 796.

District of Columbia.— Capital Traction Co. *v.* Offutt, 17 App. Cas. 292, 53 L. R. A. 390.

Georgia.— Waycross Air Line R. Co. *v.* Southern Pine Co., 115 Ga. 7, 41 S. E. 271; Gunter *v.* Mooney, 72 Ga. 205.

Illinois.— Wheeler *v.* Matland, 21 Ill. App. 177.

Indiana.— Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410; Doran *v.* Sham, 26 Ind. 284; Boyer *v.* Tessler, 18 Ind. 260.

Kansas.— Reeves *v.* State Bank, 63 Kan. 789, 66 Pac. 995.

Kentucky.— Triplett *v.* Helm, 5 J. J. Marsh. 651. And see Gibson *v.* Johnson, 65 S. W. 116, 23 Ky. L. Rep. 1322.

Louisiana.— New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338; Gillis *v.* Nelson, 16 La. Ann. 275.

Massachusetts.— Williamson *v.* McGrath, 180 Mass. 55, 61 N. E. 636; Cahill *v.* Hall, 161 Mass. 512, 37 N. E. 573; Farquhar *v.* Brown, 132 Mass. 340; Davidson *v.* Nichols, 11 Allen 514.

Michigan.— Litchfield *v.* Garratt, 10 Mich. 426.

Minnesota.— Harris *v.* McKinley, 57 Minn. 198, 58 N. W. 991.

Missouri.— Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

New Hampshire.— Batchelder *v.* Lake, 11 N. H. 359.

New Jersey.— Styles *v.* F. R. Long Co., 67 N. J. L. 413, 51 Atl. 710; Leo *v.* Green, 52 N. J. Eq. 1, 28 Atl. 904.

New York.— Johnson *v.* Morgan, 68 N. Y. 494 [*affirming* 6 Daly 333]; Erdman *v.* Upham, 70 N. Y. App. Div. 315, 75 N. Y. Suppl. 241; People *v.* Green, 1 Hun 86; Brown *v.* Genet, 63 How. Pr. 236.

North Carolina.— Hardy *v.* Williams, 31 N. C. 177.

South Carolina.— Gray *v.* Ottolengui, 12 Rich. 101.

Texas.— Strohl *v.* Pinkerton, 1 Tex. App. Civ. Cas. § 470.

Vermont.— Tobias *v.* Blin, 21 Vt. 544.

Wisconsin.— Cummings *v.* Lake Realty Co., 86 Wis. 382, 57 N. W. 43; Rossman *v.* Townsend, 17 Wis. 95, 84 Am. Dec. 733.

United States.— Farmers Bank *v.* Groves, 12 How. 51, 13 L. ed. 889; Mason *v.* Crosby, 3 Woodb. & M. 258, 16 Fed. Cas. No. 9,236; Dold *v.* U. S., 13 Ct. Cl. 97.

See 11 Cent. Dig. tit. "Contracts," § 790 *et seq.*; and *infra*, V, C, 4, a, (I); V, C, 4, b, (II), (A).

Liability of vendor without title.— One selling land to which he has no title does not thereby become a debtor for the price to the true owner. Cecil *v.* Negro Rose, 17 Md. 92.

contract is necessary to an action founded on a breach of contract is that otherwise a man's responsibility for not carrying out his agreement with another would have no limit; there would be no bounds to actions if the ill effect of the failure of a man to perform his agreement could be followed down the chain of results to the final effect.[81] This principle, it has been held, prevents one not a party to a sale of goods, but who purchases them from the vendee or a remote vendee and sustains damage because of defects therein, from maintaining an action against the original vendor.[82] It has also been applied in the case of contracts for the manufacture of an article or for work and labor;[83] to contracts to support or furnish medical attendance;[84] to a bond for the performance of a contract;[85] to the liability of attorneys and abstracters of title[86] or clerks of courts and record-

Objection that contract is not binding.— Third persons cannot object to an agreement on the ground of its lacking the requisites of a valid agreement. Hughes *v.* Lumsden, 8 Ill. App. 185; Indianapolis Natural Gas Co. *v.* Kobbey, 135 Ind. 357, 35 N. E. 392; Mason *v.* Crosby, 3 Woodb. & M. (U. S.) 258, 16 Fed. Cas. No. 9,236.

Action by corporation on promoters' contracts see CORPORATIONS.

81. Ware *v.* Brown, 2 Bond (U. S.) 267, 29 Fed. Cas. No. 17,170. And see Davidson *v.* Nichols, 11 Allen (Mass.) 514.

Another reason is given in a New Jersey case: "The object of the parties in inserting in their contract specific undertakings, with respect to the work to be done is to create obligations and duties *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract." Marvin Safe Co. *v.* Ward, 46 N. J. L. 19, 24.

82. A vendor of goods assumes no responsibility and incurs no liability beyond that which results from his contract with his vendee. With remote vendees of the article who purchase it by subsales from those to whom it was originally sold he enters into no contract, either express or implied, and takes on himself no obligation or duty whatever. Davidson *v.* Nichols, 11 Allen (Mass.) 514; and other cases in the notes following.

83. Contracts for manufacture of articles. — Where a person contracts with another to build him a wagon, and builds it so badly that when it is used by a third person to whom the vendee has loaned it it breaks down, injuring such third person, the latter cannot recover damages against the manufacturer. Winterbottom *v.* Wright, 10 M. & W. 109, 11 L. J. Exch. 415. And see Davidson *v.* Nichols, 11 Allen (Mass.) 514, 517; Thomas *v.* Winchester, 6 N. Y. 397, 54 Am. Dec. 455.

Contracts for work and labor.— If a blacksmith negligently shoes another's horse and a third person hires the horse from the owner and is injured while riding it by reason of the defective shoeing he cannot sue the blacksmith. Thomas *v.* Winchester, 6 N. Y. 397, 408, 54 Am. Dec. 455. And see Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357; Collis *v.* Selden, L. R. 3 C. P. 495, 37 L. J. C. P. 233, 16 Wkly. Rep. 1170.

Other illustrations.— The same rule applies to the liability of a contractor for the erection of a building, where he builds it so badly that it falls and injures a third person (Daugherty *v.* Herzog, 145 Ind. 255, 44 N. E. 457, 57 Am. St. Rep. 204, 32 L. R. A. 837; Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322); of the manufacturer or vendor of a steam-boiler (Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638), elevator (Necker *v.* Harvey, 49 Mich. 517, 14 N. W. 503), or steam threshing-machine (Heizer *v.* Kingsland, etc., Mfg. Co., 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821).

84. Milton *v.* Story, 11 Vt. 101, 34 Am. Dec. 671.

Contract to support.—Where a person contracts to support another, and then refuses to fulfil his agreement, whereby the other becomes chargeable to the town, as a pauper, the town has no right of action against him. Milton *v.* Story, 11 Vt. 101, 34 Am. Dec. 671.

Contract to furnish medical attendance.— Where an employer contracts with an employee to furnish him with medical attendance in case of accident, a physician cannot recover from the employer for professional services rendered the employee at the latter's request when injured. Thomas Mfg. Co. *v.* Prather, 65 Ark. 27, 44 S. W. 218.

85. Where a bond is given for the faithful performance of a contract for the erection of a building or other work the bondsmen, whose undertaking is for the benefit of the other contracting party and not for materialmen and laborers, are not liable upon their bond to third parties for labor performed or material furnished. Parker *v.* Jeffrey, 26 Oreg. 186, 37 Pac. 712; Montgomery *v.* Spencer, (Utah 1897) 50 Pac. 624; Electrical Appliance Co. *v.* U. S. Fidelity, etc., Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. *Compare infra*, V, C, 4, b, (II), (B), note 21.

86. District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

Examination of title and abstracts.— Where an attorney is employed by a prospective purchaser of real estate to examine the title, and without using the care and skill

ers;[87] and by some courts to contracts between a city and a water company for a sufficient water-supply.[88] This principle does not prevent the vendee of a chattel from recovering from the seller damages paid by him to a third person for an injury received because of a defect in the chattel.[89]

2. WHERE FALSE REPRESENTATION IS MADE. Where, as an inducement to enter into a contract with him, a person makes a false representation to the other party, which may be relied on by the latter as a defense to an action on the contract or may give him a right of action for damages, a third person who has relied upon it and suffered loss has no right of action against the person making the representation, unless it was made with the intention that it should be acted upon by him.[90]

3. WHERE BREACH OF DUTY IS CONNECTED WITH CONTRACT. If the defendant has been guilty of a breach of duty apart from the contract he will be liable to all to whom that duty extends, and he will not be protected by setting up a contract in respect to the same matter with another person. There is a general breach of duty not limited to the vendee, where a person sells an article which he knows will do damage to others and conceals that fact or where the article is eminently dangerous.[91]

4. PROMISE FOR THE BENEFIT OF THIRD PERSON — a. Doctrine That Third Person Cannot Sue — (i) *IN GENERAL.* In England it is held, subject to the exceptions

which he is bound to use reports that the title is good, a third person damaged by relying on his report and purchasing the land has no right of action against him. District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621. See also Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99; Glawatz *v.* People's Guaranty Search Co., 49 N. Y. App. Div. 465, 63 N. Y. Suppl. 691; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256. *Compare* Economy Bldg. Assoc. *v.* West Jersey Title, etc., Co., 64 N. J. L. 27, 44 Atl. 854. And see ABSTRACTS OF TITLE, 1 Cyc. 215.

Drawing wills.— Where an attorney employed to draw a will does so negligently, he is under no liability to a third person who is, because of such negligence, unable to obtain the portion of the estate which the testator intended to leave him. Buckley *v.* Grey, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862.

87. Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99 (holding that whatever liability is incurred by the clerk of the court in furnishing and certifying an abstract of title, judgments, liens, etc., is to the person for whom the certificate is made and not to his grantee; and that before the latter can recover he must show that he employed the clerk to perform the service); Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256 (where the action was against a recorder of deeds to recover damages for a false certificate of search issued by him). See also ABSTRACTS OF TITLE, 1 Cyc. 215; CLERKS OF COURTS, 7 Cyc. 228; REGISTER OF DEEDS.

88. Where a water company contracts with a city to keep at all times a sufficient supply of water for the use of the city for the extinguishment of fires and fails to keep its contract, whereby the house of a citizen is burned for want of a sufficient supply of water, many courts hold that such person cannot sue the company on the ground that there is no privity of contract.

Connecticut.— Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1.

Georgia.— Fowler *v.* Athens City Water-Works Co., 83 Ga. 219, 19 S. E. 673, 20 Am. St. Rep. 313.

Iowa.—Becker *v.* Keokuk Water-Works Co., 79 Iowa 419, 44 N. W. 694, 18 Am. St. Rep. 377; Davis *v.* Clinton Water-Works Co., 54 Iowa 59, 6 N. W. 126, 37 Am. Rep. 185.

Missouri.— Zweingard *v.* Birdseye, 57 Mo. App. 462; Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118.

Nevada.— Ferris *v.* Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485.

Pennsylvania.— Beck *v.* Kittanning Water Co., (1887) 11 Atl. 300.

Tennessee.— Foster *v.* Lookout Water Co., 3 Lea 42.

Contra, Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 11 Ky. L. Rep. 738, 25 Am. St. Rep. 536, 7 L. R. A. 77; Graves County Water, etc., Co. *v.* Ligon, 66 S. W. 725, 23 Ky. L. Rep. 2149; Duncan *v.* Owensboro Water Co., 12 S. W. 557, 12 Ky. L. Rep. 35, 15 S. W. 523, 12 Ky. L. Rep. 824; Lampert *v.* Laclede Gas Light Co., 14 Mo. App. 376; Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513. And see, generally, MUNICIPAL CORPORATIONS.

89. Boston Woven Hose, etc., Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657, 86 Am. St. Rep. 478, 51 L. R. A. 781; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640, 59 J. P. 804, 65 L. J. Q. B. 50, 73 L. T. Rep. N. S. 459, 14 Reports 767, 44 Wkly. Rep. 49; Vogan *v.* Oulton, 79 L. T. Rep. N. S. 384, 81 L. T. Rep. N. S. 485. See DAMAGES.

90. See FRAUD.

91. See DRUGGISTS; EXPLOSIVES; FOOD; NEGLIGENCE; POISONS.

hereafter stated, that where two persons make a contract in which one of them promises to confer benefits upon a third party, the latter cannot sue upon the contract, at law or in equity, for the money or other benefit which it is promised that he shall receive.[92] The same doctrine, with some difference as to the exceptions, has been held, in the absence of a statute, in some of the United States[93]

92. Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393; Price *v.* Easton, 4 B. & Ad. 433, 2 L. J. K. B. 51, 1 N. & M. 303, 24 E. C. L. 193. And see Thomas *v.* Thomas, 2 Q. B. 851, 2 G. & D. 226, 6 Jur. 645, 11 L. J. Q. B. 104, 42 E. C. L. 945; Evans *v.* Hooper, 1 Q. B. D. 45, 45 L. J. Q. B. 206, 33 L. T. Rep. N. S. 374, 24 Wkly. Rep. 226; Gray *v.* Pearson, L. R. 5 C. P. 568, 23 L. T. Rep. N. S. 416; Gresty *v.* Gibson, L. R. 1 Exch. 112, 4 H. & C. 28, 12 Jur. N. S. 319, 35 L. J. Exch. 74, 13 L. T. Rep. N. S. 676, 14 Wkly. Rep. 248; Reeves *v.* Watts, L. R. 1 Q. B. 412, 7 B. & S. 523, 12 Jur. N. S. 565, 35 L. J. Q. B. 171, 14 L. T. Rep. N. S. 478, 14 Wkly. Rep. 672; Lilly *v.* Hays, 5 A. & E. 548, 2 Hurl. & W. 338, 6 L. J. K. B. 5, 1 N. & P. 26, 31 E. C. L. 726; Bentley *v.* Mackay, 31 Beav. 143; Hybart *v.* Parker, 4 C. B. N. S. 209, 4 Jur. N. S. 265, 27 L. J. C. P. 120, 6 Wkly. Rep. 364, 93 E. C. L. 209; *In re* Rotherham Alum, etc., Co., 25 Ch. D. 103, 53 L. J. Ch. 290, 50 L. T. Rep. N. S. 219, 32 Wkly. Rep. 131; *In re* Empress Engineering Co., 16 Ch. D. 125, 43 L. T. Rep. N. S. 742, 29 Wkly. Rep. 342; Dashwood *v.* Jermyn, 12 Ch. D. 776, 27 Wkly. Rep. 868; Eley *v.* Positive Government Security L. Assur. Co., 1 Exch. D. 20, 45 L. J. Exch. 451, 34 L. T. Rep. N. S. 190, 24 Wkly. Rep. 338; Gurrin *v.* Kopera, 3 H. & C. 694, 11 Jur. N. S. 491, 34 L. J. Exch. 121, 12 L. T. Rep. N. S. 427; Chesterfield, etc., Silkstone Colliery Co. *v.* Hawkins, 3 H. & C. 677, 11 Jur. N. S. 468, 34 L. J. Exch. 121, 12 L. T. Rep. N. S. 427, 13 Wkly. Rep. 840; Storer *v.* Gordon, 3 M. & S. 308, 15 Rev. Rep. 499; Crow *v.* Rogers, 1 Str. 592; Bowne *v.* Mason, 1 Vent. 6.

Grounds.— In Price *v.* Easton, 4 B. & Ad. 433, 2 L. J. K. B. 51, 1 N. & M. 303, 24 E. C. L. 193, the judges all reached the conclusion above stated, but based their decision on different grounds. Thus, Denman, C. J., observed that the declaration could not be supported, as it did not show any consideration for the promise moving from the plaintiff to the defendant. Littledale, J., observed that no privity was shown between the plaintiff and the defendant, and Taunton, J., said that it was consistent with all the matter alleged in the declaration that the plaintiff might have been entirely ignorant of the arrangement between the real contracting parties, while Patterson, J., based his opinion on the ground that there was no promise to the plaintiff alleged.

93. *Connecticut.*— Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225; Clapp *v.* Lawton, 31 Conn. 95; Treat *v.* Stanton, 14 Conn. 445. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

District of Columbia.— See Capital Traction Co. *v.* Offutt, 17 App. Cas. 292, 53 L. R. A. 390.

Georgia.— Gunter *v.* Mooney, 72 Ga. 205. And see Fowler *v.* Athens City Water-Works Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313.

Maryland.— Owings *v.* Owings, 1 Harr. & G. 484. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

Massachusetts.— Williamson *v.* McGrath, 180 Mass. 55, 61 N. E. 636; Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469; Saunders *v.* Saunders, 154 Mass. 337, 28 N. E. 270; Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 51 L. R. A. 43; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 21 N. E. 947; Morrill *v.* Lane, 136 Mass. 93; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Reed *v.* Home Sav. Bank, 127 Mass. 295; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Dow *v.* Clark, 7 Gray 198; Mellen *v.* Whipple, 1 Gray 317; Johnson *v.* Foster, 12 Metc. 167. But see Brewer *v.* Dyer, 7 Cush. 337; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154; Watson *v.* Cambridge, 15 Mass. 286; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Michigan.— Linneman *v.* Moross, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Wheeler *v.* Stewart, 94 Mich. 445, 54 N. W. 172; Edwards *v.* Clement, 81 Mich. 513, 45 N. W. 1107; Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797; Necker *v.* Harvey, 49 Mich. 517, 14 N. W. 503; Hidden *v.* Chappel, 48 Mich. 527, 12 N. W. 687; Hunt *v.* Strew, 39 Mich. 368; Hicks *v.* McGarry, 38 Mich. 667; Osborn *v.* Osborn, 36 Mich. 48; Halsted *v.* Francis, 31 Mich. 113; Turner *v.* McCarty, 22 Mich. 265; Pipp *v.* Reynolds, 20 Mich. 88.

New Hampshire.— Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 249; Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22; Warren *v.* Batchelder, 15 N. H. 129; Butterfield *v.* Hartshorn, 7 N. H. 345, 26 Am. Dec. 741.

North Carolina.— Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362; Peacock *v.* Williams, 98 N. C. 324, 4 S. E. 550; Morehead *v.* Wriston, 73 N. C. 398; Jordan *v.* Wilson, 28 N. C. 430. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

Pennsylvania.— Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 34 Atl. 335; Morgan Engineering Co. *v.* McKee, 155 Pa. St. 51, 25 Atl. 800; Adams *v.* Kuehn, 119 Pa. St. 76, 13 Atl. 184; Guthrie *v.* Kerr, 85 Pa. St. 303; Kountz *v.* Holthouse, 85 Pa. St. 235; Robertson *v.* Reed, 47 Pa. St. 115; Campbell *v.* Lacock, 40 Pa. St. 448; Finney *v.* Finney, 16 Pa. St. 380; Ramsdale *v.* Horton,

and in some of the federal cases.[94] The reason is that it is held essential that the consideration shall move from the plaintiff; there must be privity between the parties in order to support an action on the contract.[95]

(II) *EXCEPTIONS*—(A) *Trust.* To the general rule above stated there are several exceptions or apparent exceptions. In the first place, where the promise of benefit to the third party creates a trust in his favor he may enforce the trust in a court of equity.[96] Where one pays money to another for the use of a third the latter may sue the holder for it.[97]

(B) *Quasi-Contract.* Where one through a contract with another has obtained money or property which rightfully belongs to a third person, the latter may sue therefor in his own name, as the law creates both the privity and the promise. The transaction does not create a trust in the proper sense, nor does the

3 Pa. St. 330; Edmundson *v.* Penny, 1 Pa. St. 334, 44 Am. Dec. 137; Commercial Bank *v.* Wood, 7 Watts & S. 89; Cummings *v.* Klapp, 5 Watts & S. 511; Morrison *v.* Beckey, 6 Watts 349; Blymise *v.* Bloistle, 6 Watts 182, 31 Am. Dec. 458; Mississippi Cent. R. Co. *v.* Southern R. Assoc., 8 Phila. 107. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

Rhode Island.— Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

Vermont.—Davenport *v.* Northeastern Mut. L. Assoc., 47 Vt. 528; Fugure *v.* St. Joseph Mut. Soc., 46 Vt. 362; Corey *v.* Powers, 18 Vt. 587; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332; Pangborn *v.* Saxton, 11 Vt. 79. But see the cases cited *infra*, V, C, 4, b, (I), note 7.

Virginia.— Willard *v.* Worsham, 76 Va. 392; Jones *v.* Thomas, 21 Gratt. 96, 101; Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646.

Wyoming.— McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382.

See 11 Cent. Dig. tit. "Contracts," § 798 *et seq.*

94. St. Louis Second Nat. Bank *v.* Missouri Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 75; American Exch. Nat. Bank *v.* Northern Pac. R. Co., 76 Fed. 130; Woodland *v.* Newhall, 31 Fed. 434. But see cases cited *infra*, V, C, 4, b, (I), note 7.

95. See the cases above cited.

96. *Alabama.*— Eldridge *v.* Turner, 11 Ala. 1049.

Illinois.— Preachers' Aid Soc. *v.* England, 106 Ill. 125.

Indiana.— Miller *v.* Billingsly, 41 Ind. 489; Bird *v.* Lanius, 7 Ind. 615.

Louisiana.— New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338; Wright *v.* Oakey, 16 La. Ann. 125.

Maryland.— Mory *v.* Michael, 18 Md. 227.

Massachusetts.— Chace *v.* Chapin, 130 Mass. 128.

Michigan.— Peer *v.* Kean, 14 Mich. 354.

New Jersey.— Sell *v.* Steller, 53 N. J. Eq. 397, 32 Atl. 211; Bennett *v.* Merchantville Bldg., etc., Assoc., 44 N. J. Eq. 116, 13 Atl. 852; Cubberly *v.* Cubberly, 33 N. J. Eq. 82, 591; Burlew *v.* Hillman, 16 N. J. Eq. 23.

Pennsylvania.— Zell's Appeal, 111 Pa. St. 532, 6 Atl. 107; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373.

Texas.— Urquhart *v.* Ury, 27 Tex. 7.

Virginia.— Jones *v.* Thomas, 21 Gratt. 96.

United States.— Union Pac. R. Co. *v.* Durant, 95 U. S. 576, 24 L. ed. 391. And see Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90.

England.— Touche *v.* Metropolitan Ry. Warehousing Co., L. R. 6 Ch. 671; Gandy *v.* Gandy, 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803; *In re* Flavell, 25 Ch. D. 89, 53 L. J. Ch. 185, 32 Wkly. Rep. 102; Spiller *v.* Paris Skating Rink Co., 7 Ch. D. 368, 46 Wkly. Rep. 456.

See TRUSTS.

97. *Alabama.*— Garrett *v.* Garrett, 27 Ala. 687; Hitchcock *v.* Lukens, 8 Port. 333.

Indiana.— Miller *v.* Billingsly, 41 Ind. 489.

Iowa.— Johnson *v.* Collins, 14 Iowa 63.

Maine.— Goodwin *v.* Bowden, 54 Me. 424.

Maryland.—Owings *v.* Owings, 1 Harr. & G. 484. See Eichelberger *v.* Murdoch, 10 Md. 373, 69 Am. Dec. 140.

Massachusetts.— Hall *v.* Marston, 17 Mass. 575. See Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469.

Missouri.— Utley *v.* Tolfree, 77 Mo. 307.

New York.— General Mut. Ins. Co. *v.* Benson, 5 Duer 168; Berry *v.* Mayhew, 1 Daly 54; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Suppl. 733, 54 N. Y. St. 128; Judson *v.* Gray, 17 How. Pr. 289; Delaware, etc., Canal Co. *v.* Westchester County Bank, 4 Den. 97. See Martin *v.* Graham, 17 N. Y. Suppl. 710, 44 N. Y. St. 283.

North Carolina.— White *v.* Hunt, 64 N. C. 496. See Dixon *v.* Pace, 63 N. C. 663.

Pennsylvania.— Pugh *v.* Powell, (1887) 11 Atl. 570; Grim *v.* Thomas Iron Co., 115 Pa. St. 611, 8 Atl. 595; Wynn *v.* Wood, 97 Pa. St. 216.

South Carolina.— Duncan *v.* Moon, Dudley 332.

Vermont.— Buck *v.* Albee, 27 Vt. 190.

See 11 Cent. Dig. tit. "Contracts," § 801.

Mistake as to person.— Where a person by mistake pays money to A for the use of B, to whom he is not indebted, intending to pay it for the use of C, to whom he owes it, this does not give C a right of action for the money, but the person paying must recover it back as having been paid by mistake. Wilson *v.* Greer, 7 Humphr. (Tenn.) 513.

third person's right arise out of the contract between the promisor and promisee; but it arises out of an independent contract created by law, or quasi-contract, between the promisor and the third person.[98]

(c) *Near Relationship.* In England it was early held that where one made a binding promise to another to do something for the benefit of the son or daughter of the latter, the nearness of the relationship and the fact that the contract was prompted by natural affection would give a right of action to the person interested.[99] And the same doctrine was held in Massachusetts.[1] These cases, however, have been overruled and a contrary doctrine established.[2] The contrary doctrine is also established in some of the other states.[3]

(d) *Agency.* If a person makes a contract as agent for another, without disclosing his agency to the other party, his principal may maintain an action on the contract.[4] This, however, is only an apparent exception to the general rule that a third person cannot sue on a contract, for the principal is a party to the contract.

(e) *Novation.* The case of novation is also an apparent exception only. Where a debtor and his creditor and a third person enter into an agreement by which the third person is to pay the debt to the creditor and the debtor is released[5] there is a novation, and the creditor may sue the third person. In such a case, however, there is a contract between the creditor and the third person. If the promise is made by the third person to the debtor and the creditor is not a party thereto he cannot sue, unless the circumstances bring the case within an exception to the general rule.[6]

b. Doctrine That Third Person Can Sue — (i) *In General.* In most of the

98. *Alabama.*— Hitchcock *v.* Lukens, 8 Port. 333.

Connecticut.— Findlay *v.* Adams, 2 Day 369.

Delaware.— Clark *v.* Walker, 9 Houst. 287, 32 Atl. 646; Taylor *v.* Jackson, 5 Houst. 224; Pettyjohn *v.* Hudson, 4 Harr. 468.

Illinois.— Taylor *v.* Taylor, 20 Ill. 650.

Maine.— Keene *v.* Sage, 75 Me. 138; Lewis *v.* Sawyer, 44 Me. 332; Cram *v.* Bangor House Proprietary, 12 Me. 354.

Maryland.— O'Neal *v.* Washington County, 27 Md. 227; Kalkman *v.* McElderry, 16 Md. 56; Creager *v.* Link, 7 Md. 259.

Massachusetts.— St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Putnam *v.* Field, 103 Mass. 556; Frost *v.* Gage, 1 Allen 262; Dow *v.* Clark, 7 Gray 198; Field *v.* Crawford, 6 Gray 116; Millard *v.* Baldwin, 3 Gray 484; Mellen *v.* Whipple, 1 Gray 317; Carnegie *v.* Morrison, 2 Metc. 381; Hall *v.* Maiston, 17 Mass. 575; Goodridge *v.* Lord, 10 Mass. 487.

Michigan.— Hosford *v.* Kanouse, 45 Mich. 620, 8 N. W. 567; Spencer *v.* Towles, 18 Mich. 9.

New York.— Raymond *v.* Bearnard, 12 Johns. 274, 7 Am. Dec. 317; Dumond *v.* Carpenter, 3 Johns. 183.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; Grim *v.* Thomas Iron Co., 115 Pa. St. 611, 8 Atl. 595.

Rhode Island.— Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

Virginia.— Jones *v.* Thomas, 21 Gratt. 96, 101; Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646.

United States.— St. Louis Second Nat. Bank *v.* Missouri Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 75.

England.— Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315.

99. Dutton *v.* Poole, 2 Lev. 210; Bourne *v.* Mason, 1 Vent. 6; Sprat *v.* Agar, *cited* in 1 Vent. 6.

1. Felton *v.* Dickinson, 10 Mass. 287. And see Mellen *v.* Whipple, 1 Gray (Mass.) 317.

2. Marston *v.* Bigelow, 150 Mass. 53, 22 N. E. 71; St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393.

3. Gunter *v.* Mooney, 72 Ga. 205; Linneman *v.* Moross, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497.

States in which third person may sue.— In some states where a promise is made to another for the benefit of a near relative the latter is allowed to sue on the promise; but in these states a third person for whose benefit a promise is made is allowed to sue thereon whether there is any relationship or not. See *infra*, V, C, b, (II), (B), note 15.

4. See Principal and Agent.

5. See Novation.

6. Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469; St. Louis Second Nat. Bank *v.* Missouri Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 75, in the latter of which cases it was said: "Where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to two separate ac-

states the English doctrine that where a person makes a promise to another for the benefit of a third person the latter cannot maintain an action upon it is not recognized to the full extent, but it is held, subject to the qualifications hereafter stated, that the action may be maintained. This is now the prevailing doctrine in the United States.[7] This is sometimes based on general principles of law and

tions, and therefore the rule is that the original creditor cannot sue." *Compare* the cases cited *infra*, V, C, 4, b, (I).

7. *Alabama.*— Potts *v.* Gadsden First Nat. Bank, 102 Ala. 286, 14 So. 663; Dimmick *v.* Register, 92 Ala. 458, 9 So. 79; Carver *v.* Eads, 65 Ala. 190; Dryer *v.* Lewis, 57 Ala. 551; Henry *v.* Murphy, 54 Ala. 246; Burkham *v.* Mastin, 54 Ala. 122; White *v.* Mastin, 38 Ala. 147; Shotwell *v.* Gilkey, 31 Ala. 724; Mason *v.* Hall, 30 Ala. 599; Lovely *v.* Caldwell, 4 Ala. 684.

Arkansas.— Hecht *v.* Caughron, 46 Ark. 132; Tyner *v.* Hays, 37 Ark. 599; Talhot *v.* Wilkins, 31 Ark. 411; Chamblee *v.* McKenzie, 31 Ark. 155.

California.— Tyler *v.* Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Sacramento Lumber Co. *v.* Wagner, 67 Cal. 293, 7 Pac. 705; Flint *v.* Cadenasso, 64 Cal. 83, 28 Pac. 62; Morgan *v.* Overman Silver Min. Co., 37 Cal. 534; Krentz *v.* Livingston, 15 Cal. 344.

Colorado.— Green *v.* Morrison, 5 Colo. 18; Green *v.* Richardson, 4 Colo. 584; Lehow *v.* Simonton, 3 Colo. 346.

Connecticut.— Steene *v.* Aylesworth, 18 Conn. 244; Treat *v.* Stanton, 14 Conn. 445; Crocker *v.* Higgins, 7 Conn. 342. But see the cases cited *supra*, V, C, 4, a, (I), note 93.

Delaware.— Farmers' Bank *v.* Brown, 1 Harr. 330.

Florida.— Wright *v.* Terry, 23 Fla. 160, 2 So. 6; Hunter *v.* Wilson, 21 Fla. 250.

Illinois.— Commercial Nat. Bank *v.* Kirkwood, 172 Ill. 563, 50 N. E. 219; Harms *v.* McCormick, 132 Ill. 104, 22 N. E. 511; Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 340; Thompson *v.* Dearborn, 107 Ill. 87; Snell *v.* Ives, 85 Ill. 279; Steele *v.* Clark, 77 Ill. 471; Dallum *v.* Birdsall, 66 Ill. 378; Ball *v.* Benjamin, 56 Ill. 105; Bristow *v.* Lane, 21 Ill. 194; Dunshee *v.* Hill, 20 Ill. 497; Brown *v.* Strait, 19 Ill. 88; Eddy *v.* Roberts, 17 Ill. 505; Wickham *v.* Hyde Park Bldg., etc., Assoc., 80 Ill. App. 523; Williamson-Stewart Paper Co. *v.* Seaman, 29 Ill. App. 68; Boals *v.* Nixon, 26 Ill. App. 517; Willenborg *v.* Illinois Cent. R. Co., 11 Ill. App. 298; Mathers *v.* Carter, 7 Ill. App. 225.

Indiana.— Boruff *v.* Hudson, 138 Ind. 280, 37 N. E. 786; Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 122; Leake *v.* Ball, 116 Ind. 214, 17 N. E. 918; Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Carnahan *v.* Tousey, 93 Ind. 561; Waltz *v.* Waltz, 84 Ind. 403; Indiana Mfg. Co. *v.* Porter, 75 Ind. 428; Carter *v.* Zenblin, 68 Ind. 436; Rhodes *v.* Matthews, 67 Ind. 131; Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671; Cross *v.* Truesdale, 28 Ind. 44; Gwaltney *v.* Wheeler, 26 Ind. 415; Devol *v.* McIntosh, 23 Ind. 529; Beals *v.* Beals, 20 Ind. 163; Lamb *v.* Donovan, 19 Ind. 40; Day *v.* Patterson, 18 Ind. 114; Cloud *v.* Moorman, 18 Ind. 40; Bird *v.* Lanius, 7 Ind. 615; Nelson *v.* Hardy, 7 Ind. 364; Harper *v.* Ragan, 2 Blackf. 39.

Iowa.— Pipestone First Nat. Bank *v.* Rowley, 92 Iowa 530, 61 N. W. 195; Osmundson *v.* Thompson, 90 Iowa 755, 67 N. W. 863; Luney *v.* Mead, 60 Iowa 469, 15 N. W. 290; Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223; Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 281; Johnson *v.* Knapp, 36 Iowa 616; Johnson *v.* Collins, 14 Iowa 63.

Kansas.— Hardesty *v.* Cox, 53 Kan. 618, 36 Pac. 985; West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Strong *v.* Marcy, 33 Kan. 109, 5 Pac. 366; Brenner *v.* Luth, 28 Kan. 581; Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 632; Floyd *v.* Ort, 20 Kan. 162; Kansas Pac. R. Co. *v.* Hopkins, 18 Kan. 494; Harrison *v.* Simpson, 17 Kan. 508; Anthony *v.* Herman, 14 Kan. 494.

Kentucky.— Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 11 Ky. L. Rep. 738, 25 Am. St. Rep. 536, 7 L. R. A. 77; Benge *v.* Hiatt, 82 Ky. 666, 6 Ky. L. Rep. 714; Dodge *v.* Moss, 82 Ky. 441; Allen *v.* Thomas, 3 Metc. 198, 77 Am. Dec. 169; Lucas *v.* Chamberlain, 8 B. Mon. 276; Clarke *v.* McFarland, 5 Dana 45; Farrow *v.* Turner, 2 A. K. Marsh. 495; Blakeley *v.* Adams, 68 S. W. 393, 24 Ky. L. Rep. 263; Madison First Nat. Bank *v.* Schussler, 2 S. W. 145, 8 Ky. L. Rep. 516; Davis *v.* Wiley, 3 Ky. L. Rep. 313.

Louisiana.— New Orleans St. Joseph's Assoc. *v.* Magnier, 16 La. Ann. 338; McKerall *v.* McMillan, 9 Rob. 19; Hill *v.* Barlow, 6 Rob. 142; Pemberton *v.* Zacharie, 5 La. 310; Millaudon *v.* Allard, 2 La. 547; Flower *v.* Lane, 6 Mart. N. S. 151; Dick *v.* Reynolds, 4 Mart. N. S. 525; Marigny *v.* Remy, 3 Mart. N. S. 607, 15 Am. Dec. 172; Duchamp *v.* Nicholson, 2 Mart. N. S. 672; New Orleans *v.* Bailey, 5 Mart. 321; Smith *v.* Kemper, 4 Mart. 409, 6 Am. Dec. 708.

Maine.— Coffin *v.* Bradbury, 89 Me. 476, 36 Atl. 988; Lewis *v.* Sawyer, 44 Me. 332; Bohanan *v.* Pope, 42 Me. 93; Maxwell *v.* Haynes, 41 Me. 559; Machias Hotel Co. *v.* Coyle, 35 Me. 405, 58 Am. Dec. 712; Tored *v.* Tobey, 29 Me. 269; Hinkley *v.* Fowler, 15 Me. 285; Dearborn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206.

Maryland.— Seigman *v.* Hoffacker, 57 Md. 321; McNamee *v.* Withers, 37 Md. 171; Small *v.* Schaefer, 24 Md. 143. But see Owings *v.* Owings, 1 Harr. & G. 484.

Minnesota.— Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438;

sometimes, as in the code states, on the provisions of the code of procedure that every action shall be prosecuted "in the name of the real party in interest." In

Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Maxfield *v.* Schwartz, 43 Minn. 221, 45 N. W. 429; Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177; Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76; Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882; Merriam *v.* Pine City Lumber Co., 23 Minn. 314; Sanders *v.* Clason, 13 Minn. 379; Van Eman *v.* Stanchfield, 10 Minn. 255.

Mississippi.—Sweatman *v.* Parker, 49 Miss. 19, 30; Vigniau *v.* Ruffins, Walk. 312.

Missouri.— Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035; Porter *v.* Woods, 138 Mo. 539, 39 S. W. 794; Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; State *v.* Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789; Mosman *v.* Bender, 80 Mo. 579; Fitzgerald *v.* Barker, 70 Mo. 685; Schuster *v.* Kansas City, etc., R. Co., 60 Mo. 290; Rogers *v.* Gosnell, 51 Mo. 466, 58 Mo. 589; Meyer *v.* Lowell, 44 Mo. 328; Bassett *v.* Hughes, 43 Mo. 319; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; State Bank *v.* Benoist, 10 Mo. 520; Duerre *v.* Ruediger, 65 Mo. App. 407; Markel *v.* Western Union Tel. Co., 19 Mo. App. 80; Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429; Beardslee *v.* Morgner, 4 Mo. App. 139.

Nebraska.— Dodd *v.* Skelton, (1902) 89 N. W. 297; Rohman *v.* Gaiser, 53 Nebr. 474, 73 N. W. 923; Meyer *v.* Shamp, 51 Nebr. 424, 71 N. W. 57; Tecumseh Nat. Bank *v.* Best, 50 Nebr. 518, 70 N. W. 41; Fitzgerald *v.* McClay, 47 Nebr. 816, 66 N. W. 828; Hare *v.* Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851; Doll *v.* Crume, 41 Nebr. 655, 59 N. W. 806; Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050; Sample *v.* Hale, 34 Nebr. 220, 51 N. W. 837; Kaufman *v.* U. S. National Bank, 31 Nebr. 661, 48 N. W. 738; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506.

Nevada.— Miliani *v.* Tognini, 19 Nev. 133, 7 Pac. 279; Bishop *v.* Stewart, 13 Nev. 25; Alcalda *v.* Morales, 3 Nev. 132; Ruhling *v.* Hackett, 1 Nev. 360.

New Jersey.— Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141; Cubberly *v.* Cubberly, 33 N. J. Eq. 82; Price *v.* Trusdell, 28 N. J. Eq. 200; Crowell *v.* Currier, 27 N. J. Eq. 152; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Burlew *v.* Hillman, 16 N. J. Eq. 23; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

New York.— Buchanan *v.* Tilden, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170; Clark *v.* Howard, 150 N. Y. 232, 44 N. E. 695; Societa Italiana Di Beneficenza *v.* Sulzer, 138 N. Y. 468, 34 N. E. 193, 52 N. Y. St. 904; Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 27 N. Y. St. 233, 15 Am. St. Rep. 508, 6 L. R. A. 610; Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Todd *v.* Weber, 95 N. Y. 181, 47 Am. Rep. 20; Little *v.* Banks, 85 N. Y. 258; Pardee *v.* Treat, 82 N. Y. 385; Campbell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Barker *v.* Bradley, 42 N. Y. 316, 1 Am. Dec. 521; Becker *v.* Torrance, 31 N. Y. 631; Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327; Lawrence *v.* Fox, 20 N. Y. 268; Babcock *v.* Chase, 92 Hun 264, 36 N. Y. Suppl. 879, 72 N. Y. St. 401; Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Suppl. 432, 43 N. Y. St. 578; Knowles *v.* Erwin, 43 Hun 150; Pike *v.* Seiter, 15 Hun 402; Brown *v.* Curran, 14 Hun 260; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith 364; Traver *v.* Snyder, 35 Misc. 261, 71 N. Y. Suppl. 761; Everdell *v.* Hill, 27 Misc. 285, 58 N. Y. Suppl. 447; Riordan *v.* Tremont First Presb. Church, 3 Misc. 553, 23 N. Y. Suppl. 323, 52 N. Y. St. 524 [*affirmed* in 6 Misc. 84, 26 N. Y. Suppl. 38, 55 N. Y. St. 396]; Cook *v.* Berrott, 21 N. Y. Suppl. 358, 50 N. Y. St. 163; Delaware, etc., Canal Co. *v.* Westchester Bank, 4 Den. 97; Stewart *v.* Hamilton College, 2 Den. 403; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 749; Spencer *v.* Field, 10 Wend. 87; Weston *v.* Barker, 12 Johns. 276, 7 Am. Dec. 319; Schemerhorn *v.* Vanderheyden, 1 Johns. 139, 3 Am. Dec. 319.

North Carolina.— Gorrell *v.* Greenborn Water Supply Co., 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513; Porter *v.* Richmond, etc., R. Co., 97 N. C. 46, 2 S. E. 374; Styron *v.* Bell, 53 N. C. 222; Carroway *v.* Cox, 44 N. C. 173; Cox *v.* Skeen, 24 N. C. 220, 38 Am. Dec. 691; Jones *v.* Loftin, 9 N. C. 199. But see the cases cited *supra*, V, C, 4, a, (I), note 93.

Ohio.— Emmitt *v.* Brophy, 42 Ohio St. 82; Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Trimble *v.* Strother, 25 Ohio St. 378; Thompson *v.* Thompson, 4 Ohio St. 333.

Oregon.— Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466; Schneider *v.* White, 12 Oreg. 503, 8 Pac. 652; Hughes *v.* Oregon, R., etc., Co., 11 Oreg. 437, 5 Pac. 206; Baker *v.* Eglin, 11 Oreg. 333, 8 Pac. 280.

Pennsylvania.— Pittsburgh Carbon Co. *v.* Philadelphia Co., 130 Pa. St. 438, 18 Atl. 732; Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 15 Atl. 871; Kountz *v.* Holthouse, 85 Pa. St. 235; Torrens *v.* Campbell, 74 Pa. St. 470; Ayers' Appeal, 28 Pa. St. 179; Bellas *v.* Fagely, 19 Pa. St. 273; Hubbert *v.* Borden, 6 Whart. 79; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107; Kelly *v.* Evans, 3 Penr. & W. 387, 24 Am. Dec. 325; Strohecker *v.* Grant, 16 Serg. & R. 237; Greenwalt *v.* Horner, 6 Serg. & R. 71; Hart's Estate, 7 Wkly. Notes Cas. 162. But see the cases cited *supra*, V, C, 4, a, (I), note 93.

Rhode Island.—Kehoe *v.* Patton, 23 R. I. 360, 50 Atl. 655; Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427; Urquhart *v.* Brayton, 12 R. I.

a code state the "real party in interest" may sue, although the party in whose name the contract is made is declared by the code to be a trustee of an express trust and may also sue in his own name. But a recovery by either would be a bar to an action by the other.[8] And generally one in whose name a contract is made for the benefit of another may sue on it in his own name, even when an action might be maintained by the other.[9]

(II) *Limits to the Doctrine That Third Person May Sue*—(A) *In General.* In many of the cases the doctrine is stated broadly that a person may maintain an action on a promise made for his benefit, although not a party to the contract; but this statement of the doctrine is too broad. By the weight of authority the action cannot be maintained merely because the third person will be incidentally benefited by performance of the contract; but he must be a party to the consideration, or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance.[10] If the person

169. But see Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497.

South Carolina.— Brown *v.* O'Brien, 1 Rich. 268, 44 Am. Dec. 254; Thompson *v.* Gordon, 3 Strobh. 196.

Tennessee.— Brice *v.* King, 1 Head 152; McCarty *v.* Blevins, 5 Yerg. 195, 26 Am. Dec. 262.

Texas.— Mathonican *v.* Scott, 87 Tex. 396, 28 S. W. 1063; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Monroe *v.* Buchanan, 27 Tex. 241; Zacharie *v.* Bryan, 2 Tex. 274; Bartley *v.* Rhodes, (Tex. Civ. App. 1895) 33 S. W. 604.

Utah.— Montgomery *v.* Rief, 15 Utah 495, 50 Pac. 623; Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477; Clark *v.* Fisk, 9 Utah 94, 33 Pac. 248.

Vermont.— Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; Rutland, etc., R. Co. *v.* Cole, 24 Vt. 33; Crampton *v.* Ballard, 10 Vt. 251. But see the cases cited *supra*, V, C, 4, a, (I), note 93.

Wisconsin.— Etscheid *v.* Baker, 112 Wis. 129, 88 N. W. 52; Larson *v.* Cook, 85 Wis. 564, 55 N. W. 703; Grant *v.* Diebold Safe, etc., Co., 77 Wis. 72, 45 N. W. 951; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; Winninghoff *v.* Wittig, 64 Wis. 180, 24 N. W. 912; Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; Bassett *v.* Hughes, 43 Wis. 319; McDowell *v.* Leav, 35 Wis. 171; Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459; Kimball *v.* Noyes, 17 Wis. 695; Cotterill *v.* Stevens, 10 Wis. 422; Hodson *v.* Carter, 3 Pinn. 212, 3 Chandl. 234.

United States.— Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855; Austin *v.* Seligman, 21 Blatchf. 506, 18 Fed. 519. But see cases cited *supra*, V, C, 4, a, (I), note 94.

See 11 Cent. Dig. tit. "Contracts," § 798 *et seq.*

8. Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; Rogers *v.* Gosnell, 51 Mo. 466.

9. *Alabama.*— Shotwell *v.* Gilkey, 31 Ala. 724.

Connecticut.— Elmer *v.* Welch, 47 Conn. 56; Steene *v.* Aylesworth, 18 Conn. 244.

Illinois.— Town *v.* Wood, 37 Ill. 512.

Indiana.— Vancleave *v.* Clark, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519.

Iowa.— Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138.

Kansas.— Trice *v.* Yeoman, 8 Kan. App. 537, 54 Pac. 288.

Massachusetts.— Locke *v.* Homer, 131 Mass. 93, 41 Am. Rep. 199.

Minnesota.— Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177; Merriam *v.* Pine City Lumber Co., 23 Minn. 314.

Nebraska.— Kaufman *v.* U. S. National Bank, 31 Nebr. 661, 48 N. W. 738; Gregory *v.* Hartley, 6 Nebr. 356.

New York.— Belloni *v.* Freeborn, 63 N. Y. 383; Wright *v.* Chapin, 87 Hun 144, 33 N. Y. Suppl. 1068, 67 N. Y. St. 771; Ward *v.* Cowdry, 5 N. Y. Suppl. 282, 21 N. Y. St. 372 (where it is said: "A promise to pay to a third person a debt due him by the promisee may be enforced by the promisee against the promisor's estate, without waiting for the third person to sue thereon").

Ohio.— Wilson *v.* Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477.

Wisconsin.— Learned *v.* Bishop, 42 Wis. 470.

United States.— Clark *v.* Sidway, 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157; Wicker *v.* Hoppock, 6 Wall. 94, 18 L. ed. 752.

But see Seigman *v.* Hoffacker, 57 Md. 321.

10. *Alabama.*— Carter *v.* Darby, 15 Ala. 696, 50 Am. Dec. 156.

Arkansas.— Thomas Mfg. Co. *v.* Prather, 65 Ark. 27, 44 S. W. 218; Johnson *v.* Bamberger, (1892) 19 S. W. 920.

California.—Southern California Sav. Bank *v.* Thornton, 112 Cal. 255, 44 Pac. 466; Buckley *v.* Gray, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862; Chung Kee *v.* Davidson, 73 Cal. 522, 15 Pac. 100; Canney *v.* South Pac. Coast R. Co., 63 Cal. 501; Ellison *v.* Jackson Water Co., 12 Cal. 542.

Connecticut.— Baxter *v.* Camp, 71 Conn. 245, 249, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514, where it is said: "Unguarded expressions are to be found in some of the earlier opinions of this court, which countenance the broad proposition that where a promise is made to one man for the benefit of another, the latter may sustain a suit upon that promise; but no such doctrine has ever been applied to govern our

for whose benefit a contract is made has either a legal or equitable interest in

determination of a cause." And see Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1.

Florida.— Wright *v.* Terry, 23 Fla. 160, 2 So. 6.

Illinois.— Crandall *v.* Payne, 154 Ill. 627, 630, 39 N. E. 601 (where it is said that "it would be going too far to hold that a mere stranger to the contract, who was to derive only an incidental benefit therefrom, might recover for a breach of such contract"); Goodenow *v.* Jones, 75 Ill. 48; Laidlou *v.* Hatch, 75 Ill. 11; Compton *v.* Payne, 69 Ill. 354; Walker *v.* Brown, 28 Ill. 378, 81 Am. Dec. 287; Hall *v.* Carpen, 27 Ill. 386, 81 Am. Dec. 234.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Haskett *v.* Flint, 5 Blackf. 69, 33 Am. Dec. 452.

Iowa.— German State Bank *v.* Northwestern Water, etc., Co., 104 Iowa 717, 74 N. W. 685. And see Becker *v.* Keokuk Water-Works, 79 Iowa 419, 44 N. W. 694, 18 Am. St. Rep. 377; Vanhorn *v.* Des Moines, 63 Iowa 447, 19 N. W. 293, 50 Am. Rep. 750; Davis *v.* Clinton Water Works Co., 54 Iowa 59, 6 N. W. 126, 37 Am. Rep. 185.

Kansas.— Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541.

Louisiana.— Arnous *v.* Davern, 18 La. 42.

Maine.— Tewksbury *v.* Hayes, 41 Me. 123.

Minnesota.— Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; Greenwood *v.* Sheldon, 31 Minn. 254, 17 N. W. 478.

Missouri.— Porter *v.* Woods, 138 Mo. 539, 39 S. W. 794; Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; Roddy *v.* Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; Mann *v.* Chicago, etc., R. Co., 86 Mo. 347; Jones *v.* Miller, 12 Mo. 408; Lampert *v.* Laclede Gaslight Co., 14 Mo. App. 376; Gordon *v.* Livingston, 12 Mo. App. 267.

Nebraska.— Frerking *v.* Thomas, (1902) 89 N. W. 1005; Shamp *v.* Meyer, 20 Nebr. 223, 29 N. W. 379.

Nevada.— Ferris *v.* Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485.

New Jersey.— Styles *v.* F. R. Long Co., 67 N. J. L. 413, 51 Atl. 710; Marvin Safe Co. *v.* Ward, 46 N. J. L. 19; Kahl *v.* Love, 37 N. J. L. 5.

New York.— Townsend *v.* Rackham, 143 N. Y. 516, 38 N. E. 731, 62 N. Y. St. 851; Durnherr *v.* Rau, 135 N. Y. 219, 222, 32 N. E. 49, 48 N. Y. St. 394 (where it is said: "It is not sufficient that the performance of the covenant may benefit the third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance"); Lorillard *v.* Clyde, 122 N. Y. 498, 25 N. E. 917, 34 N. Y. St. 224, 10 L. R. A. 113; Conley *v.* Dazian, 114 N. Y. 161, 25 N. E. 135, 22 N. Y. St. 813; Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 22 N. Y. St. 813, 8 Am. St. Rep. 767, 3 L. R. A. 468; Berry *v.* Brown, 107 N. Y. 659, 14 N. E. 289; Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Wilbur *v.* Warren, 104 N. Y. 192, 10 N. E. 263; Wheat *v.* Rice, 97 N. Y. 296; Pardee *v.* Treat, 82 N. Y. 385; Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219; Vrooman *v.* Turner, 69 N. Y. 280, 284, 25 Am. Rep. 195 (where it is said: "There must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally"); Simson *v.* Brown, 68 N. Y. 355; Merrill *v.* Green, 55 N. Y. 270; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Lyth *v.* Hingston, 14 N. Y. App. Div. 11, 43 N. Y. Suppl. 653; Alyea *v.* Citizens' Sav. Bank, 12 N. Y. App. Div. 574, 42 N. Y. Suppl. 185; Buchanan *v.* Tilden, 5 N. Y. App. Div. 354, 39 N. Y. Suppl. 228; Buffalo Cement Co. *v.* McNaughton, 90 Hun 74, 35 N. Y. Suppl. 453, 69 N. Y. St. 846; Leibinger, etc., Brewing Co. *v.* Ernst, 89 Hun 156, 35 N. Y. Suppl. 47, 69 N. Y. St. 440; Coleman *v.* Hiler, 85 Hun 547, 33 N. Y. Suppl. 357, 67 N. Y. St. 41; Feist *v.* Schiffer, 79 Hun 275, 29 N. Y. Suppl. 423, 60 N. Y. St. 859; Wainwright *v.* Queens County Water Co., 78 Hun 146, 28 N. Y. Suppl. 987, 60 N. Y. St. 204; Clark *v.* Howard, 74 Hun 228, 26 N. Y. Suppl. 620, 56 N. Y. St. 322; O'Neil *v.* Hudson Valley Ice Co., 74 Hun 163, 26 N. Y. Suppl. 598, 56 N. Y. St. 289; Servis *v.* Holwede, 58 Hun 602, 11 N. Y. Suppl. 406, 33 N. Y. St. 773; Blunt *v.* Boyd, 3 Barb. 209; Colgrove *v.* Tallmadge, 6 Bosw. 289; Opper *v.* Hirsh, 33 Misc. 560, 68 N. Y. Suppl. 879; Lennon *v.* Lyon, 22 Misc. 505, 50 N. Y. Suppl. 763; Seaman *v.* Whitney, 24 Wend. 260, 35 Am. Dec. 618.

North Dakota.— Parlin *v.* Brandenburg, 2 N. D. 473, 52 N. W. 405.

Ohio.— Burdick *v.* Cheadle 26 Ohio St. 393, 20 Am. Rep. 767.

Oregon.— Washburn *v.* Interstate Invest. Co., 26 Oreg. 436, 36 Pac. 533, 38 Pac. 620; Parker *v.* Jeffery, 26 Oreg. 186, 37 Pac. 712; Rohr *v.* Baker, 13 Oreg. 350, 10 Pac. 627.

Pennsylvania.— Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 34 Atl. 335; Adams *v.* Kuehn, 119 Pa. St. 76, 13 Atl. 184; Guthrie *v.* Kerr, 85 Pa. St. 303; Kountz *v.* Holthouse, 85 Pa. St. 235; Morrison *v.* Beckey, 6 Watts 349; Blymire *v.* Boistle, 6 Watts 182, 31 Am. Dec. 458.

the performance of the contract, he need not necessarily be privy to the consideration.[11]

(B) *Illustrations of Actions by Third Persons.* The doctrine that a third person may maintain an action on a contract made for his benefit has been applied to an agreement by which one of the parties promises, on the receipt of property or other consideration, to pay a debt due from the other to a third person,[12] to a

Rhode Island.— Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497.

Tennessee.— Mississippi Cent. R. Co. *v.* Southern R. Assoc., 7 Baxt. 595; McAlester *v.* Marberry, 4 Humphr. 426.

Utah.— Montgomery *v.* Rief, 15 Utah 495, 501, 50 Pac. 623, where it is said that "to entitle a third party, who may be benefited by the performance of a contract, to sue, there must have been an intention on the part of the contracting parties to secure some direct benefit to him, or there must be some privity and some obligation or duty from the promisor to the third party which will enable him to enforce the contract, or some equitable claim to the benefit resulting from the promise or the performance of the contract, and there must be some legal right on the part of the third party to adopt and claim the benefit of the promise or contract."

Vermont.— Fugure *v.* St. Joseph Mut. Soc., 46 Vt. 362; Tuttle *v.* Catlin, 1 D. Chipm. 366, 12 Am. Dec. 691.

Virginia.— Stuart *v.* James River, etc., Co., 24 Gratt. 294; Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646.

Wisconsin.— Rossman *v.* Townsend, 17 Wis. 95, 84 Am. Dec. 733.

United States.— Davis *v.* Patrick, 122 U. S. 138, 7 S. Ct. 1102, 30 L. ed. 1090; St. Louis Second Nat. Bank *v.* Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 74; Antisdel *v.* Chicago Hotel Cabinet Co., 89 Fed. 308, 32 C. C. A. 216; American Exch. Nat. Bank *v.* Northern Pac. R. Co., 76 Fed. 130; Sayward *v.* Dexter, etc., Co., 72 Fed. 758, 19 C. C. A. 176; Jackson Iron Co. *v.* Negaunee Concentrating Co., 65 Fed. 298, 12 C. C. A. 636; O'Rourke *v.* Peck, 29 Fed. 223; Anderson *v.* Fitzgerald, 21 Fed. 294; Austin *v.* Scligman, 21 Blatchf. 506, 18 Fed. 519.

See 11 Cent. Dig. tit. "Contracts," § 798 *et seq.*

11. *Illinois.*— Snell *v.* Ives, 85 Ill. 279; Beasley *v.* Webster, 64 Ill. 458; Bristow *v.* Lane, 21 Ill. 194; Eddy *v.* Roberts, 17 Ill. 505; Williamson-Stewart Paper Co. *v.* Seaman, 29 Ill. App. 68.

Indiana.— Raymond *v.* Pritchard, 24 Ind. 318.

Kansas.— Hardesty *v.* Cox, 53 Kan. 618, 36 Pac. 985; Plano Mfg. Co. *v.* Burrows, 40 Kan. 361, 19 Pac. 809; Rickman *v.* Miller, 39 Kan. 362, 18 Pac. 304.

New Jersey.— Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141.

New York.— Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582; Coster *v.* Albany, 43 N. Y. 399; Secor *v.* Lord, 4 Abb. Dec. 188, 3 Keyes 525, 3 Transcr. App. 328; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726.

Oregon.— Washburn *v.* Interstate Invest. Co., 26 Oreg. 436, 36 Pac. 533, 38 Pac. 620.

The name of the person to be benefited by the contract need not be given if he is otherwise sufficiently described or designated. He may be one of a class of persons, if the class is sufficiently described or designated. Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541. And see Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; Gresty *v.* Gibson, L. R. 1 Exch. 112, 4 H. & C. 28, 12 Jur. N. S. 319, 35 L. J. Exch. 74, 13 L. T. Rep. N. S. 676, 14 Wkly. Rep. 284; Reeves *v.* Watts, L. R. 1 Q. B. 412, 7 B. & S. 523, 12 Jur. N. S. 565, 35 L. J. Q. B. 171, 14 L. T. Rep. N. S. 478, 14 Wkly. Rep. 672.

12. *Alabama.*— Pugh *v.* Barnes, 108 Ala. 167, 19 So. 370; Young *v.* Hawkins, 74 Ala. 370; Carver *v.* Eads, 65 Ala. 190.

California.— Morgan *v.* Overman Silver Min. Co., 37 Cal. 534.

Illinois.— Bay *v.* Williams, 112 Ill. 91, 54 Am. Rep. 209; Beasley *v.* Webster, 64 Ill. 458; Mathers *v.* Carter, 7 Ill. App. 225.

Indiana.— Helms *v.* Kearns, 40 Ind. 124; Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671.

Massachusetts.— Perry *v.* Swasey, 12 Cush. 36; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154. But see Johnson *v.* Foster, 12 Metc. 167.

Michigan.— Halsted *v.* Francis, 31 Mich. 113. But see Hicks *v.* McGarry, 38 Mich. 667.

Minnesota.—Hawley *v.* Wilkinson, 18 Minn. 525; Sanders *v.* Clason, 13 Minn. 379.

Missouri.— State *v.* St. Louis, etc., R. Co., 125 Mo. 596, 28 S. W. 1074; Winn *v.* Lippincott Invest. Co., 125 Mo. 528, 28 S. W. 998; Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; Meyer *v.* Lowell, 44 Mo. 328; Belt *v.* McLaughlin, 12 Mo. 433; Corl *v.* Riggs, 12 Mo. 430; Raum *v.* Kaltwasser, 4 Mo. App. 574.

Nebraska.— Dodd *v.* Skelton, (1902) 89 N. W. 297.

New Jersey.— Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141.

New York.— Clark *v.* Howard, 150 N. Y. 232, 44 N. E. 695; Sing Sing First Nat. Bank *v.* Chalmers, 144 N. Y. 432, 39 N. E. 331, 63 N. Y. St. 658; Townsend *v.* Rackham, 143 N. Y. 516, 38 N. E. 731, 62 N. Y. St. 851; Wager *v.* Link, 134 N. Y. 122, 31 N. E. 213, 45 N. Y. St. 584; Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 27 N. Y. St. 233, 15 Am. St. Rep. 508, 6 L. R. A. 610;

promise made by the purchaser of property to the seller to pay as part of the consideration a debt due from the seller to a third person;[13] to an agreement between the vendor and purchaser of land by which the purchaser assumes a mortgage or other debt of the vendor;[14] to a promise on a sufficient consideration

White *v.* Rintoul, 108 N. Y. 222, 15 N. E. 318; Campbell *v.* Smith, 71 N. Y. 26, 27 Am. Rep. 5; Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582; Lawrence *v.* Fox, 20 N. Y. 268; Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Suppl. 432, 43 N. Y. St. 578; Kingsbury *v.* Earle, 27 Hun 141; Hand *v.* Kennedy, 45 N. Y. Super. Ct. 385; Cailleux *v.* Hall, 1 E. D. Smith 5; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726. But see Wheat *v.* Rice, 97 N. Y. 296; Lennon *v.* Lyon, 22 Misc. 505, 50 N. Y. Suppl. 763.

Pennsylvania.—Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 15 Atl. 871; Vincent *v.* Watson, 18 Pa. St. 96; Beers *v.* Robinson, 9 Pa. St. 229; Hind *v.* Holdship, 2 Watts 104, 26 Am. Dec. 107.

Texas.— Bartley *v.* Rhodes, (Tex. Civ. App. 1895) 33 S. W. 604.

Compare Clapp *v.* Lawton, 31 Conn. 95; Owings *v.* Owings, 1 Harr. & G. (Md.) 484.

See 11 Cent. Dig. tit. "Contracts," § 800.

13. *Alabama.*— Potts *v.* Gadsden First Nat. Bank, 102 Ala. 286, 14 So. 663; Henry *v.* Murphy, 54 Ala. 246; Huckabee *v.* May, 14 Ala. 263.

Georgia.— Dallas *v.* Heard, 32 Ga. 604; Bell *v.* McGrady, 32 Ga. 257.

Illinois.— Snell *v.* Ives, 85 Ill. 279.

Indiana.— Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Fisher *v.* Wilmoth, 68 Ind. 449; Carter *v.* Zenblin, 68 Ind. 436; Durham *v.* Hall, 67 Ind. 123; Loeb *v.* Weis, 64 Ind. 285.

Minnesota.— Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57.

Nebraska.— Dodd *v.* Skelton, (1902) 89 N. W. 297.

New York.— Cook *v.* Berrott, 66 Hun 633, 21 N. Y. Suppl. 358, 50 N. Y. St. 163; Hale *v.* Boardman, 27 Barb. 82; Griffin *v.* Hungerford, 19 Misc. 683, 44 N. Y. Suppl. 1054.

Pennsylvania.—Delp *v.* Bartholomay Brewing Co., 123 Pa. St. 42, 15 Atl. 871; Torrens *v.* Campbell, 74 Pa. St. 470; Beers *v.* Robinson, 9 Pa. St. 229.

Rhode Island.— Kehoe *v.* Patton, 23 R. I. 360, 50 Atl. 655.

Wisconsin.— Etscheid *v.* Baker, 112 Wis. 129, 88 N. W. 52.

See 11 Cent. Dig. tit. "Contracts," § 800.

14. *Arkansas.*— Thomas Mfg. Co. *v.* Prather, 65 Ark. 27, 44 S. W. 218; Patton *v.* Adkins, 42 Ark. 197.

California.— Flint *v.* Cadenasso, 64 Cal. 83, 28 Pac. 62. But see McLaren *v.* Hutchinson, 18 Cal. 80.

Colorado.— Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652; Skinner *v.* Harker, 23 Colo. 333, 48 Pac. 648; Stuyvesant *v.* Western Mortg., etc., Co., 22 Colo. 28, 43 Pac. 144; Green *v.* Morrison, 5 Colo. 18; Woods Invest. Co. *v.* Palmer, 8 Colo. App. 132, 45 Pac. 237; Burbank *v.* Roots, 4 Colo. App. 197, 35 Pac. 275.

Illinois.— Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Bay *v.* Williams, 112 Ill. 91, 54 Am. Rep. 209; Thompson *v.* Dearborn, 107 Ill. 87; Flagg *v.* Geltmacher, 98 Ill. 293; Rogers *v.* Herron, 92 Ill. 583. *Compare* Daub *v.* Englebach, 109 Ill. 267; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467.

Indiana.—Stuckman *v.* Roose, 147 Ind. 402, 46 N. E. 680; Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Lowe *v.* Hamilton, 132 Ind. 406, 31 N. E. 1117; Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 898; Hancock *v.* Fleming, 103 Ind. 533, 3 N. E. 254; Ellis *v.* Johnson, 96 Ind. 377; Jones *v.* Parks, 78 Ind. 537; Rodenbarger *v.* Bramblett, 78 Ind. 213; Campbell *v.* Patterson, 58 Ind. 66; Josselyn *v.* Edwards, 57 Ind. 212; McDill *v.* Gunn, 43 Ind. 315. But see Eastman *v.* Ramsey, 3 Ind. 419.

Iowa.— Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555; Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57; Lamb *v.* Tucker, 42 Iowa 118; Ross *v.* Kennison, 38 Iowa 396; Phillips *v.* Van Schaick, 37 Iowa 229; Scott *v.* Gill, 19 Iowa 187; Moses *v.* Clerk Dallas Dist. Ct., 12 Iowa 139; Corbett *v.* Waterman, 11 Iowa 86.

Kansas.—Stephenson *v.* Elliott, 53 Kan. 550, 36 Pac. 980; Mumper *v.* Kelley, 43 Kan. 256, 23 Pac. 558; Plano Mfg. Co. *v.* Burrows, 40 Kan. 361, 19 Pac. 809; Rickman *v.* Miller, 39 Kan. 362, 18 Pac. 304; Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Raben *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 277.

Kentucky.— Madison First Nat. Bank *v.* Schussler, 2 S. W. 145, 8 Ky. L. Rep. 516.

Maine.—Cumberland Nat. Bank *v.* St. Clair, 93 Me. 35, 44 Atl. 123; Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994; Flint *v.* Winter Harbor Land Co., 89 Me. 420, 36 Atl. 634.

Massachusetts.— Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154. But see Prentice *v.* Brimhall, 123 Mass. 291.

Minnesota.— Hine *v.* Myrick, 60 Minn. 518, 62 N. W. 1125; McRae *v.* Sullivan, 56 Minn. 266, 57 N. W. 659; Washington L. Ins. Co. *v.* Marshall, 56 Minn. 250, 57 N. W. 658; Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76; Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882.

Mississippi.— Lee *v.* Newman, 55 Miss. 365.

Missouri.— Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Fitzgerald *v.* Barker, 85 Mo. 13; Rogers *v.* Gosnell, 58 Mo. 589; Flanagan *v.* Hutchinson, 47 Mo. 237; Crone *v.* Dexter, 68 Mo. App. 122. But see Page *v.* Becker, 31 Mo. 466.

Nebraska.— Dodd *v.* Skelton, (1902) 89

to pay money or furnish support to the wife, child, or other near relative of the promisee;[15] to a promise by an incoming partner to pay a part of the debts of the old firm;[16] to a contract by a city with the state to pay damages resulting to property-owners from public improvements;[17] to a contract by the father of an illegitimate child with the mother for its support;[18] to a contract between a railroad company and a contractor for construction of the road that the latter shall pay adjoining landowners damages resulting from blasting;[19] to a contract by a railroad company with a city to pay the salary of a special policeman assigned to duty at the station;[20] to a bond executed by a contractor for the erection of a

N. W. 297; Hare *v.* Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851; Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050; Keedle *v.* Flack, 27 Nebr. 836, 44 N. W. 34; Cooper *v.* Foss, 15 Nebr. 515, 19 N. W. 506; Stewart *v.* Snelling, 15 Nebr. 502, 19 N. W. 705.

Nevada.— Richards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New Hampshire.— Lang *v.* Henry, 54 N. H. 57.

New Jersey.— Vreeland *v.* Van Blarcom, 35 N. J. Eq. 530. But see Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650.

New York.— Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 27 N. Y. St. 233, 15 Am. St. Rep. 508, 6 L. R. A. 610; Schley *v.* Fryer, 100 N. Y. 71, 2 N. E. 280; Dunning *v.* Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Coster *v.* Albany, 43 N. Y. 399, 411; Ricard *v.* Sanderson, 41 N. Y. 179; Burr *v.* Beers, 24 N. Y. 178, 80 Am. Dec. 327; Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575 [*reversing* 9 Bosw. 79]; Hall *v.* Robbins, 4 Lans. 463, 61 Barb. 33; Adams *v.* Wadhams, 40 Barb. 225; Seaman *v.* Hasbrouck, 35 Barb. 151; Connor *v.* Williams, 2 Rob. 46; Barker *v.* Bucklin, 2 Den. 45, 43 Am. Dec. 726. But see Wager *v.* Link, 58 Hun (N. Y.) 272, 12 N. Y. Suppl. 68, 34 N. Y. St. 711.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; Society of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119; Emmitt *v.* Brophy, 42 Ohio St. 82; Brewer *v.* Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Thompson *v.* Thompson, 4 Ohio St. 333.

Oregon.— Strong *v.* Kamm, 13 Oreg. 172, 9 Pac. 331.

Pennsylvania.— Freed *v.* Richey, 115 Pa. St. 361, 8 Atl. 626; Merriman *v.* Moore, 90 Pa. St. 78; Keim *v.* Taylor, 11 Pa. St. 163; Beers *v.* Robinson, 9 Pa. St. 229. But see Blymire *v.* Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458.

Rhode Island.— Kehoe *v.* Patton, 23 R. I. 360, 50 Atl. 655; Mechanics' Sav. Bank *v.* Goff, 13 R. I. 516; Urquhart *v.* Brayton, 12 R. I. 169.

Tennessee.— O'Conner *v.* O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33; Moore *v.* Stovall, 2 Lea 543; McCarty *v.* Blevins, 5 Yerg. 195, 26 Am. Dec. 262.

Texas.— McCown *v.* Schrimpf, 21 Tex. 22, 73 Am. Dec. 221; Southern Home Bldg., etc., Assoc. *v.* Winans, (Tex. Civ. App. 1900) 60 S. W. 825; Mitchell *v.* National Railway Bldg., etc., Assoc., (Tex. Civ. App. 1899) 49 S. W. 624; Geistweidt *v.* Mann, (Tex. Civ. App. 1896) 37 S. W. 372.

Utah.— McKay *v.* Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623; Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

Wisconsin.— Etscheid *v.* Baker, 112 Wis. 129, 88 N. W. 52; Stites *v.* Thompson, 98 Wis. 329, 73 N. W. 774; Enos *v.* Sanger, 96 Wis. 150, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862; Bassett *v.* Hughes, 43 Wis. 319.

United States.— Clark *v.* Carrington, 7 Cranch 308, 3 L. ed. 354.

Contra, Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225; Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362; Peacock *v.* Williams, 98 N. C. 324, 4 S. E. 550; Morehead *v.* Wriston, 73 N. C. 398; Willard *v.* Worsham, 76 Va. 392; Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210 (District of Columbia); Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667 (District of Columbia); Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456; Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322; Rey *v.* Simpson, 22 How. (U. S.) 341, 16 L. ed. 260.

See MORTGAGES.

15. Benge *v.* Hiatt, 82 Ky. 666, 6 Ky. L. Rep. 714, 56 Am. Rep. 912; Clarke *v.* McFarland, 5 Dana (Ky.) 45; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370; Buchanan *v.* Tilden, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170; Babcock *v.* Chase, 92 Hun (N. Y.) 264, 36 N. Y. Suppl. 879, 72 N. Y. St. 401; Knowles *v.* Erwin, 43 Hun (N. Y.) 150; Everdell *v.* Hill, 27 Misc. (N. Y.) 285, 58 N. Y. Suppl. 447; Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517. *Compare supra,* V, C, 4, a, (II), (C).

16. Dunlap *v.* McNeil, 35 Ind. 316; Floyd *v.* Ort, 20 Kan. 162; Bellas *v.* Fagely, 19 Pa. St. 273. *Contra,* Manny *v.* Frasier, 27 Mo. 419; Edick *v.* Green, 38 Hun (N. Y.) 202; Mackintosh *v.* Fatman, 38 How. Pr. (N. Y.) 145; Kountz *v.* Holthouse, 85 Pa. St. 235; McCarteney *v.* Wyoming Nat. Bank, 1 Wyo. 382. See PARTNERSHIP.

17. Little *v.* Banks, 85 N. Y. 258; Coster *v.* Albany, 43 N. Y. 399. See MUNICIPAL CORPORATIONS.

18. Benge *v.* Hiatt, 82 Ky. 666, 56 Am. Rep. 912; Todd *v.* Weber, 95 N. Y. 181, 47 Am. Rep. 20.

19. Locklin *v.* Beckwith, 6 N. Y. St. 583.

20. Porter *v.* Richmond, etc., R. Co., 97 N. C. 46, 2 S. E. 374.

building or for public work, to the owner or municipality, conditioned to pay for labor and materials;[21] to a warranty of property purchased for a third person, the warranty being made to and for the benefit of such third person;[22] to a subscription list for the location of a denominational college presented to and accepted by a church, it being held that the college, when incorporated, could sue thereon as the beneficiary;[23] and by some courts to a contract between a water company and a city for a sufficient water-supply.[24]

(c) *Contracts Under Seal.* In some states it is held that the doctrine permitting one to sue on a contract made for his benefit, but to which he is not a party, applies as well to covenants or promises under seal as to simple contracts;[25] but in other states the contrary is held,[26] on the ground that assumpsit will not lie

21. Fitzgerald *v.* McClay, 47 Nebr. 816, 66 N. W. 828; Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796. And see Lawrence *v.* U. S., 71 Fed. 228.

Qualification.— But it has been held that persons furnishing labor and material to a city contractor cannot sue on a bond given by him to the city conditioned on his payment of all bills for labor and materials used in performing the contract, unless there was an intent on the part of the city to take the bond for their benefit and an obligation of the city to them which would create a privity of interest. Lyth *v.* Hingston, 14 N. Y. App. Div. 11, 43 N. Y. Suppl. 653. And see Buffalo Cement Co. *v.* McNaughton, 90 Hun (N. Y.) 74, 35 N. Y. Suppl. 453, 69 N. Y. St. 846.

22. Dallum *v.* Birdsall, 66 Ill. 378. See SALES.

23. Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. See SUBSCRIPTIONS.

24. See *supra*, V, C, 1, note 88.

25. *Alabama.*— Douglass *v.* Branch Bank, 19 Ala. 659; Huckabee *v.* May, 14 Ala. 263.

Illinois.—By statute in Illinois. American Splane Co. *v.* Barber, 194 Ill. 171, 62 N. E. 597, 88 Am. St. Rep. 169 [*affirming* 91 Ill. App. 359]; Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975; Dean *v.* Walker, 107 Ill. 540, 47 Am. Rep. 467; Hume *v.* Brower, 25 Ill. App. 130. *Compare* Harms *v.* McCormick, 132 Ill. 104, 22 N. E. 511; Moore *v.* House, 64 Ill. 162; Hager *v.* Phillips, 14 Ill. 260.

Kentucky.— Garvin *v.* Mobley, 1 Bush 48; Blakeley *v.* Adams, 68 S. W. 393, 473, 24 Ky. L. Rep. 263, 324.

Minnesota.— Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257 [*overruling dictum* in Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882].

Missouri.— St. Louis *v.* Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; Fitzgerald *v.* Barker, 85 Mo. 13, 70 Mo. 685; Rogers *v.* Gosnell, 51 Mo. 466, 58 Mo. 589. But see Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125.

Nebraska.— Fitzgerald *v.* McClay, 47 Nebr. 816, 66 N. W. 828; Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796.

New York.— Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550, 51 N. Y. St. 200; Gifford *v.* Corrigan, 117 N. Y. 257, 22 N. E. 756, 27 N. Y. St. 233, 15 Am. St. Rep. 508, 6 L. R. A. 610; Coster *v.* Albany, 43 N. Y. 399; Riordan *v.* Tremont First Presb. Church, 6 Misc. 84, 26 N. Y. Suppl. 38, 55 N. Y. St. 396.

Ohio.— Emmitt *v.* Brophy, 42 Ohio St. 82.

Oregon.— Hughes *v.* Oregon R., etc., Co., 11 Oreg. 437, 5 Pac. 206.

Wisconsin.— Houghton *v.* Milburn, 54 Wis. 554, 12 N. W. 23, 11 N. W. 517; Bassett *v.* Hughes, 43 Wis. 319; McDowell *v.* Leav, 35 Wis. 171; Kimball *v.* Noyes, 17 Wis. 695.

See 11 Cent. Dig. tit. "Contracts," § 799; and, generally, BONDS, 5 Cyc. 820; COVENANTS; DEEDS.

26. *Indiana.*—Vickery *v.* Walker, Smith 78; Haskett *v.* Flint, 5 Blackf. 69, 33 Am. Dec. 452.

Maine.— Farmington *v.* Hobert, 74 Me. 416 (holding that a suit in the name of a town cannot be maintained on a bond running to the treasurer, although for use of the town); Hinkley *v.* Fowler, 15 Me. 285.

Maryland.— Seigman *v.* Haffacker, 57 Md. 321.

Massachusetts.—Saunders *v.* Saunders, 154 Mass. 337, 28 N. E. 270; Flynn *v.* Massachusetts Ben. Assoc., 152 Mass. 288, 25 N. E. 716; Coffin *v.* Adams, 131 Mass. 133; Prentice *v.* Brimhall, 123 Mass. 291; Flynn *v.* North American L. Ins. Co., 115 Mass. 449; Northampton *v.* Elwell, 4 Gray 81; Millard *v.* Baldwin, 3 Gray 484; Mellen *v.* Whipple, 1 Gray 317; Huntington *v.* Knox, 7 Cush. 371, 374; Johnson *v.* Foster, 12 Metc. 167; Sanders *v.* Filley, 12 Pick. 554.

New Hampshire.— How *v.* How, 1 N. H. 49.

New Jersey.— Loeb *v.* Barris, 50 N. J. L. 382, 13 Atl. 602; Smith *v.* Emery, 12 N. J. L. 53, 62; Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108; Crowell *v.* Currier, 27 N. J. Eq. 152. But see National Union Bank *v.* Segar, 39 N. J. L. 173. *Contra*, by statute. Styles *v.* F. R. Long Co., 67 N. J. L. 413, 51 Atl. 710.

Pennsylvania.— De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38; Strohecker *v.* Grant, 16 Serg. & R. 237; Mississippi Cent. R. Co. *v.* Southern R. Assoc., 8 Phila. 107.

Rhode Island.— Woonsocket Rubber Co. *v.* Banigan, 21 R. I. 146, 42 Atl. 512.

Tennessee.— McAlister *v.* Marberry, 4 Humphr. 426.

Vermont.— Fairchild *v.* North Eastern Mut. L. Ins. Co., 51 Vt. 613; Johnson *v.* Colburn, 36 Vt. 693; Phelps *v.* Conant, 30 Vt. 277; Crampton *v.* Ballard, 10 Vt. 251.

Virginia.— Jones *v.* Thomas, 21 Gratt. 96;

on a contract under seal, and that it is only an action of assumpsit that will lie by a person for whose benefit a promise has been made to another.[27]

(D) *Contract Must Be Binding.* To entitle one to maintain an action on a promise made to another for his benefit, it is necessary of course that there shall be a valid and binding contract. For example there must be a consideration.[28]

(E) *Failure of Consideration and Rescission of Contract.* To a suit by a third person upon a contract made for his benefit, a failure of consideration or a rescission of the contract by the parties thereto, before the acceptance by the plaintiff of the stipulation in his favor, is a defense;[29] but it has been held that after such acceptance by the beneficiary the parties to the contract cannot rescind it.[30]

D. Parties Against Whom Contracts May Be Enforced — 1. In General. A liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his act or consent and therefore as a general rule an action on a contract cannot be maintained against a person who is not a party to the contract.[31] Thus an agreement between persons by which one agrees to sell goods

Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646. *Compare* Clarksons *v.* Doddridge, 14 Gratt. 42.

West Virginia.— Johnson *v.* McClung, 26 W. Va. 659.

United States.— Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855.

England.— Barford *v.* Stuckey, 2 B. & B. 333, 5 Moore C. P. 23, 6 E. C. L. 170; Southampton *v.* Brown, 6 B. & C. 718, 5 L. J. K. B. O. S. 253, 30 Rev. Rep. 511, 13 E. C. L. 322; Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102, 4 L. J. K. B. O. S. 184, 29 Rev. Rep. 261, 11 E. C. L. 495; Salter *v.* Kidgly, Carth. 76; Gilby *v.* Copley, 3 Lev. 138; Offly *v.* Warde, 1 Lev. 235; Storer *v.* Gordon, 3 M. & S. 308, 15 Rev. Rep. 499.

See 11 Cent. Dig. tit. "Contracts," § 799; and, generally, Bonds, 5 Cyc. 819; Covenants; Deeds.

27. Hinckley *v.* Fowler, 15 Me. 285. *Contra,* Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975.

28. Kingsbury *v.* Ellis, 4 Cush. (Mass.) 578; Jefferson *v.* Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257; Union Railway Storage Co. *v.* McDermott, 53 Minn. 407, 55 N. W. 606; Thornton *v.* Smith, 7 Mo. 86; Armstrong *v.* School Dist. No. 3, 28 Mo. App. 169; Sing Sing First Nat. Bank *v.* Chalmers, 39 Hun (N. Y.) 468.

29. *Indiana.*— Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671.

Iowa.— Gilbert *v.* Sanderson, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103.

Missouri.— Amonett *v.* Montague, 75 Mo. 43.

New Hampshire.—Butterfield *v.* Hartshorn, 7 N. H. 345, 26 Am. Dec. 741.

Pennsylvania.— Ramsdale *v.* Horton, 3 Pa. St. 330; Stone *v.* Justice, 9 Phila. 22, 29 Leg. Int. 44.

Texas.— Heath *v.* Coreth, 11 Tex. Civ. App. 91, 32 S. W. 56.

30. *Indiana.*— Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671.

Kentucky.— Dodge *v.* Moss, 82 Ky. 441.

Louisiana.— Pecquet *v.* Pecquet, 17 La. Ann. 204.

Minnesota.— Van Eman *v.* Stanchfield, 10 Minn. 255.

Missouri.—Armstrong *v.* School Dist. No. 3, 28 Mo. App. 169.

New York.—Knowles *v.* Erwin, 43 Hun 150.

Wisconsin.— Bassett *v.* Hughes, 43 Wis. 319; Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459.

Evidence of acceptance.— The bringing of suit by the person beneficially interested is a sufficient acceptance. Motley *v.* Manufacturers' Ins. Co., 29 Me. 337, 50 Am. Dec. 591; Warren *v.* Batchelder, 16 N. H. 580.

Evidence of abandonment.— Where one agrees to pay the debt of another, but the creditor sues his original debtor, there is an abandonment of his rights under the agreement. Bohanan *v.* Pope, 42 Me. 93.

31. *Alabama.*— Alabama Great Southern R. Co. *v.* Moore, 109 Ala. 393, 19 So. 804; Cowley *v.* Shelby, 71 Ala. 122.

Colorado.— Crawford *v.* Brown, 21 Colo. 272, 40 Pac. 692.

Illinois.— Derickson *v.* Krause, 4 Ill. App. 507.

Kentucky.—Holandsworth *v.* Com., 11 Bush 617.

Louisiana.— Wiggin *v.* Flower, 5 Rob. 406.

Massachusetts.— New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 21 N. E. 947; Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9.

Minnesota.— Bolles *v.* Carli, 12 Minn. 113.

Missouri.— Schuster *v.* Kansas City, etc., R. Co., 60 Mo. 290.

Nevada.— Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

New Hampshire.— Howland *v.* Gates, 62 N. H. 293.

New Jersey.— Lehigh Coal, etc., Co. *v.* Central R. Co., 41 N. J. Eq. 167, 3 Atl. 134.

New York.— Fitch *v.* Dederick, 37 N. Y. 225; Maloney *v.* Iroquois Brewing Co., 63 N. Y. App. Div. 454, 71 N. Y. Suppl. 1098; Wells *v.* Williams, 39 Barb. 567.

North Carolina.— Clayton *v.* Newton Academy, 95 N. C. 298.

Oklahoma.— Boston, etc., Cattle Loan Co. *v.* Dickson, 11 Okla. 680, 69 Pac. 889.

to the other, taking the notes of a third person in payment, does not bind such third person to give the notes, even though he may know of the agreement.[32] So also if a person employs another to do work for him he is not liable to an action for services performed in the work by a third person under a contract between such third person and the employee,[33] nor for materials furnished by a third person under a contract with the employee,[34] unless the third person proves a new contract, express or implied, with himself.[35] A creditor cannot sue the debtor of his debtor;[36] nor can one by paying another's debt give himself a right of action against the debtor.[37]

2. ASSIGNEES AND REPRESENTATIVES. The parties to a contract, except in a limited class of agreements, such as those for personal services and the like, are presumed to have intended to bind their assignees and legal representatives as well as themselves;[38] and hence a party to the contract has the same right to enforce it against such third persons as he has to enforce it against the other party to it.[39]

3. PRINCIPALS AND AGENTS. A principal is bound by the contract of his agent within his authority, even though he is not named in the contract or his interest disclosed.[40]

4. RATIFICATION BY RECEIPT OF BENEFITS. If with a full knowledge of all the facts a person ratify an agreement which another person has improperly made concerning the property of the person ratifying it, he thereby makes himself a party to it. He is in precisely the same position in this respect as if the original agreement had been made with him.[41] And it has been held that one who knowingly accepts the benefits intended as the consideration coming to him under a

Pennsylvania.—Norris *v.* Maitland, 9 Phila. 7, 29 Leg. Int. 149.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

Wisconsin.— Rossman *v.* Townsend, 17 Wis. 95, 84 Am. Dec. 733.

England.— Schmaling *v.* Thomlinson, 1 Marsh. 500, 6 Taunt. 147, 1 E. C. L. 549; Durnford *v.* Messiter, 5 M. & S. 446.

See 11 Cent. Dig. tit. "Contracts," § 808.

Action against new corporation on reorganization or consolidation see CORPORATIONS.

32. Howland *v.* Gates, 62 N. H. 293; Fitch *v.* Dederick, 37 N. Y. 225.

33. *Alabama.*— Huntsville Belt Line, etc., R. Co. *v.* Corpening, 97 Ala. 581, 12 So. 295.

Illinois.— Campbell *v.* Day, 90 Ill. 363; Stull *v.* Hance, 62 Ill. 52; Fender *v.* Kelly, 58 Ill. App. 283.

Indiana.— Floyd *v.* Indianapolis, etc., R. Co., 8 Ind. 469; Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575.

New York.— Buffalo Cement Co. *v.* McNaughton, 90 Hun 74, 35 N. Y. Suppl. 453, 89 N. Y. St. 846; O'Neil *v.* Hudson Valley Ice Co., 74 Hun 163, 26 N. Y. Suppl. 598, 56 N. Y. St. 289; Hurd *v.* Johnson Park Invest. Co., 13 Misc. 643, 34 N. Y. Suppl. 915, 69 N. Y. St. 141.

Pennsylvania.— Mundorff *v.* Kilbuck Tp., 4 Pennyp. 103.

Texas.— Strohl *v.* Pinkerton, 1 Tex. App. Civ. Cas. § 470; International, etc., R. Co. *v.* Hutchins, 1 Tex. App. Civ. Cas. § 303.

United States.— Baltzer *v.* Raleigh, etc., Air Line R. Co., 115 U. S. 634, 6 S. Ct. 216, 29 L. ed. 505; U. S. *v.* Driscoll, 96 U. S. 421, 24 L. ed. 847; Tally Mfg. Co. *v.* New Chester Co., 48 Fed. 879.

34. Peers *v.* Board of Education, 72 Ill. 508; Brown *v.* Morgan, 2 Bosw. (N. Y.) 485; Hutton *v.* Gordon, 2 Misc. (N. Y.) 267, 23 N. Y. Suppl. 770.

35. Lumaghi *v.* Neuber, 67 Ill. 250; McIntosh *v.* Clannon, 18 La. 469; Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

36. Varnell *v.* McGinnis, 72 Ill. 445; Gales *v.* Penny, 9 Mart. N. S. (La.) 212; King of Spain *v.* Oliver, Pet. C. C. (U. S.) 276, 14 Fed. Cas. No. 7,813.

37. Brown *v.* Chesterville, 63 Me. 241; Hearn *v.* Cullin, 54 Md. 533; Durnford *v.* Messiter, 5 M. & S. 446.

38. Kernochan *v.* Murray, 111 N. Y. 306, 18 N. E. 868, 19 N. Y. St. 392, 7 Am. St. Rep. 744, 2 L. R. A. 183.

39. Johnson *v.* Walker, 25 Ark. 196.

Parties by assignment see ASSIGNMENTS, 4 Cyc. 1.

Parties after death of party see EXECUTORS AND ADMINISTRATORS.

40. See PRINCIPAL AND AGENT.

41. *Colorado.*— Laclede Firebrick Mfg. Co. *v.* Williams, 14 Colo. 37, 23 Pac. 453.

Illinois.— Cherry *v.* Carthage College, 62 Ill. 337.

Indiana.— Stucky *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606.

Louisiana.— Bell *v.* Lawson, 12 Rob. 152.

New York.— Morse *v.* Brockett, 67 Barb. 234; Sun Mut. Ins. Co. *v.* Tallmadge, 4 Daly 539.

United States.— Drakely *v.* Gregg, 8 Wall. 242, 9 L. ed. 409.

contract, voluntarily made by another in his behalf, becomes bound by reason of such acceptance to perform his part of the contract.[42]

5. CONTRACT MAY IMPOSE DUTY ON THIRD PERSONS. While a contract cannot impose any contractual obligation upon one not a party to it, it may impose a duty upon third persons not to interfere with its due performance. It seems to be well settled that where there is an express contract of service for a definite period of time, a person who induces either the servant or the master to break it is liable to an action; and some courts apply the rule to other contracts.[43]

VI. REALITY OF CONSENT.

A. In General. Since mutual consent is essential to every agreement, and agreement is generally essential to contract, there can as a rule be no binding contract where there is no real consent. Apparent consent may be unreal because of mistake,[44] misrepresentation,[45] fraud,[46] duress,[47] or undue influence;[48] or because of mental incapacity.[49]

B. Mistake — 1. DEFINITION. Mistake is occasioned by ignorance or misconception of some matter, under the influence of which an act is done; and arises where one of the parties does not mean the same thing as the other, or where one or both while meaning the same thing form untrue conclusions as to the subject-matter of the agreement.[50]

2. EFFECT IN GENERAL. Mistake does not of itself affect the validity of contracts at all.[51] But mistake may be such as to prevent any real agreement from being formed, in which case the agreement is not merely voidable, as in the case of fraud,[52] but is absolutely void, both at law and in equity.[53] Or mistake may occur in the expression of a real agreement, in which case, subject to rules of evidence, the instrument may be reformed in equity.[54]

3. AGREEMENT PRESUMED FROM ASSENT. The general rule of law is that a person is bound by an agreement to which he has assented, where this assent is uninfluenced by fraud, violence, undue influence, or the like, and he will not be permitted to say that he did not intend to agree to its terms.[55]

4. EFFECT OF SIGNING WRITTEN INSTRUMENT — a. In General. As a written contract is the highest evidence of the terms of an agreement between the parties to it, it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his

See 11 Cent. Dig. tit. "Contracts," §§ 808, 809; and, generally, PRINCIPAL AND AGENT.

42. Stucky *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606 (holding that where one contracts for the publication of an advertisement which is obviously intended for the benefit of another as well as for himself, and such other makes no objection and receives the benefit thereof with full knowledge, the latter is liable to the publisher for the value of the advertisement to him); Bailey *v.* Rutjes, 86 N. C. 517; Miller *v.* Land, etc., Co., 66 N. C. 503.

43. See TORTS.

44. See *infra*, VI, B.

45. See *infra*, VI, C.

46. See *infra*, VI, D.

47. See *infra*, VI, E.

48. See *infra*, VI, F.

49. See DRUNKARDS; INSANE PERSONS.

50. Anson Contr. 127. See Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Raffles *v.* Wichelhaus, 2 H. & C. 906, 33 L. J. Exch. 160; Couturier *v.* Hastie, 5 H. L. Cas. 673.

51. Pollock Contr. 383. See Hunter *v.* Walters, L. R. 7 Ch. 75, 25 L. T. Rep. N. S. 765.

52. See *infra*, VI, D.

53. Pollock Contr. 383. See Rupley *v.* Doggett, 74 Ill. 351; Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Foster *v.* Mackinnon, L. R. 4 C. P. 704; Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Couturier *v.* Hastie, 5 H. L. Cas. 673.

54. Pollock Contr. 383. See *infra*, VI, B, 6.

55. Borden *v.* Richmond, etc., R. Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632. And see Cannon *v.* Lindsay, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472; Hunter *v.* Walters, L. R. 7 Ch. 75, 25 L. T. Rep. N. S. 765; Tamplin *v.* James, 15 Ch. D.

action in reliance upon the agreement. He owes it to the public which, as a matter of public policy, treats the written contract as a conclusive answer to the question, What was the agreement?[56] Hence the courts do not permit one to avoid a contract into which he has entered on the grounds that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form.[57]

215, 43 L. T. Rep. N. S. 520, 29 Wkly. Rep. 311.

56. Sanborn, J., in Chicago, etc., R. Co. *v.* Belliwith, 83 Fed. 437, 28 C. C. A. 358.

57. *Alabama.*— Martin *v.* Smith, 116 Ala. 639, 22 So. 917; Campbell *v.* Larmore, 84 Ala. 499, 4 So. 593; Goetter *v.* Pickett, 61 Ala. 387; Swift *v.* Fitzhugh, 9 Port. 39.

District of Columbia.— Kilbourn *v.* King, 6 D. C. 310.

Illinois.— Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628 [*reversing* 11 Ill. App. 465]; Linington *v.* Strong, 107 Ill. 295; Hair *v.* Johnson, 35 Ill. App. 562; Wheeler *v.* Long, 8 Ill. App. 463.

Indiana.— Zenor *v.* Johnson, 107 Ind. 69, 7 N. E. 751; Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195; Robinson *v.* Glass, 94 Ind. 211; American Ins. Co. *v.* McWhorter, 78 Ind. 136; Rogers *v.* Place, 29 Ind. 577; Beist *v.* Sipe, 16 Ind. App. 4, 44 N. E. 762.

Iowa.— Sheneberger *v.* Union Cent. L. Ins. Co., 104 Iowa 578, 87 N. W. 493, 55 L. R. A. 269; McKinney *v.* Herrick, 66 Iowa 414, 23 N. W. 767; Gulliher *v.* Chicago, etc., R. Co., 59 Iowa 416, 13 N. W. 429.

Kansas.— Roach *v.* Karr, 18 Kan. 529, 29 Am. Rep. 778.

Kentucky.— Gaither *v.* Daugherty, 38 S. W. 2, 18 Ky. L. Rep. 709.

Louisiana.— Jackson *v.* Lemle, 35 La. Ann. 855; Allen *v.* Whetstone, 35 La. Ann. 846; Boagni *v.* Fouchy, 26 La. Ann. 594; Watson *v.* Planters' Bank, 22 La. Ann. 14; Barker *v.* Banks, 15 La. 453.

Maine.— Eldridge *v.* Dexter, etc., R. Co., 88 Me. 191, 33 Atl. 974; Metcalf *v.* Metcalf, 85 Me. 473, 27 Atl. 457; Maine Mut. Mar. Ins. Co. *v.* Hodgkins, 66 Me. 109.

Massachusetts.— Johnson *v.* Olney, 140 Mass. 195, 4 N. E. 225; Rice *v.* Dwight Mfg. Co., 2 Cush. 80.

Michigan.— Sanborn *v.* Sanborn, 104 Mich. 180, 62 N. W. 371; Pellyplace *v.* Groton Bridge, etc., Co., 103 Mich. 155, 61 N. W. 266; Anderson *v.* Walter, 34 Mich. 113.

Minnesota.— Quimby *v.* Shearer, 56 Minn. 534, 58 N. W. 155.

Missouri.— Gwin *v.* Waggoner, 98 Mo. 315, 11 S. W. 227; Penn *v.* Brashear, 65 Mo. App. 24; Kingman *v.* Shanley, 61 Mo. App. 54; Campbell *v.* Van Houten, 44 Mo. App. 231; Robinson *v.* Jarvis, 25 Mo. App. 421; Rothchild *v.* Frensdorf, 21 Mo. App. 318; Taylor *v.* Fox, 16 Mo. App. 527.

New Jersey.— Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472, holding that where a person signs an otherwise valid written contract it is a conclusive presumption, except as against fraud, that it was read, understood, and assented to.

New York.— Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Wheaton *v.* Fay, 62 N. Y. 275; Phillip *v.* Gallant, 62 N. Y. 256; Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; Chu Pawn *v.* Irwin, 82 Hun 607, 31 N. Y. Suppl. 724, 64 N. Y. St. 411; Wheeler *v.* Mowers, 16 Misc. 143, 38 N. Y. Suppl. 950, 74 N. Y. St. 540; Bacon *v.* Proctor, 13 Misc. 1, 33 N. Y. Suppl. 995, 67 N. Y. St. 845; Rozen *v.* Dry Dock, etc., R. Co., 7 Misc. 130, 27 N. Y. Suppl. 337, 58 N. Y. St. 8; Root *v.* Zaller, 2 N. Y. Suppl. 742, 19 N. Y. St. 679.

North Carolina.— Dellinger *v.* Gillespie, 118 N. C. 737, 24 S. E. 538.

North Dakota.— Little *v.* Little, 2 N. D. 175, 49 N. W. 736.

Ohio.— New York, etc., R. Co. *v.* Seiberling, 8 Ohio Cir. Ct. 593.

Pennsylvania.— Kraus *v.* Stein, 173 Pa. St. 221, 33 Atl. 1031; Johnston *v.* Patterson, 114 Pa. St. 398, 6 Atl. 746; Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Greenfield's Estate, 14 Pa. St. 489, 496 (where Chief Justice Gibson said: "If a party who can read, . . . will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law"); Addicks *v.* Hutton, 2 Wkly. Notes Cas. 30.

Texas.— Couchran *v.* Alderete, (Tex. 1894) 26 S. W. 109.

Vermont.— Bishop *v.* Allen, 55 Vt. 423.

Wisconsin.— Deering *v.* Hoeft, 111 Wis. 339, 87 N. W. 298; McGowan *v.* Supreme Ct. I. O. of F., 107 Wis. 462, 83 N. W. 775; Jackowski *v.* Illinois Steel Co., 103 Wis. 448, 79 N. W. 757; Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105, 58 N. W. 72, 21 Am. St. Rep. 30; Sanger *v.* Dun, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789; Fuller *v.* Madison Mut. Ins. Co., 36 Wis. 599.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203, where it was said: "It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." See also Muller *v.* Kelly, 116 Fed. 545; Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121; Chicago, etc., R. Co. *v.* Belliwith, 83 Fed. 437, 28 C. C. A. 358;

b. Person Unable to Read. If a person cannot read the language in which a contract is written, it is as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents.[58]

c. Fraud. Of course if the other party induces the signer to sign the paper without reading it, and to rely on his statement of the contents, this may give the signer a right, if the statement was fraudulent, to avoid the contract as against him on the ground of fraud.[59] But this would not go to the existence of the agreement itself and the right of rescission would therefore not exist as to third parties ignorant of it.[60]

d. Substituted Document. Where some trick is used to substitute another instrument for the one which it is intended to sign, as where a promissory note is substituted for a receipt, and in like cases, the signature has no legal effect, not because the other party is guilty of fraud, but because the person who perpetrates the fraud knows that the other has no intention to execute that kind of an instrument, and hence there is no agreement which can give rights to any one,[61] except

Lumley *v.* Wabash R. Co., 71 Fed. 21; Fireman's Fund Ins. Co. *v.* Norwood, 69 Fed. 71, 16 C. C. A. 136; McKay *v.* Jackman, 17 Fed. 641.

England.— Hunter *v.* Walters, L. R. 7 Ch. 75, 25 L. T. Rep. N. S. 765.

See 11 Cent. Dig. tit. "Contracts," § 416.

Printed forms.— Where a contract is a printed form filled up in writing, and the written portion is read over to the party to be bound, after which he then directs his signature to be placed to the paper, and he has an opportunity to read the entire paper but does not, he is bound by the agreement, provided that the printed matter was not fraudulently concealed or withheld from his observation. Kilbourn *v.* King, 6 D. C. 310. *Compare,* however, Home Sav. Assoc. *v.* Noblesville Monthly Meeting, etc., (Ind. App. 1902) 64 N. E. 478.

58. *California.*— Hawkins *v.* Hawkins, 50 Cal. 558.

Delaware.—See Green *v.* Maloney, 7 Houst. 22, 30 Atl. 672.

Illinois.— See Smentek *v.* Cornhauser, 17 Ill. App. 266.

Indiana.— Williams *v.* Stoll, 79 Ind. 80, 41 Am. Rep. 604; Lindley *v.* Hofman, 22 Ind. App. 237, 53 N. E. 471.

Iowa.— See Dryer *v.* Security F. Ins. Co., (1900) 82 N. W. 494.

Missouri.— Penn *v.* Brashear, 65 Mo. App. 24; Shanley *v.* Laclede Gaslight Co., 63 Mo. App. 123.

Nebraska.— See Omaha First Nat. Bank *v.* Lierman, 5 Nebr. 247.

New Jersey.— See Suffern *v.* Butler, 18 N. J. Eq. 220.

New York.— Phillip *v.* Gallant, 1 Hun 528.

Pennsylvania.— Weller's Appeal, 103 Pa. St. 594; Bauer *v.* Roth, 4 Rawle 83.

Wisconsin.—Deering *v.* Hoeft, 111 Wis. 339, 87 N. W. 298.

United States.— Muller *v.* Kelly, 116 Fed. 545; Chicago, etc., R. Co. *v.* Belliwith, 83 Fed. 437, 28 C. C. A. 358.

See 11 Cent. Dig. tit. "Contracts," § 417.

59. *Alabama.*— Martin *v.* Smith, 116 Ala. 639, 22 So. 917.

Arkansas.— Jones *v.* Austin, 17 Ark. 498.

California.— Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 56.

Florida.— May *v.* Seymour, 17 Fla. 725.

Georgia.— Wood *v.* Cincinnati Safe, etc., Co., 96 Ga. 120, 22 S. E. 909; Chapman *v.* Atlantic Guano Co., 91 Ga. 821, 18 S. E. 41.

Illinois.— R. J. Gunning Co. *v.* Cusack, 50 Ill. App. 290.

Indiana.— New *v.* Wambach, 42 Ind. 456.

Iowa.— Burlington Lumber Co. *v.* Evans Lumber Co., 100 Iowa 469, 69 N. W. 558.

Minnesota.—Maxfield *v.* Schwartz, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; Aultman *v.* Oson, 34 Minn. 450, 26 N. W. 451.

Mississippi.— Stamps *v.* Bracy, 1 How. 312.

Missouri.— Beck, etc., Lithographing Co. *v.* Obert, 54 Mo. App. 240. And see Vandergrif *v.* Brock, 89 Mo. App. 411.

New Jersey.— Alexander *v.* Brogley, 62 N. J. L. 584, 41 Atl. 691.

Pennsylvania.— Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441.

Texas.— Houston, etc., R. Co. *v.* Burns, (Tex. Civ. App. 1901) 63 S. W. 1035; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003 [*affirming* 63 Fed. 800, 12 C. C. A. 598]; Lumley *v.* Wabash R. Co., 71 Fed. 21.

See 11 Cent. Dig. tit. "Contracts," § 423.

The burden of proof is on the party alleging that his signature was procured by fraud. Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472. See *infra,* XII, I, 13.

60. See *infra,* VI, D, 3, c, (VII).

61. *Illinois.*—Sims *v.* Bice, 67 Ill. 88; Puffer *v.* Smith, 57 Ill. 527.

Indiana.— Baldwin *v.* Bricker, 86 Ind. 221.

Iowa.— Burlington Lumber Co. *v.* Evans Lumber Co., 100 Iowa 469, 69 N. W. 558.

where the signer is estopped by negligence or otherwise to set up the truth as against *bona fide* third persons.[62]

5. Effect of Accepting Paper Containing Terms. Where one accepts a paper which he knows contains the terms of an offer, he will be bound by it, and cannot be heard to say that he did not read it or did not know what it contained.[63] This principle finds frequent application in the case of bills of lading, express receipts, and the like.[64] So where a person receives an insurance policy pursuant to an application, it is his duty to examine it and see those things in respect thereto which are open to ordinary observation by a person of ordinary intelligence, and if he neglects to do so, taking it for granted that what he has received is what he applied for or intended to apply for, such conduct on his part amounts to an acceptance of the policy received regardless of whether it corresponds to

Kentucky.— Sibley *v.* Holcomb, 104 Ky. 670, 47 S. W. 765, 20 Ky. L. Rep. 862.

Michigan.—McGinn *v.* Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 488; Soper *v.* Peck, 51 Mich. 563, 17 N. W. 57.

Missouri.— Wright *v.* McPike, 70 Mo. 175; Nicol *v.* Young, 68 Mo. App. 448; Cole *v.* Wiedman, 19 Mo. App. 7.

Nebraska.— Omaha First Nat. Bank *v.* Lierman, 5 Nebr. 247.

New Jersey.— Alexander *v.* Brogley, 63 N. J. L. 307, 43 Atl. 888, 62 N. J. L. 584, 41 Atl. 691, where defendants were induced to sign their names to a printed form of contract for the purchase of a book by a fraudulent representation made to one defendant that he was writing his name only to show how it was spelled, and to the other that he was signing his name only as an autograph. It was held that they were not bound.

New York.—Page *v.* Krekey, 137 N. Y. 307, 33 N. E. 311, 50 N. Y. St. 650, 33 Am. St. Rep. 731, 21 L. R. A. 409.

Pennsylvania.— Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441.

Wisconsin.— Bowers *v.* Thomas, 62 Wis. 480, 22 N. W. 710.

England.— The Roughgood's Case, 2 Coke 9*a*; Wake *v.* Harrop, 6 H. & N. 768, 7 Jur. N. S. 710, 30 L. J. Exch. 273, 4 L. T. Rep. N. S. 555, 9 Wkly. Rep. 788.

Compare Binford *v.* Bruso, 22 Ind. App. 512, 54 N. E. 146 [*criticized* in 13 Harv. L. Rev. 222].

62. Negotiable instruments.—In some states what is called "fraud and circumvention," that is, where the maker of a note signs it believing he is signing another kind of a paper, will prevent a recovery even by a *bona fide* holder, if the maker is not guilty of negligence.

Alabama.— See Nance *v.* Lary, 5 Ala. 370.

Illinois.— Auten *v.* Gruner, 90 Ill. 300 (where the signer was shown a note for ten dollars which he agreed to sign, but another for three hundred was by a trick substituted for it); Hewitt *v.* Jones, 72 Ill. 218; Hubbard *v.* Rankin, 71 Ill. 129 (where the signer was induced to sign a promissory note thinking that it was an appointment as agent to sell a patent right); Taylor *v.* Atchison, 54 Ill. 196, 5 Am. Rep. 118.

Michigan.— Gibbs *v.* Linabury, 22 Mich. 479, 7 Am. Rep. 675.

Ohio.— De Camp *v.* Hamma, 29 Ohio St. 467.

England.— Foster *v.* Mackinnon, L. R. 4 C. P. 704.

See Commercial Paper.

In other states the innocent holder is allowed to recover, or at least the courts turn the equity of the case against the defendant on the doctrine of estoppel, on very slight proof of negligence.

Indiana.— Robinson *v.* Glass, 94 Ind. 211; Baldwin *v.* Barrows, 86 Ind. 351; Fisher *v.* Van Behren, 70 Ind. 19, 36 Am. Rep. 162; Detwiler *v.* Bush, 44 Ind. 70; Cline *v.* Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Lindley *v.* Hofman, 22 Ind. App. 237, 53 N. E. 471.

Iowa.— Green *v.* Wilkie, 98 Iowa 74, 66 N. W. 1046, 60 Am. St. Rep. 184, 36 L. R. A. 434; Fayette County Bank *v.* Steffes, 54 Iowa 214, 6 N. W. 267; Douglass *v.* Matting, 29 Iowa 498, 48 Am. Rep. 238.

Kansas.— Ort *v.* Paturn, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

Kentucky.— McCoy *v.* Gouvion, 102 Ky. 386, 43 S. W. 699, 19 Ky. L. Rep. 1441.

Minnesota.— Mackey *v.* Peterson, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211.

Missouri.— Frederick *v.* Clemens, 60 Mo. 313; Shirts *v.* Overjohn, 60 Mo. 305; Corby *v.* Weddle, 57 Mo. 452; Martin *v.* Smylee, 55 Mo. 577; Briggs *v.* Ewart, 51 Mo. 245, 11 Am. Dec. 445.

New Hampshire.— Citizens' Nat. Bank *v.* Smith, 55 N. H. 593.

New York.— Chapman *v.* Rose, 56 N. Y. 137, 15 Am. Rep. 401. *Contra*, Whitney *v.* Snyder, 2 Lans. (N. Y.) 477.

Pennsylvania.— Brown *v.* Reed, 79 Pa. St. 370, 21 Am. Rep. 75.

West Virginia.— Parkersburg First Nat. Bank *v.* Johns, 22 W. Va. 520, 46 Am. Rep. 506.

Wisconsin.— Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30; Walker *v.* Ebert, 29 Wis. 194, 9 Am. Rep. 548.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 202.

See Commercial Paper.

63. See *supra*, II, C, 3, c, (VI).

64. See Carriers, 6 Cyc. 403 *et seq.*

the policy applied for or intended to have been applied for or not, and if it does not so correspond he cannot be heard to complain.[65]

6. Mistake of Expression and Reformation — a. In General. A mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. Here in courts of law the contract must stand as it is written, for it is a well-settled rule of evidence in those courts that parol evidence is not admissible to contradict, add to, or vary a writing.[66] Equity, however, will relieve by restraining proceedings on the contract at law, or by rectifying or reforming it in accordance with the real intention of the parties,[67] or may cancel it;[68] and this either at the suit of the party or by way of defense to an action on the instrument.[69] The jurisdiction of equity to correct mistakes generally in contracts, so as to make them express the actual intent of the parties, is one of the ancient heads of the jurisdiction of courts of chancery.[70] Equity will not

65. American Ins. Co. *v.* Neiberger, 74 Mo. 167; Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22; Bostwick *v.* New York Mut. L. Ins. Co., (Wis. 1902) 89 N. W. 538; McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532. See Insurance.

66. See Evidence.

67. *Alabama.*— Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

California.— De Jarnatt *v.* Cooper, 59 Cal. 703.

Connecticut.— West *v.* Suda, 69 Conn. 60, 36 Atl. 1015; Chamberlain *v.* Thompson, 10 Conn. 243, 26 Am. Dec. 390; Chapman *v.* Allen, Kirby 399, 1 Am. Dec. 24.

Georgia.— Price *v.* Cutts, 29 Ga. 142, 74 Am. Dec. 52; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553.

Illinois.— Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Iowa.—Reid *v.* Cook, 88 Iowa 717, 54 N. W. 353; Montgomery *v.* Shockey, 37 Iowa 107.

Kentucky.— Yelton *v.* Hawkins, 2 J. J. Marsh. 1; Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610.

Maryland.— Baltimore Nat. F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289; Newcomer *v.* Kline, 11 Gill & J. 457, 37 Am. Dec. 74; Aldridge *v.* Weems, 2 Gill & J. 36, 19 Am. Dec. 250.

Michigan.— Fero *v.* H. M. Loud, etc., Lumber Co., 101 Mich. 310, 59 N. W. 603.

Minnesota.— Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742; Ezell *v.* Peyton, 134 Mo. 484, 36 S. W. 35; Turner *v.* Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

New York.— Kilmer *v.* Smith, 77 N. Y. 226, 33 Am. Rep. 613; Hargous *v.* Ablon, 3 Den. 406, 45 Am. Dec. 481.

Pennsylvania.— Ashcom *v.* Smith, 2 Penr. & W. 211, 21 Am. Dec. 437.

South Carolina.— Lawrence *v.* Beaubien, 2 Bailey 623, 23 Am. Dec. 155; Rogers *v.* Collier, 2 Bailey 581, 23 Am. Dec. 153.

Tennessee.— Walker *v.* Dunlop, 5 Hayw. 271, 9 Am. Dec. 787.

Texas.— Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Ross *v.* Armstrong, 25 Tex. Suppl. 354, 78 Am. Dec. 574.

United States.— Elliot *v.* Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. ed. 678; Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. 46.

See Reformation of Instruments.

68. Hudson *v.* Waugh, 93 Va. 518, 25 S. E. 530. See Cancellation of Instruments, 6 Cyc. 282.

Cancellation in part.— In one case it was held that where by mutual mistake matters were embraced in a contract which were not intended, equity would cancel such part and decree the performance of the rest. Hamilton *v.* McAlister, 49 S. C. 230, 27 S. E. 63.

69. Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137; Barlow *v.* Elliott, 56 Mo. App. 374; Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33; and other cases above cited. But evidence tending to show mistake, which is insufficient to authorize reformation of an instrument, is not available as a defense in an action brought upon the instrument. Day *v.* Raguet, 14 Minn. 273.

70. Henkleman *v.* Peterson, 154 Ill. 419, 40 N. E. 359. See Reformation of Instruments.

Illustrations.—Mistakes of the following nature have been corrected in equity: Where an attorney in drawing a contract by mistake omitted an important provision (Waterman *v.* Dutton, 6 Wis. 265); a mistake made by a surveyor, by which a larger amount of land was contracted for than there was in reality (Gilmore *v.* Morgan, 2 J. J. Marsh. (Ky.) 65; Jenks *v.* Fritz, 7 Watts & S. (Pa.) 201, 42 Am. Dec. 227); where a mortgage showed upon its face that by a scrivener's mistake the word "quarterly" was used instead of the word "annually" (Fowler *v.* Woodward, 26 Minn. 347, 4 N. W. 231); where a material, not simply a slight, mistake was made in the quantity of land conveyed (Read *v.* Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204; Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371; Ladd *v.* Pleasants, 39 Tex. 415; Durham *v.* Legard,

relieve when the mistake is not as to the contents of the instrument but as to its legal effect;[71] where neither fraud, mistake, nor surprise is proved, and the contract is such as the parties designed it to be;[72] where a deed is voluntary;[73] where the contract is illegal or relates to an illegal matter;[74] where the mistake was not mutual;[75] where the mistake arose from negligence;[76] where the correction is not asked for;[77] nor where the complaining party has been guilty of laches.[78] Where the mistake is obvious on the face of the writing the court may construe it according to the obvious intention.[79]

b. Evidence Required. To establish mistake, the party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; at any rate a mere preponderance of evidence is not suffieient. The written instrument deliberately prepared and executed is evidence of the highest character, and will be presumed to express the intention of the parties to it, until the contrary appears

34 Beav. 611); where by mutual mistake two hundred and six acres were conveyed as "about 222 acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee being held entitled to a corresponding abatement therefrom (Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371); where an instrument was void on account of a patent ambiguity (Campbell *v.* Johnson, 44 Mo. 247); where through mistake the whole of the premises was conveyed upon trusts, when the intention was to convey only one portion on trust and the remainder in fee simple (Kirk *v.* Zell, 1 MacArthur (D. C.) 116); when there was a misdescription in a contract (Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460); where an attorney, in drawing a deed by which a father conveyed a life-estate to his daughter, neglected to insert "for her sole and separate benefit" (Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185); where a note was executed by mistake for too large an amount (Rigsbee *v.* Trees, 21 Ind. 227; Harrison *v.* Jameson, 3 J. J. Marsh. (Ky.) 232); and defects in statutory requisites as to form (Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; Somerville *v.* Trueman, 4 Harr. & M. (Md.) 43, 1 Am. Dec. 389; Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193).

71. *California.*— Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142.

Illinois.— Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

Indiana.— Toops *v.* Snyder, 70 Ind. 554.

Iowa.— Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

Maine.— Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556.

Maryland.— Anderson *v.* Lydings, 8 Md. 427, 63 Am. Dec. 708.

New York.— Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

See REFORMATION OF INSTRUMENTS.

72. McElderry *v.* Shipley, 2 Md. 25, 56 Am. Dec. 703; Bradford *v.* Bradford, 54 N. H. 463; Story *v.* Conger, 36 N. Y. 673, 93 Am. Dec. 546. See REFORMATION OF INSTRUMENTS.

73. Powell *v.* Powell, 27 Ga. 36, 73 Am. Dec. 724; Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565; Eaton *v.* Eaton, 15 Wis. 259. But the rule that a deed will not be reformed at the instance of mere volunteers does not apply to a dispute between two volunteers claiming under the same deed, when the grantor has no interest in the controversy. Adair *v.* McDonald, 42 Ga. 506. See REFORMATION OF INSTRUMENTS.

74. Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565; Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317, 27 Eng. Reprint 1055. See REFORMATION OF INSTRUMENTS.

75. *California.*— De Jarnatt *v.* Cooper, 59 Cal. 703.

Georgia.— Murray *v.* Sells, 53 Ga. 257.

Maryland.— Dulany *v.* Rogers, 50 Md. 524.

Massachusetts.—Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152.

New York.— Smith *v.* Mackin, 4 Lans. 41.

Rhode Island.— Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

United States.— Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395.

England.— Fowler *v.* Fowler, 4 De G. & J. 250, 61 Eng. Ch. 196.

See REFORMATION OF INSTRUMENTS.

Fraud.— And mistake on one side only is a ground for reformation when such mistake is caused by tne fraud of the other party. Bergen *v.* Ebey, 88 Ill. 269; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063. And in some courts where the other party was singly cognizant of the mistake. Essex *v.* Day, 52 Conn. 483, 1 Atl. 620; Wyche *v.* Greene, 26 Ga. 415; Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114.

76. *California.*— Belt *v.* Mehen, 2 Cal. 159, 56 Am. Dec. 329.

Indiana.— Toops *v.* Snyder, 70 Ind. 554.

Massachusetts.— Jackson *v.* Olney, 140 Mass. 195, 4 N. E. 225.

Missouri.— Brown *v.* Fagan, 71 Mo. 563.

Texas.— Robertson *v.* Smith, 11 Tex. 211, 60 Am. Dec. 234.

See REFORMATION OF INSTRUMENTS.

77. Gamble *v.* Daugherty, 71 Mo. 599.

78. Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479.

79. Leake Contr. 8, § 1; Saunderson *v.* Piper, 2 Arn. 58, 5 Bing. N. Cas. 425, 7 Dowl.

in the most satisfactory manner.[80] And there must always be express proof of the real intention of the parties.[81] The power to reform instruments, it is said, is exercised by courts of equity with great caution, and never unless a proper case is made by the pleadings.[82]

7. Mistake of One Party Only — a. In General. A mistake of one of the parties only in the expression of his agreement or as to the subject-matter, not known to the other, does not affect its binding force,[83] and is no ground for its rescission even in equity,[84] unless it is such a mistake as to show that there is a complete difference in substance between what is supposed to be and what is taken, so as to constitute a failure of consideration. The principle of our law is the same as that of the civil law, and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.[85]

P. C. 632, 3 Jur. 773, 7 Scott 408, 35 E. C. L. 231; Wilson *v.* Wilson, 5 H. L. Cas. 40, 23 L. J. Ch. 697.

80. *Alabama.*— Hinton *v.* Citizen's Mut. Ins. Co., 63 Ala. 488; Alexander *v.* Caldwell, 55 Ala. 517.

Arkansas.— Rector *v.* Collins, 46 Ark. 167; Carnall *v.* Wilson, 14 Ark. 482.

Colorado.— Wilson *v.* Morris, 4 Colo. App. 242, 36 Pac. 248.

Connecticut.— Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248.

Iowa.— Murphy *v.* Cedar Falls First Nat. Bank, 95 Iowa 325, 63 N. W. 702; Herring *v.* Peaslee, 92 Iowa 391, 60 N. W. 650; Hervey *v.* Savery, 48 Iowa 313.

Massachusetts.— Sawyer *v.* Hovey, 3 Allen 331, 81 Am. Dec. 659.

Missouri.—Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108; Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928 (where it was said that "the authorities all require that the parol evidence of the mistake 'must be most clear and convincing.' Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only a certainty of error"); Turner *v.* Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319 (where it was said that "in order to reach such a standard of probative efficacy, the evidence must be clear, and positive, and convincing"); Modrell *v.* Riddle, 82 Mo. 31; Worley *v.* Dryden, 57 Mo. 226, 233 (where it was said: "This court has gone as far as any in holding, that before a deed can be contradicted and the title to land affected, that there should not only be clear and unequivocal evidence, but there should be no room for reasonable doubt as to the facts relied on"); State *v.* Frank, 51 Mo. 98; Able *v.* Union Ins. Co., 26 Mo. 56.

New York.— Wilson *v.* Deen, 74 N. Y. 531; Roberts *v.* Derby, 68 Hun 299, 23 N. Y. Suppl. 34, 52 N. Y. St. 95.

Pennsylvania.— Thayer *v.* Seep, 168 Pa. St. 414, 31 Atl. 1072.

Washington.— Phillips *v.* Port Townsend Lodge No. 6 F. & A. M., 8 Wash. 529, 36 Pac. 476.

Wisconsin.— Parker *v.* Hull, 71 Wis. 368, 37 N. W. 351, 5 Am. St. Rep. 224; Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479.

81. Moore *v.* Vick, 2 How. (Miss.) 746, 32 Am. Dec. 301; State *v.* Frank, 51 Mo. 98, 99 (where it was said: "Every presumption is in favor of the instrument as it is, and the evidence must be unequivocal to show both that an error was committed and also its precise character. This implies the ability to show the language the parties intended to use").

82. Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280.

83. *California.*— Crane *v.* McCormick, 92 Cal. 176, 28 Pac. 222.

Georgia.— Comer *v.* Granniss, 75 Ga. 277.

Kansas.— Griffin *v.* O'Neil, 48 Kan. 117, 29 Pac. 143.

Texas.— Brown *v.* Levy, (Tex. Civ. App. 1902) 69 S. W. 255, holding that where a person makes an offer to erect a building for a certain amount and the other party accepts it, there is a consummated and binding agreement, although the former in adding up the items of his estimates makes a mistake, for which the latter is not responsible, by which the total is made ten thousand dollars too small.

England.— Ionides *v.* Pacific F. & M. Ins. Co., L. R. 6 Q. B. 674, 25 L. T. Rep. N. S. 490; Scott *v.* Littledale, 8 E. & B. 815, 4 Jur. N. S. 849, 27 L. J. Q. B. 201, 92 E. C. L. 815.

84. Moffett, etc., Co. *v.* Rochester, 91 Fed. 28, 33 C. C. A. 319.

85. Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly. Rep. 1039. See also Lyman *v.* Campbell, 34 Mo. App. 213; Moffett, etc., Co. *v.* Rochester, 91 Fed. 28, 32, 33 C. C. A. 319 (where it was said: "A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms

b. As to Value, Quality, and Other Collateral Attributes. Where a purchaser or seller of any property, real or personal, buys or sells upon a mistaken idea of its nature, quality, or value, this mistake of one, unless induced by the other, does not affect the binding force of the agreement.[86] So where the mistake is as to some other collateral attribute of the agreement, as where a person thinking that another is insolvent buys his note,[87] or where a person through error in computations and neglecting to take into consideration certain features of the work offers to erect a building for too small a sum,[88] or where a station agent, on application of a shipper for the rate of freight, quotes, through a mistake in the instructions to him, a lower rate than the real rate.[89]

c. In Motive or Expectation. A mistake of a party to an agreement relating to his motive or expectation has no effect on the agreement; as for example where a person agrees to purchase something under the mistaken belief that he needs it or that it will answer a purpose he has in view,[90] where one purchases a house under the mistaken belief that it is situated in a particular county, of which he wishes to become a freeholder,[91] where one buys land in the unrealized expectation of procuring a consent which is required for building on it,[92] where one takes a lease of land under the belief that there is a vein of coal in it,[93] where one applies for shares in a company under a mistaken belief that he requires them to qualify himself as a director,[94] or where one orders more of an article than he really needs.[95]

d. Of One Party Caused by the Other. If a mistake on the part of one of the

as reduced in writing, although expressing the understanding of one party, did not express that of the other. In all the reported cases where there was not the element of mutual mistake, or mistake of one side with knowledge on the other, there was, in the language of Addison, 'some undue influence, misrepresentation, surprise, or abuse of confidence,' or the contract was so oppressive as to be unconscionable").

Specific performance.— A court of equity, however, will sometimes refuse specific performance of an agreement which it would not order rescinded. Specific performance being not a matter of strict right, if the defendant is able to prove a mistake which would make the enforcement of the agreement inequitable and oppressive, equity will refuse to enforce it and will leave the plaintiff to his action at law. Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346; Mortlock *v.* Buller, 10 Ves. Jr. 292, 7 Rev. Rep. 417. See SPECIFIC PERFORMANCE.

86. Dortic *v.* Dugas, 55 Ga. 484; Citizens' Bank *v.* James, 26 La. Ann. 264; Hunter *v.* Goudy, 1 Ohio 449; Griffiths *v.* Jones, L. R. 15 Eq. 279, 42 L. J. Ch. 468, 21 Wkly. Rep. 470; Smith *v.* Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221, 25 L. T. Rep. N. S. 329, 19 Wkly. Rep. 1059; Scott *v.* Littledale, 8 E. & B. 815, 4 Jur. N. S. 849, 27 L. J. Q. B. 201, 92 E. C. L. 815; Sutton *v.* Temple, 13 L. J. Exch. 17, 12 M. & W. 52.

Sale of real property.—Where one purchases land erroneously supposing that a certain tract belongs to it, the mistake does not affect the sale. Tamplin *v.* James, 15 Ch. D. 215, 43 L. T. Rep. N. S. 520, 29 Wkly. Rep. 311; Stapylton *v.* Scott, 13 Ves. Jr. 425. See VENDOR AND PURCHASER.

Sale of personal property.—Where one buys for one dollar a stone from another, which the other has found, and which he thinks is of small value, and it turns out to be a valuable diamond, the sale is binding. Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610; Sankey *v.* Mifflinburg First Nat. Bank, 78 Pa. St. 48.

87. Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; Dambmann *v.* Schulting, 75 N. Y. 55.

88. Moffett, etc., Co. *v.* Rochester, 91 Fed. 28, 33 C. C. A. 319.

89. Borden *v.* Richmond, etc., R. Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632. But see Rowland *v.* New York, etc., R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175.

90. Leake Contr. 227. See Western German Sav. Bank *v.* Farmers', etc., Bank, 10 Bush (Ky.) 669; Ollivant *v.* Bayley, 5 Q. B. 288, 1 Dav. & M. 373, 7 Jur. 1130, 13 L. J. Q. B. 34, 48 E. C. L. 288; Scott *v.* Littledale, 8 E. & B. 815, 4 Jur. N. S. 849, 27 L. J. Q. B. 201, 92 E. C. L. 815; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399.

91. Shirley *v.* Davis [*cited* in Drewe *v.* Hanson, 6 Ves. Jr. 675, 678, 7 Ves. Jr. 270, note 40].

92. Adams *v.* Weare, 1 Bro. Ch. 567, 28 Eng. Reprint 1301.

93. Jefferys *v.* Fairs, 4 Ch. D. 448, 46 L. J. Ch. 113, 36 L. T. Rep. N. S. 10, 25 Wkly. Rep. 227.

94. *In re* British, etc., Tel. Co., L. R. 14 Eq. 316, 42 L. J. Ch. 9, 27 L. T. Rep. N. S. 748, 21 Wkly. Rep. 37.

95. Coates *v.* Buck, 93 Wis. 128, 67 N. W. 23.

parties to an agreement is caused by the other, it may entitle him to avoid the contract on the ground of fraud.[96]

e. Of One Party Known to the Other. One is not permitted to accept a promise which he knows that the other party understands in a different sense from that in which he understands it. In such a case there is no agreement,[97] although equity sometimes rectifies the contract so as to make it express the real intention.[98] The rule is different if the other party simply knows that the offerer is mistaken as to the value or quality of the subject-matter, or as to his expectations or motives.[99] Thus, as we shall see, it does not affect the agreement if the

96. Leake Contr. 336; Beebe *v.* Young, 14 Mich. 136; Phillips *v.* Hollister, 2 Coldw. (Tenn.) 269. See *infra*, VI, D.

97. *Georgia.*—Shelton *v.* Ellis, 70 Ga. 297; Wyche *v.* Greene, 26 Ga. 415. By the code of Georgia, where the intentions of the parties differ, the meaning placed on the contract by one, and known to be thus misunderstood by the other at the time, shall be held to be the true meaning. Goulding *v.* Hammond, 49 Fed. 443 [*reversed* on other grounds in 54 Fed. 639, 4 C. C. A. 533].

Kansas.— Griffin *v.* O'Neil, 48 Kan. 117, 29 Pac. 143.

Maine.— Lapish *v.* Wells, 6 Me. 175.

Texas.— Dorsey Printing Co. *v.* Gainesville Cotton Seed Oil Mill, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 556.

Vermont.— Everson *v.* International Granite Co., 65 Vt. 658, 27 Atl. 320.

United States.— Hume *v.* U. S., 132 U. S. 406, 10 S. Ct. 134, 33 L. ed. 393.

England.— Gordon *v.* Street, [1899] 2 Q. B. 641, 69 L. J. Q. B. 45, 81 L. T. Rep. N. S. 237, 48 Wkly. Rep. 158; Webster *v.* Cecil, 30 Beav. 62; Tamplin *v.* James, 15 Ch. D. 215, 43 L. T. Rep. N. S. 520, 29 Wkly. Rep. 311 (where it was said that a person cannot "snap at an offer" which he knows is made by mistake).

Illustrations.— This rule has been applied for example in a suit for specific performance of a contract to sell land, where the defendant, after having refused an offer from the plaintiff of £2,000, wrote him a letter containing an offer to sell for £1,200, whereas he intended to write £2,100, and the plaintiff accepted the offer (Webster *v.* Cecil, 30 Beav. 62); in an action for shucks furnished the government, where the plaintiff's bid for furnishing the same had been made on a blank furnished by the government, which, because of inadvertence in not striking out a word, required the government to pay sixty cents a pound, when shucks were only really worth two cents a pound, and were usually sold by the hundred weight (Hume *v.* U. S., 132 U. S. 406, 10 S. Ct. 134, 33 L. ed. 393); where by mistake in a rate sheet a railroad rate was given at fifteen dollars less than it should have been, and a person bought a ticket at that rate knowing of the mistake (Shelton *v.* Ellis, 70 Ga. 297); in a contract for the sale of goods, where the error was in failing to give the price which the seller had decided upon, the seller having had certain figures in mind which he intended to give, and having by a mere slip of the tongue, which the buyer understood to be such, given other figures (Harran *v.* Foley, 62 Wis. 584, 22 N. W. 837); where the vendor of land stated a price which was determined by footing incorrectly an itemized valuation of the property, and the buyer was looking upon the paper while he was making the addition, and knew of the miscalculation (Griffin *v.* O'Neil, 48 Kan. 117, 29 Pac. 143); and where plaintiff contracted with defendants for certain stone monuments for a sum fixed by one of defendants on information given him by their foreman, and on which he relied, and the price fixed was much below the value of the goods, through an error of the foreman in computation, known to plaintiff (Everson *v.* International Granite Co., 65 Vt. 658, 27 Atl. 320).

Equity will rescind an agreement which contains a vital mistake of one party known to the other. Rider *v.* Powell, 28 N. Y. 310; Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. ed. 678; Webster *v.* Cecil, 30 Beav. 62. See Smith *v.* Mackin, 4 Lans. (N. Y.) 41, where plaintiff had agreed in writing to surrender possession of certain real estate, supposing it to be a part only of that which was included in the description, and having discovered that the description covered the whole, brought an action to rescind the agreement. It was held maintainable. "The defendant," it was said, "knew how the fact was at the time the contract was made, and was also aware of the plaintiff's misapprehension in regard to it." The case was one where the defendant's conduct was unconscionable.

Estoppel.— Where a party places a construction on a proposed contract, agreeing to execute it in that way, and thereby induces the other to agree, he will be estopped from afterward repudiating that construction. Schmohl *v.* Fiddick, 34 Ill. App. 190; The Alberto, 24 Fed. 379.

98. Anson Contr. 130. See Garrard *v.* Frankel, 30 Beav. 445; and REFORMATION OF INSTRUMENTS.

99. Smith *v.* Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221, 25 L. T. Rep. N. S. 329, 19 Wkly. Rep. 1059, where plaintiff sold defendant a quantity of oats, defendant thinking that they were old oats, and plaintiff knowing that he thought so and knowing that they were not. It was held that the sale was binding. But if defendant had thought they were old oats and that plaintiff

seller of property does not disclose matters affecting its value or the buyer matters within his knowledge alone enhancing its value.[1]

8. Mutual Mistake — a. As to Material Facts. Mutual mistake as to material facts will avoid the agreement.[2]

b. As to Extrinsic Facts. As to extrinsic facts which may have a bearing or influence on the making of an agreement, but which are not the cause of it, it seems that a mutual mistake does not affect the agreement. The agreement may be set aside for the mistake only where the point misconceived was the cause of the agreement or had an important influence upon it.[3] The fact that both parties mistook the value of the subject-matter of the contract, so that one sold more of a thing or a more valuable thing than he thought he was selling, and the other got more than he expected to get, is immaterial to the case.[4] And so it is

was selling them as old oats, and plaintiff had known that defendant in making his offer thought he was being promised old oats, there would have been no contract, for it would be such a mistake and such a knowledge of the mistake as to fall under the general rule stated in the text. See Smith *v.* Hughes, *supra*.

1. See *infra*, VI, D, 2, b, (I).

2. *Alabama.*— Scruggs *v.* Driver, 31 Ala. 274.

California.— Barfield *v.* Price, 40 Cal. 535.

Mississippi.— Harrison *v.* Stowers, Walk. 165.

New York.— Funch *v.* Abenheim, 20 Hun 1; Mildeberger *v.* Baldwin, 2 Hall 176.

North Carolina.— Oldham *v.* Kirchner, 79 N. C. 106, 28 Am. Rep. 302.

Pennsylvania.— Fink *v.* Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. Rep. 750; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; Gibson *v.* Union Rolling Mill Co., 3 Watts 32.

Texas.— Harrell *v.* De Normandie, 26 Tex. 120.

Vermont.— Ketchum *v.* Catlin, 21 Vt. 191.

Virginia.— French *v.* Townes, 10 Gratt. 513.

United States.—Allen *v.* Hammond, 11 Pet. 63, 9 L. ed. 633 [*affirming* 2 Sumn. 387, 11 Fed. Cas. No. 6,000]; Wilson *v.* Queen Ins. Co., 5 Fed. 674.

3. Segur *v.* Tingley, 11 Conn. 134; Dambmann *v.* Schulting, 75 N. Y. 55; Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893. See Pomeroy Eq. Juris. § 856, where it is said: "If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive." See also Moore *v.* Scott, 47 Nebr. 346, 66 N. W. 441; Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly. Rep. 1039.

4. *Pennsylvania.*— Sankey *v.* Miffinburg First Nat. Bank, 78 Pa. St. 48, where, on the sale of bonds at their face value, both parties were ignorant that the bonds were selling on the market at a premium.

Tennessee.— Webster *v.* Stark, 10 Lea 406, where one who had built a mill partly on land of another purchased of the other two lots, both parties supposing them to include the mill, which, however, was found to be on a third lot, and it was held no ground for equitable interference.

Virginia.— Thompson *v.* Jackson, 3 Rand. 504, 15 Am. Dec. 721, where on the sale of a specific tract of land both parties supposed that it contained less than it really did.

Wisconsin.—Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610, where both buyer and seller of a stone thought that it was of small value while it was really of great value.

England.— Hope *v.* Walter, [1900] 1 Ch. 257, 69 L. J. Ch. 166, 82 L. T. Rep. N. S. 30, [1899] 1 Ch. 879, 60 L. J. Ch. 359, 80 L. T. Rep. N. S. 355, 47 Wkly. Rep. 479 (where, at the time of the sale of a house at auction, neither the vendor nor the vendee knew that the tenant in whose possession it was had been using it as a brothel, which fact, if publicly known in the neighborhood, would greatly reduce its value for the purpose of being let to tenants); Barr *v.* Gibson, 1 H. & H. 70, 7 L. J. Exch. 124, 3 M. & W. 390 (where on a sale of a ship at sea, both parties were ignorant that she was then in a damaged condition).

Conflicting cases.— In Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531, B sold to A a blooded cow for eighty dollars, both thinking that the cow was barren. Before the time for delivery B discovered that the cow was with calf and refused to deliver. As a breeder the cow was worth ten times the price it was sold for. It was held that the mistake avoided the sale. One judge dissented on the ground that the mistake went to the quality or value of the thing sold. In Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739, the plaintiff had paid the defendant, as worth fifty cents, a private gold coin really worth ten dollars, and it was held that the mistake was a ground for rescission. So in several cases where the mistake was as to the productiveness of land sold. Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184, 41 N. W. 815; Irwin

generally as to all facts which are not of the essence of the agreement, the rule being that a mutual mistake as to these has no effect.[5]

c. When Facts Doubtful and Parties Assume Risk. Where the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties.[6]

d. As to Terms of Agreement — (I) *Offer and Acceptance Not Identical.* It has been seen that it is essential to every agreement that the parties to it should have consented to the same subject-matter in the same sense; they must have contracted *ad idem*.[7] Hence where one person offers a thing and the other accepts it and the parties have in mind a different thing, there can be no agreement. So where the language used is understood differently by the parties, there is no meeting of minds and there can be no agreement.[8] These cases may be classed under the head of mistake as to the identity of the subject-matter.

(II) *Where Terms of Agreement Are Not Ambiguous.* The rule, how-

v. Wilson, 45 Ohio St. 426, 15 N. E. 426. And see Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621.

5. Kowalke *v.* Milwaukee Electric R., etc., Co., 103 Wis. 472, 79 N. W. 207, 74 Am. St. Rep. 877, where a woman was injured in alighting from a car, and shortly after a compromise of her claim was made by the railroad she had a miscarriage. It was held that the mistake of both parties as to her pregnancy was not a ground for setting aside the agreement.

6. Eastman *v.* St. Anthony Falls Water Power Co., 24 Minn. 437; Crowder *v.* Langdon, 38 N. C. 476; Perkins *v.* Gay, 3 Serg. & R. (Pa.) 327, 8 Am. Dec. 653; Kowalke *v.* Milwaukee Electric R., etc., Co., 103 Wis. 472, 476, 79 N. W. 762, 74 Am. St. Rep. 877 (where it was said: "Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance").

7. Rovegno *v.* Defferari, 40 Cal. 459; Rowland *v.* New York, etc., R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; Rupley *v.* Daggett, 74 Ill. 351; Hazard *v.* New England Mar. Ins. Co., 1 Sumn. (U. S.) 218, 11 Fed. Cas. No. 6,282; Greene *v.* Bateman, 2 Woodb. & M. (U. S.) 59, 10 Fed. Cas. No. 5,762. And see *supra*, II, C, 3, d, (II).

Signing wrong writings.— In a suit to recover the price of hogs sold by plaintiff to defendant, who refused to accept and pay for them, where the written contract showed that plaintiff bought the hogs of himself, and that defendant sold the same number of hogs to himself, each party having signed the writing the other should have executed, it was held that plaintiff could not recover. Canterberry *v.* Miller, 76 Ill. 355.

8. *California.*— Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 121 Cal. 641, 54 Pac. 101.

Colorado.— Lamar Milling, etc., Co. *v.* Craddock, 5 Colo. App. 203, 37 Pac. 950.

Connecticut.— Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Georgia.— Stix *v.* Roulston, 88 Ga. 743, 15 S. E. 826.

Illinois.— Rupley *v.* Daggett, 74 Ill. 351; Brant *v.* Gallup, 5 Ill. App. 262.

Indiana.— Mummenhoff *v.* Randall, 19 Ind. App. 44, 49 N. E. 40.

Iowa.— Clay *v.* Ricketts, 66 Iowa 362, 23 N. W. 755.

Kansas.— Hogue *v.* Mackey, 44 Kan. 277, 24 Pac. 477.

Louisiana.— Pittsburgh, etc., Coal Co. *v.* Slack, 42 La. Ann. 107, 7 So. 230.

Massachusetts.— Kyle *v.* Kavanaugh, 103 Mass. 356, 4 Am. Rep. 560; Gardner *v.* Lane, 9 Allen 492, 85 Am. Dec. 779.

Minnesota.— Strong *v.* Lane, 66 Minn. 94, 68 N. W. 765.

Missouri.— Robinson *v.* Estes, 53 Mo. App. 582.

New Jersey.— Braeutigam *v.* Edwards, 38 N. J. Eq. 542.

New York.— Fullerton *v.* Dalton, 58 Barb. 236.

Texas.— Gulf, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1893) 24 S. W. 566; Bland *v.* Brookshire, 3 Tex. App. Civ. Cas. § 446.

United States.— Greene *v.* Bateman, 2 Woodb. & M. 359, 10 Fed. Cas. No. 5,762.

England.— Raffles *v.* Wichelhaus, 2 H. & C. 906, 33 L. J. Exch. 160.

But see Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

Mistake as to quantity.— Where defendants inquired of plaintiff's agent the expense of transporting certain lath, and the agent inquired as to the quantity, to which defendants replied that there would be five hundred bundles, but the agent understood them to say one hundred, and gave them a price on that quantity, which price defendants

ever, that both parties must assent to the same thing and in the same sense has no reference to the misconception of a party not authorized by the language used or by the terms of the agreement. If the agreement describes the subject-matter and the description does not admit of two meanings, the fact that one of the parties mistakenly thought that it was something else does not affect the contract.[9]

e. As to Existence of Subject-Matter — (i) *In General.* Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears that such facts did not exist, there is no agreement.[10] Thus where parties

agreed to pay, it was held that there was no contract, as the misunderstanding of the agent prevented the meeting of the minds of the parties. Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177. And see Clay *v.* Ricketts, 66 Iowa 362, 23 N. W. 755; Gulf, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1893) 24 S. W. 566.

Mistake as to price or consideration.— Where a seller of goods asked one hundred and sixty-five dollars for them, and the buyer accepted, thinking he asked sixty-five dollars, it was held that there was no agreement. Rupley *v.* Daggett, 74 Ill. 351. And see Mummenhoff *v.* Randall, 19 Ind. App. 44, 49 N. E. 40. So where plaintiff understood he was to sell and convey to defendant certain realty for a fixed sum, and certain personalty for an additional sum, equal to the fair value thereof, which was not named, but defendant understood that plaintiff was to convey to him both the real estate and personal property without any separate price or consideration for the personal property, it was held that the minds of the parties did not meet and there was no contract. Fullerton *v.* Dalton, 58 Barb. (N. Y.) 236.

Mistake as to time of payment.— Where, in negotiations for a sale, the vendor understood that the instalments were to be paid every thirty days, while the vendee understood that they were to be due every ninety days, it was held that there was no agreement, as the minds of the parties never met. Hogue *v.* Mackey, 44 Kan. 277, 24 Pac. 477.

Mistake as to identity of goods sold.— Where a person agreed to buy of another a cargo of cotton "to arrive ex Peerless from Bombay," and there were two ships of that name, and the seller meant one and the buyer the other, it was held that there was no agreement. Raffles *v.* Wichelhaus, 2 H. & C. 906, 33 L. J. Exch. 160.

Mistake as to identity of land.— Where a person agreed to purchase from another a lot of land in Prospect street, and there were two streets of that name in the town, and the vendor meant a lot on one of these streets and the purchaser meant a lot on the other, it was held that there was no agreement. Kyle *v.* Kavanaugh, 103 Mass. 356, 4 Am. Rep. 560. And see Strong *v.* Lane, 66 Minn. 94, 68 N. W. 765.

Mistake as to time.— Where, in negotiations for a sale, it was the understanding and intention of the seller that the sale should take effect on a certain day, and the understanding and intention of the purchaser that it should take effect on a different day, it was held that there was no contract for want of mutual assent. Pittsburg, etc., Coal Co. *v.* Slack, 42 La. Ann. 107, 7 So. 230.

Mistake in printed form of contract.— Where a contract with a building association was written on a blank form of a bond and mortgage ordinarily used by the association, which form contained different provisions from those agreed on, both parties believing that such form embodied the terms of the contract, and the contract as intended to be made was carried out for over a year, it was held that an insistence thereafter by the association that the mortgage and bond was the contract constituted fraud. Home Sav. Assoc. *v.* Noblesville Monthly Meeting, etc., (Ind. App. 1902) 64 N. E. 478.

9. Thompson *v.* Ray, 46 Ala. 224; Strong *v.* Lane, 66 Minn. 94, 68 N. W. 765; Neufville *v.* Stuart, 1 Hill Eq. (S. C.) 159. And see *supra*, II, B, 2, b.

Illustrations.— Thus, although, where a person agrees to buy cotton to arrive "ex Peerless from Bombay," and there are two ships of that name and the buyer means one and the seller another, there is no agreement (see *supra*, VI, B, 8, d, (I), note 8), if there is only one ship of that name, but one of the parties is thinking of a ship of a different name, the agreement is valid. Anson Contr. 130 [*explaining* Raffles *v.* Wichelhaus, 2 H. & C. 906, 33 L. J. Exch. 160]. So where a person makes an offer to another for car No. 5029 loaded with hay and the offeree accepts, and it afterward occurs to the offeree that he has made a mistake, and in looking up his books he discovers that he was thinking of car No. 5009 and intended to sell that, the contract is binding, for it matters not what the party thought; the law binds him to what he said.

10. *Arkansas.*— Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886.

Illinois.—Anderson *v.* Armstead, 69 Ill. 452; Bradford *v.* Chicago, 25 Ill. 411.

Indiana.— Fleetwood *v.* Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779.

Iowa.— Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61.

Louisiana.— Goodwyn *v.* Perry, 25 La. Ann. 292.

Massachusetts.— Rice *v.* Dwight Mfg. Co., 2 Cush. 80; Thompson *v.* Gould, 20 Pick. 134.

Michigan.— Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570; Gibson *v.* Pelkie, 37 Mich. 380.

agree in regard to a thing which unknown to both parties does not exist at the time, there is no contract, for there is no subject-matter.[11] So also where parties

Minnesota.— Geib *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

Missouri.— Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43.

New Jersey.— Gebel *v.* Weiss, 42 N. J. Eq. 521, 8 Atl. 889.

New York.— Duncan *v.* New York Mut. Ins. Co., 138 N. Y. 88, 33 N. E. 730, 51 N. Y. St. 661, 20 L. R. A. 386; Silvernail *v.* Cole, 12 Barb. 685; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262; Dale *v.* Roosevelt, 5 Johns. Ch. 174 [*affirmed* in 2 Cow. 129]; Champlin *v.* Laytin, 1 Edw. 467.

Ohio.— Scioto Fire Brick Co. *v.* Pond, 38 Ohio St. 65; Loffland *v.* Russell, Wright 438.

Pennsylvania.— Fink *v.* Smith, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. Rep. 750; Riegel *v.* American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857, 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166; Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144; Willing *v.* Peters, 7 Pa. St. 287; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; Frevall *v.* Fitch, 5 Whart. 325, 34 Am. Dec. 558; Horbach *v.* Gray, 8 Watts 492.

Tennessee.— King *v.* Doolittle, 1 Head 77.

Vermont.— Bedell *v.* Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871; Hadlock *v.* Williams, 10 Vt. 570.

West Virginia.— Bluestone Coal Co. *v.* Bell, 38 W. Va. 297, 18 S. E. 493.

United States.—Allen *v.* Hammond, 11 Pet. 63, 9 L. ed. 633; U. S. *v.* Charles, 74 Fed. 142, 20 C. C. A. 346; Scriba *v.* Insurance Co. of North America, 2 Wash. C. C. 107, 21 Fed. Cas. No. 12,560.

England.— Clifford *v.* Watts, L. R. 5 C. P. 577, 40 L. J. C. P. 36, 22 L. T. Rep. N. S. 717, 18 Wkly. Rep. 925; Cooper *v.* Phibbs, L. R. 2 H. L. 149, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049; Evans *v.* Llewellyn, 2 Bro. Ch. 150, 29 Eng. Reprint 86, 1 Cox Ch. 333, 29 Eng. Reprint 1190, 1 Rev. Rep. 49; Tucker *v.* Searle, 2 Ch. Rep. 173; Turner *v.* Turner, 2 Ch. Rep. 154; Hitchcock *v.* Giddings, Dan. 1, 4 Price 135, Wils. Exch. 32, 18 Rev. Rep. 725; Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115; Couturier *v.* Hastie, 5 H. L. Cas. 673, 2 Jur. N. S. 1241, 25 L. J. Exch. 253; Hore *v.* Becher, 6 Jur. 93, 11 L. J. Ch. 153, 12 Sim. 465, 35 Eng. Ch. 393; Bingham *v.* Bingham, 1 Ves. 126, 27 Eng. Reprint 934.

Illustrations.— This principle has been applied, for example, where a person purchased an annuity from another, and at the time of the purchase, without the knowledge of either party, the annuitant was dead (Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115); where a creditor holding a policy of insurance on the life of his debtor surrendered the same to the company for a paid-up policy for a smaller sum, when the debtor, without the knowledge of either of the parties, was dead (Riegel *v.* American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857, 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166); where there was a covenant in a lease by which a person undertook to dig from the premises not less than a certain number of tons of potter's clay annually, paying a certain royalty per ton, and it appeared that unknown to the parties there had never been so much clay under the land, the court saying: "Here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there; and the covenant is applicable only if there be clay" (Clifford *v.* Watts, L. R. 5 C. P. 577, 588, 40 L. J. C. P. 36, 22 L. T. Rep. N. S. 717, 18 Wkly. Rep. 925. See Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570; Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144; Bluestone Coal Co. *v.* Bell, 38 W. Va. 297, 18 S. E. 493); where a person owning land in a certain town, to which place, as was supposed, the county-seat had been legally removed, conveyed for a nominal sum certain lands in the town to the county for a court-house, the enhancement of his other lands by reason of the supposed removal of the county-seat being the real consideration, and the supreme court subsequently held that the proceedings for the removal of the county-seat were void (Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886); and where a creditor, being ignorant of the fact that his claim was secured, wrote to the other creditors of his debtor consenting to accept concurrently with them the surrender of property offered by the debtor on certain conditions, because he believed that he was in no better condition than such other creditors (Goodwin *v.* Perry, 25 La. Ann. 292).

11. *Massachusetts.*— Thompson *v.* Gould, 20 Pick. 134.

Michigan.— Gibson *v.* Pelkie, 37 Mich. 380.

Missouri.— Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43.

New York.— Silvernail *v.* Cole, 12 Barb. 685.

Ohio.— Scioto Fire Brick Co. *v.* Pond, 38 Ohio St. 65.

Tennessee.— King *v.* Doolittle, 1 Head 77.

United States.—Allen *v.* Hammond, 11 Pet. 63, 9 L. ed. 633; U. S. *v.* Charles, 74 Fed. 142, 20 C. C. A. 346.

England.— Hore *v.* Becher, 6 Jur. 93, 11 L. J. Ch. 153, 12 Sim. 465, 35 Eng. Ch. 393.

Illustrations.— Where a person agrees to sell to another a horse or a building, and at the time of the sale the horse is dead or the building has been burned down, of which fact both parties are ignorant, there is no binding agreement. Anderson *v.* Armstead, 69 Ill. 452; Bradford *v.* Chicago, 25 Ill. 411; Thompson *v.* Gould, 20 Pick. (Mass.) 134; Allen

contract under a mutual belief that a right exists which in fact does not exist, there is no agreement.[12] But, although every agreement must have a subject-matter to operate upon,[13] the thing may have only a potential existence, as for example the unborn young of an animal[14] or goods to be acquired or manufactured.[15]

(II) *Absolute Unconditional Agreement.* Where, however, there is an absolute, unconditional contract, or the contract concerns a matter about which there may be some doubt, and it appears that the existence of the thing was not an implied condition, but that the party intended to take the risk, then it is no answer to the enforcement of the agreement that the thing did not actually exist.[16]

f. As to Identity of Party. Mistake as to the identity of the other party arises where a person contracts with another believing him to be the one with

v. Hammond, 11 Pet. (U. S.) 63, 9 L. ed. 633; Hitchcock *v.* Giddings, Dan. 1, 4 Price 135, Wils. Exch. 32, 18 Rev. Rep. 725.

So where a sale is made of a cargo of corn supposed by both of the parties to be on a ship on the seas, and it turns out that prior to that time it had become so heated that it had to be unloaded and sold, there is no sale. Couturier *v.* Hastie, 5 H. L. Cas. 673, 2 Jur. N. S. 1241, 25 L. J. Exch. 253. And see Sales. And where the consideration of a covenant to pay an annuity is the conveyance of a tract of land which both parties believe, and which is stated in the deed, to contain a coal mine, and there was no coal mine on the land, the covenant cannot be enforced. Dale *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 174 [*affirmed* in 2 Cow. (N. Y.) 129]. See Vendor and Purchaser.

12. "In the maxim (ignorance of the law excuses no one) the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." Halsbury, Ch., in Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049. See Gebel *v.* Weiss, 42 N. J. Eq. 521, 8 Atl. 889; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Champlin *v.* Laytin, 1 Edw. (N. Y.) 467.

Illustrations.— Thus where a person agrees with another to lease or buy an estate from him which both believe to belong to him, but which is found to belong to the other party, the contract will not be enforced. Bingham *v.* Bingham, 1 Ves. 126, 27 Eng. Reprint 934. See also Fleetwood *v.* Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; Haddock *v.* Williams, 10 Vt. 570; Evans *v.* Llewellyn, 2 Bro. Ch. 150, 29 Eng. Reprint 86, 1 Cox Ch. 333, 29 Eng. Reprint 1190, 1 Rev. Rep. 49; Tucker *v.* Searle, 2 Ch. Rep. 173; Turner *v.* Turner, 2 Ch. Rep. 154. But see Tenney *v.* Hand, 32 Mich. 63. So where a person sells to another the right to collect a certain judgment which they both think is in existence, and there is no such judgment, there is no sale. Gibson *v.* Pelkie, 37 Mich. 380. And an agreement made in the mistaken belief that the consideration therefor has been performed is not binding. Loffland *v.* Russell, Wright (Ohio) 438.

13. Scriba *v.* Insurance Co. of North America, 2 Wash. (U. S.) 107, 21 Fed. Cas. No. 12,560; and other cases above cited.

14. Wolf *v.* Esteb, 7 Ind. 448. See Sales.

15. Calkins *v.* Lockwood, 16 Conn. 276, 41 Am. Dec. 143. See Sales.

16. Jervis *v.* Tomkinson, 1 H. & N. 195, 26 L. J. Exch. 41, 4 Wkly. Rep. 683; Bute *v.* Thompson, 14 L. J. Exch. 95, 13 M. & W. 487; Perkins *v.* Gay, 3 Serg. & R. (Pa.) 237, 7 Am. Dec. 653.

Illustrations.—Thus where a person agreed with another to take a ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight, and there was so little guano at Ichaboe that the performance of the promise to load a complete cargo was impossible, and the promisor was sued for damages for failure to bring home a cargo, it was held that he was liable, since the quantity of guano on the island was a matter of doubt and the promisor had taken the risk. Hills *v.* Sughrue, 15 M. & W. 253. So where a vendor covenanted that he had power to sell a shop to the vendee, it was held that the covenant was absolute and was broken where the shop had ceased to exist at the time of the sale, although both parties were ignorant of it. Barr *v.* Gibson, 1 H. & H. 70, 7 L. J. Exch. 124, 3 M. & W. 390. And where a person sold another the right to remove all the gravel on certain premises, if sufficient could be found for the purchaser's purposes, the seller refusing to guarantee the quality or quantity, and the purchaser examined the land and understood that it might not contain gravel of the quantity and quality desired, it was held that the fact that the gravel found was not suitable for all the purchaser's purposes was immaterial. Valley City Milling Co. *v.* Prange, 123 Mich. 211, 81 N. W. 1074.

whom he intends to contract, while as a matter of fact it is another person.[17] Here, whether the mistake arises through the other's fraud, as when he falsely represents himself to be another,[18] or accepts an offer which is meant for

17. It cannot arise where the offerer has not in contemplation any definite person with whom he desires to contract, as in cases of general offers which may be accepted by any one. See *supra*, II, C, 3, b, (II). Nor can it apply to a contract made with a person who turns out to be the agent of an undisclosed principal. See PRINCIPAL AND AGENT.

18. *Indiana.*—Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 29, 12 Am. St. Rep. 367; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433 5 N. E. 908, 55 Am. Rep. 180.

Massachusetts.— Rodliff *v.* Dallinger, 141 Mass. 1, 55 Am. Rep. 439; Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283; Samuel *v.* Cheney, 135 Mass. 278, 46 Am. Rep. 467; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

New Jersey.— Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York.— Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. 864, 29 N. Y. St. 395, 16 Am. St. Rep. 843; Hentz *v.* Miller, 94 N. Y. 64; Barcus *v.* Dorries, 64 N. Y. App. Div. 109, 71 N. Y. Suppl. 695; Consumers' Ice Co. *v.* Webster, 32 N. Y. App. Div. 592, 53 N. Y. Suppl. 56; Collins *v.* Ralli, 20 Hun 246 [*affirmed* in 85 N. Y. 637].

Ohio.— Hamet *v.* Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Dean *v.* Yates, 22 Ohio St. 388.

Pennsylvania.— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Decan *v.* Shipper, 35 Pa. St. 239. 78 Am. Dec. 334.

Vermont.— McCrillis *v.* Allen, 57 Vt. 505.

United States.— Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 379, 8 S. Ct. 1308, 32 L. ed. 246; Paine *v.* Loch, 96 Fed. 164, 37 C. C. A. 434.

England.— Gordon *v.* Street, [1899] 2 Q. B. 641, 69 L. J. Q. B. 45, 81 L. T. Rep. N. S. 237, 48 Wkly. Rep. 158; Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73; Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239; Kingsford *v.* Merry, 1 Hurl. & W. 503, 3 Jur. N. S. 68, 26 L. J. Exch. 83, 5 Wkly. Rep. 151.

Illustrations.— This rule has been applied for example where a person by imitating the signature of another induced third persons to supply him with goods, under a belief that they were supplying such other person, it being held that there was no contract of sale, "as between him and them there was merely the one side to a contract" (Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406); where the vendor in an executory contract of sale was led to believe by the person who negotiated the contract in behalf of the vendee that he was acting for a particular firm, whereas he was contracting for a corporation engaged in the same business, under the same name, the existence of which corporation was unknown to the vendor (Consumers' Ice Co. *v.* Webster, 32 N. Y. App. Div. 592, 53 N. Y. Suppl. 56); where one Gordon, the plaintiff, who was a notorious money-lender, issued an advertisement in the name of "Addison," and the defendant borrowed money from him in that name, giving a note for a larger amount than borrowed, and upon discovering the deception repudiated the transaction and offered to repay the amount borrowed, and in the action on the note the jury found that plaintiff had intentionally concealed from defendant the fact that he was Gordon in order to induce him to borrow money from him, that defendant was so induced, and that he contracted with "Addison" believing him to be a money-lender of that name (Gordon *v.* Street, [1899] 2 Q. B. 641, 69 L. J. Q. B. 45, 81 L. T. Rep. N. S. 237, 48 Wkly. Rep. 158); where certain persons, as brokers, entered into a contract for the purchase of bonds for another, claiming to act for an undisclosed principal, and stipulating that they should in no manner be held liable on the contract, which, as they had reason to believe, was made by the other party under a misapprehension as to the value of the bonds, when in fact they were acting for themselves, and there was no other principal, it being held that they could not maintain an action on the contract (Paine *v.* Loch, 96 Fed. 164, 37 C. C. A. 434); where S, being W's agent to sell a pair of oxen, concealed his agency in the negotiations for the sale of them to H, and in answer to H's inquiry made representations intending to induce H to believe that they were the property of S himself and not of W, and agreed that H might drive them home, and that he would give H a bill of sale for them the next day, and that H might drive them back if he did not find them as S had told him, and H drove them home, and, discovering the same evening that W claimed to own them and that they had never been the property of S, for that reason drove them back the next morning and refused to take the bill of sale; it being held in the action by W against H for the price of the oxen, that it should have been left to the jury to determine, under all the circumstances, whether the minds of the parties really met, and if so what the contract was (Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93); and where a person doing business under the name of Committee of Distribution, through his agent obtained another's order for certain books, falsely representing and inducing the other to believe that he was purchasing books from a com-

another,[19] there is no agreement. One who enters into an agreement has a right to know with whom he is agreeing, and when a person intends to contract with another he cannot be compelled to accept a third person as the other party to the contract.[20]

9. Mistake of Law — a. General Rule. It is laid down in general language in many cases that a mistake, in order that it may affect a contract, must be a mistake of fact, and that a mere mistake of law will not affect the enforceability of an agreement; and this is well settled as a general rule,[21] not only at law but also

mittee of the United States congress, that the books could be obtained only on the recommendation of a congressman, and that he had been recommended by the congressman of his district (Barcus *v.* Dorries, 64 N. Y. App. Div. 109, 71 N. Y. Suppl. 695).

19. *Connecticut.*— Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101.

Massachusetts.— Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

Michigan.— Gregory *v.* Wendell, 40 Mich. 432.

New Hampshire.—Concord Coal Co. *v.* Ferrin, 71 N. H. 331, 51 Atl. 283.

New Jersey.— Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York.— Holtz *v.* Schmidt, 59 N. Y. 253.

United States.— Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 387, 8 S. Ct. 1308, 32 L. ed. 246.

England.—Humble *v.* Hunter, 12 Q. B. 310, 12 Jur. 121, 17 L. J. Q. B. 350, 64 E. C. L. 310; Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107.

Illustrations.— This rule has been applied where after A had succeeded to the business of B, with whom C had been accustomed to deal, C sent an order to B, which was accepted by A without any notification of the change, it being held that A could not recover the price of the goods so sold (Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107); where A who had purchased ice from B under a contract, becoming dissatisfied, terminated that contract and made a new contract for ice with C, and B afterward bought C's business and delivered ice to A, who had no notice or knowledge of the purchase until after the ice was delivered and used, it being held that B could not recover for the ice from A (Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9); and where A being indebted to B for labor on a model of an appliance, told B that he was being backed by a member of a firm in the coal business, and that he would cause the firm to furnish B a ton of coal for application on his indebtedness, and notified the firm that B wanted a ton of coal, without stating the arrangement made with B, and the coal was delivered and charged by the firm to B, who used it and credited its value on A's account, it being held that B was not liable for the price (Concord Coal Co. *v.* Ferrin, 71 N. H. 331, 51 Atl. 283).

20. Humble *v.* Hunter, 12 Q. B. 310, 12 Jur. 121, 17 L. J. Q. B. 350, 64 E. C. L. 310. And see Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 387, 8 S. Ct. 1308, 32 L. ed. 246, where it is said: "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

21. *Alabama.*—Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Hemphill *v.* Moody, 64 Ala. 468; Clark *v.* Hart, 57 Ala. 390; Cahaba *v.* Burnett, 34 Ala. 400; Betts *v.* Gunn, 31 Ala. 219.

Arkansas.—Maledon *v.* Leflore, 62 Ark. 387, 35 S. W. 1102; Rector *v.* Collins, 46 Ark. 167, 55 Am. Rep. 571; State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

California.— Christy *v.* Sullivan, 50 Cal. 337, 19 Am. Rep. 655; Bucknall *v.* Story, 46 Cal. 589, 13 Am. Rep. 220; Branham *v.* San Jose, 24 Cal. 585; Kenyon *v.* Welty, 20 Cal. 637, 81 Am. Dec. 137.

Georgia.— De Give *v.* Healey, 60 Ga. 391; Carr *v.* Dickson, 58 Ga. 144; Arnold *v.* Georgia R., etc., Co., 50 Ga. 304; Ligon *v.* Rogers, 12 Ga. 281.

Illinois.— Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

Indiana.— Jenks *v.* Lima, 17 Ind. 326; Downs *v.* Donnelly, 5 Ind. 496.

Iowa.— Baldwin *v.* State Ins. Co., 60 Iowa 497, 15 N. W. 300; Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440.

Kentucky.— Fisher *v.* May, 2 Bibb 448, 5 Am. Dec. 626.

Louisiana.—Urquhart *v.* Gove, 4 Rob. 207; Brander *v.* Ferriday, 16 La. 296; Smith *v.* Gorton, 10 La. 374; Lyles *v.* Martin, 5 La. 113; Tanner *v.* Robert, 5 Mart. N. S. 255.

Maine.— Eldridge *v.* Dexter, etc., R. Co., 88 Me. 191, 33 Atl. 974; Livermore *v.* Peru, 55 Me. 469; Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556; Jenks *v.* Matthews, 31 Me. 318; Norris *v.* Blethern, 19 Me. 348.

Maryland.— Lester *v.* Baltimore, 29 Md. 414, 96 Am. Dec. 542; Gist *v.* Drakely, 2 Gill 330, 41 Am. Dec. 426; State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

Massachusetts.— Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530; Alton *v.* Webster First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 34 Am. St. Rep. 285, 18 L. R. A. 144; Lee *v.* Kirby, 104 Mass. 420; Andrews *v.* Spurr, 8 Allen 412; Benson *v.* Monroe, 7 Cush. 125, 54 Am. Dec. 716.

Michigan.—Miller *v.* Brooks, 109 Mich. 174,

in equity.[22] Equity will not reform an instrument by inserting a clause which the parties agreed to leave out,[23] or substitute one thing for another which the parties have agreed on,[24] although their choice was the result of a mistake of law. And where money is voluntarily paid with knowledge of all the facts, the person paying the same cannot recover it back on the ground that he was mistaken as to his legal liability to pay or was ignorant of the law of the case.[25]

66 N. W. 1092; Holmes *v.* Hill, 8 Mich. 66, 77 Am. Dec. 444.

Minnesota.— Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305.

Missouri.— Couch *v.* Kansas City, 127 Mo. 436, 30 S. W. 117; Norton *v.* Highleyman, 88 Mo. 621; St. Louis *v.* Priest, 88 Mo. 612; Price *v.* Estill, 87 Mo. 378; Mutual Sav. Inst. *v.* Enslin, 46 Mo. 200; Campbell *v.* Clark, 44 Mo. App. 249.

New Jersey.— Wintermute *v.* Snyder, 3 N. J. Eq. 489; Hinchman *v.* Emans, 1 N. J. Eq. 100.

New York.— Pitcher *v.* Hennessey, 48 N. Y. 415; Lanning *v.* Carpenter, 48 N. Y. 408; Wright *v.* Tallmadge, 15 N. Y. 307; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Fellows *v.* Heermans, 4 Lans. 230; Wheadon *v.* Olds, 20 Wend. 174; Champlin *v.* Laytin, 18 Wend. 407, 31 Am. Dec. 382; Clarke *v.* Dutcher, 9 Cow. 674; Sprague *v.* Birdsall, 2 Cow. 419; Storrs *v.* Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316.

Pennsylvania.— Clapp *v.* Hoffman, 159 Pa. St. 531, 28 Atl. 362; Beegle *v.* Wentz, 55 Pa. St. 369, 93 Am. Dec. 762; McAninch *v.* Laughlin, 13 Pa. St. 371; Strohecker *v.* Farmers' Bank, 6 Pa. St. 41; Good *v.* Herr, 7 Watts & S. 253, 42 Am. Dec. 236.

South Carolina.— Hutton *v.* Edgerton, 6 S. C. 485; Lawrence *v.* Beaubien, 2 Bailey 623, 23 Am. Dec. 155.

Tennessee.— Farnsworth *v.* Dunsmore, 2 Swan 38; Trigg *v.* Read, 5 Humphr. 529, 42 Am. Dec. 447; Drew *v.* Clark, Cooke 374, 5 Am. Dec. 698; Harlan *v.* Central Phosphate Co., (Tenn. Ch. 1901) 62 S. W. 614.

Texas.— Ximenes *v.* Wilson County, (Tex. Civ. App. 1896) 36 S. W. 127.

Vermont.—Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; McDaniels *v.* Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406.

Virginia.— Brown *v.* Armistead, 6 Rand. 594.

West Virginia.—Beard *v.* Beard, 25 W. Va. 486, 52 Am. Rep. 219.

Wisconsin.—Birkhauser *v.* Schmitt, 45 Wis. 316, 30 Am. Rep. 740.

United States.— Lamborn *v.* Dickinson County, 97 U. S. 181, 24 L. ed. 926; U. S. Bank *v.* Daniel, 12 Pet. 32, 9 L. ed. 989; Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120 [*reversing* in part 3 Cranch C. C. 377, 20 Fed. Cas. No. 11,947, 2 Cranch C. C. 590, 20 Fed. Cas. No. 11,946]; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [*reversed* in 1 Pet. 1, 7 L. ed. 27]; Allen *v.* Galloway, 30 Fed. 466; Seeley *v.* Reed, 25 Fed. 361.

England.— Powell *v.* Smith, L. R. 14 Eq. 85, 41 L. J. Ch. 734, 20 Wkly. Rep. 602; Irnham *v.* Child, 1 Bro. Ch. 92, Dick. 554, 28 Eng. Reprint 1006; *In re* Railway Time Tables Pub. Co., 42 Ch. D. 98, 58 L. J. Ch. 504, 61 L. T. Rep. N. S. 94, 1 Meg. 208, 37 Wkly. Rep. 531; Mildmay *v.* Hungerford, 2 Vern. 243; Price *v.* Dyer, 17 Ves. Jr. 356, 11 Rev. Rep. 102.

See 11 Cent. Dig. tit. "Contracts," § 418.

Change in law by change in decision of supreme court.— Contracts made on the faith of the law as enunciated in a decision of a court of last resort, in the absence of fraud, misrepresentation, or want of knowledge of all the facts, will not be set aside because of a subsequent decision by the same court overruling the former one. Pittsburgh, etc., Iron Co. *v.* Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395; Ingles *v.* Bryant, 117 Mich. 113, 75 N. W. 442; Lyon *v.* Richmond, 2 Johns. Ch. (N. Y.) 51.

22. U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989, where it is said by the supreme court of the United States that a court of equity will not relieve against a mistake of law, and that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision. See also Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; and other cases cited in the note preceding. And see EQUITY; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

23. *Alabama.*—Clark *v.* Hart, 57 Ala. 390; Betts *v.* Gunn, 31 Ala. 219.

Georgia.— Ligon *v.* Rogers, 12 Ga. 281.

Massachusetts.— Lee *v.* Kirby, 104 Mass. 420; Andrews *v.* Spurr, 8 Allen 412.

Michigan.— Holmes *v.* Hill, 8 Mich. 66, 77 Am. Dec. 444.

England.— Irnham *v.* Child, 1 Bro. Ch. 92, Dick. 554, 28 Eng. Reprint 1006.

See REFORMATION OF INSTRUMENTS.

24. Baldwin *v.* State Ins. Co., 60 Iowa 497, 15 N. W. 300; Lanning *v.* Carpenter, 48 N. Y. 408; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Hunt *v.* Rouseman, 1 Pet. (U. S.) 1, 7 L. ed. 27. See REFORMATION OF INSTRUMENTS.

25. *Alabama.*—Hemphill *v.* Moody, 64 Ala. 468; Cahaba *v.* Burnett, 34 Ala. 400.

Arkansas.— Rector *v.* Collins, 46 Ark. 167, 55 Am. Rep. 571, holding that the maker of a note, who had paid interest at more than the legal rate after maturity, under a mistake as to the legal effect of a phrase used in the note, could not recover it back.

A mistake of law is where a person knows the facts of the case, but is ignorant of the legal consequences.[26]

b. Exceptions — (i) *In General.* To the general rule that mistake of law is no ground for relief there are certain exceptions or apparent exceptions. Mistake as to particular private rights is treated as mistake of fact or as a mixed mistake of law and fact.[27] Private rights of property, although they are the result of rules of law, or depend upon rules of law applied to the construction of legal instruments, are usually considered matters of fact.[28] It is said that courts in cases of peculiar hardship have distinguished between ignorance of the existence of a law and of its legal effect.[29] And it is held that where one, through a mistake of the law, acknowledges himself under an obligation which the law will

California.— Christy *v.* Sullivan, 50 Cal. 337, 19 Am. Rep. 655 (holding that one who had purchased county warrants drawn by the auditor upon the treasurer, but which were upon their face invalid, and not a charge upon the county, could not, in the absence of fraud or misrepresentations, recover the price paid); Bucknall *v.* Story, 46 Cal. 589, 13 Am. Rep. 220; Branham *v.* San Jose, 24 Cal. 585.

Georgia.— Arnold *v.* Georgia R., etc., Co., 50 Ga. 304. *Compare* Culbreath *v.* Culbreath, 7 Ga. 64, 50 Am. Dec. 375.

Indiana.— Jenks *v.* Lima, 17 Ind. 326; Downs *v.* Donnelly, 5 Ind. 496.

Maine.— Livermore *v.* Peru, 55 Me. 469; Norris *v.* Blethen, 19 Me. 348.

Maryland.— Lester *v.* Baltimore, 29 Md. 415, 96 Am. Dec. 542.

Massachusetts.—Benson *v.* Monroe, 7 Cush. 125, 54 Am. Dec. 716.

Missouri.— Mutual Sav. Inst. *v.* Enslin, 46 Mo. 200.

New York.— Rheel *v.* Hicks, 25 N. Y. 289; Granger *v.* Olcott, 1 Lans. 169; Goddard *v.* Merchants' Bank, 2 Sandf. 247; Onondaga *v.* Briggs, 2 Den. 26; Silliman *v.* Wing, 7 Hill 159; Wheadon *v.* Olds, 20 Wend. 174; Champlin *v.* Laytin, 18 Wend. 407, 31 Am. Dec. 382; Clarke *v.* Dutcher, 9 Cow. 674; Sprague *v.* Birdsall, 2 Cow. 419.

Pennsylvania.— Real Estate Sav. Inst. *v.* Linder, 74 Pa. St. 371.

Vermont.— Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563.

West Virginia.—Beard *v.* Beard, 25 W. Va. 486, 52 Am. Rep. 219, holding that where a defendant, after suit brought, voluntarily paid a part of the demand, and a decree was afterward rendered for the residue, which on appeal was reversed, he could not recover the part so paid, as it was paid under a mistake of law.

Wisconsin.— Birkhauser *v.* Schmitt, 45 Wis. 316, 30 Am. Rep. 740. In this case the plaintiff, proposing to buy of defendant his interest in certain lands, was informed of all the facts affecting the title, but an attorney acting for both parties, upon consideration of those facts, advised them that defendant had a certain interest in the lands. Plaintiff acting upon that advice purchased the supposed interest. This advice being incorrect, it was held that the mistake was one of law only, and that plaintiff could not recover the purchase-money.

United States.— Lamborn *v.* Dickinson County, 97 U. S. 181, 24 L. ed. 926.

Compare Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264; Ray *v.* Commonwealth Bank, 3 B. Mon. (Ky.) 510, 39 Am. Dec. 479.

See Payment.

26. Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508.

27. *Arkansas.*— State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

Connecticut.— Blakeman *v.* Blakeman, 39 Conn. 320, 325, where a person purchased of another land, including a right of way through a lane, and paid a greater price than would have been paid for the land alone, and it appeared that there had been an appurtenant right of way, which had ceased by operation of law. It was held that this was not a mistake of law, but of fact; that "both parties were mistaken then in relation to the fact of the existence of the way — a mutual mistake."

Iowa.— Baker *v.* Massey, 50 Iowa 399.

Kentucky.— Bryan *v.* Masterson, 4 J. J. Marsh. 225; Fitzgerald *v.* Peck, 4 Litt. 125.

Louisiana.— Williams *v.* Hunter, 13 La. Ann. 476.

Michigan.— Black *v.* Ward, 27 Mich. 191, 15 Am. Rep. 162.

Missouri.— Griffith *v.* Townley, 69 Mo. 13, 33 Am. Rep. 476, where an administrator sold land, both he and the purchaser believing that it was the fee that he was selling, and it turned out that nothing passed but the equity of redemption. It was held a mutual mistake of law and fact entitling the purchaser to relief.

New York.— Champlin *v.* Laytin, 1 Edw. 467.

Tennessee.— King *v.* Doolittle, 1 Head 77; Trigg *v.* Read, 5 Humphr. 529, 42 Am. Dec. 447.

Virginia.—Webb *v.* Alexandria, 33 Gratt. 168.

28. Leake Contr. 288; Cooper *v.* Phibbs, L. R. 2 H. L. Cas. 149, 16 L. T. Rep. N. S. 678, 15 Wkly. Rep. 1049.

29. State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

not impose upon him he shall not be bound thereby.[30] And where the mistake of law is mutual, equity will sometimes relieve on the ground of surprise.[31] And if the party can be relieved without injustice to the other, equity will do so, especially where the party to be benefited by the mistake invokes the aid of equity to put him in a position where he may profit by the mistake.[32]

(II) *Fraud, Undue Influence, and Abuse of Confidence.* It is well settled that a contract will not be enforced in equity when a mistake of law of one of the parties is induced by fraud, imposition, undue influence, or an abuse of confidence springing out of the peculiar relations existing between the parties. In such cases the general rule that mistake of law is no ground for relief does not apply, for there is something more than this.[33]

(III) *Foreign Laws.* The rule that mistake of law is no ground for relief does not apply where the mistake is as to the law of a foreign country or a sister state. Such a mistake is regarded as a mistake of fact and not of law.[34]

10. Remedies. If a contract is still executory, the party complaining of a mistake avoiding the same may repudiate the contract and set up the mistake as a defense in an action at law or a suit in equity brought against him to enforce the contract or recover damages for its breach,[35] or he may obtain relief in equity,

30. Freeman *v.* Boynton, 7 Mass. 483; Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62; May *v.* Coffin, 4 Mass. 341; Offutt *v.* Parrott, 1 Cranch C. C. (U. S.) 154, 18 Fed. Cas. No. 10,453. *Contra,* Cardwell *v.* Strother, Litt. Sel. Cas. (Ky.) 429, 12 Am. Dec. 326; Ridlon *v.* Davis, 51 Vt. 457.

31. State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

32. Freichnecht *v.* Meyer, 39 N. J. Eq. 551.

33. *Alabama.*— Hardigree *v.* Metchum, 51 Ala. 151; Dill *v.* Shahan, 25 Ala. 694, 60 Am. Dec. 540.

Arkansas.— State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

Kentucky.—Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 17 Ky. L. Rep. 385, 53 Am. St. Rep. 426, 28 L. R. A. 478.

Maine.— Eldridge *v.* Dexter, etc., R. Co., 88 Me. 191, 33 Atl. 974.

Minnesota.— Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

Missouri.— Hickan *v.* Hickan, 46 Mo. App. 496.

Nebraska.— Kleeman *v.* Peltzer, 17 Nebr. 381, 22 N. W. 793.

New Jersey.— Clark *v.* Clark, (1896) 42 Atl. 98.

New York.—Haviland *v.* Willets, 141 N. Y. 35, 50, 35 N. E. 958, 56 N. Y. St. 562 (where the court said: "It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. All the cases which deny a remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other"); Vanderbeck *v.* Rochester, 122 N. Y. 285, 25 N. E. 408, 33 N. Y. St. 381; Flynn *v.* Hurd, 118 N. Y. 19, 22 N. E. 1109, 27 N. Y. St. 744; Silliman *v.* Wing, 7 Hill (N. Y.) 159; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382 [*affirming* 1 Edw. (N. Y.) 467].

North Carolina.— Sandin *v.* Ward, 94 N. C. 490.

Pennsylvania.— Whelen's Appeal, 70 Pa. St. 410.

South Carolina.— Lawrence *v.* Beaubien, 2 Bailey 623, 23 Am. Dec. 155; Garner *v.* Garner, 1 Desauss. 437.

Tennessee.— Drew *v.* Clarke, 3 Cooke 374, 5 Am. Dec. 698.

Texas.— West *v.* West, 9 Tex. Civ. App. 475, 29 S. W. 242.

34. Norton *v.* Marden, 15 Me. 45, 32 Am. Dec. 132; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; King *v.* Doolittle, 1 Head (Tenn.) 77.

35. *Delaware.*—Green *v.* Maloney, 7 Houst. 32, 30 Atl. 672.

Illinois.—Sims *v.* Bice, 67 Ill. 88; Smentek *v.* Cornhauser, 17 Ill. App. 266.

Indiana.— Fleetwood *v.* Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779.

Iowa.— Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61.

Massachusetts.— Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

Michigan.— Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570; Gibson *v.* Pelkie, 37 Mich. 380; Anderson *v.* Walter, 34 Mich. 113.

Missouri.— Woodworth *v.* McLean, 97 Mo. 325, 11 S. W. 43.

Nebraska.— Omaha First Nat. Bank *v.* Lierman, 5 Nebr. 247.

New Hampshire.—Concord Coal Co. *v.* Ferrin, 71 N. H. 331, 51 Atl. 283.

New Jersey.— Suffern *v.* Butler, 18 N. J. Eq. 220.

New York.— Varens *v.* Dorres, 64 N. Y. App. Div. 109, 71 N. Y. Suppl. 695; Consumers' Ice Co. *v.* Webster, etc., Co., 32 N. Y.

in a proper case, by suit to cancel or rescind the contract,[36] or reform it,[37] or by suit for an injunction.[38] If the contract has been executed by him he may rescind the same and recover on the *quantum meruit* or *quantum valebat* for what he has done or furnished under it;[39] or he may recover money or property paid or delivered by him under the agreement.[40] Or in a proper case the mistake may be set up to show that there was no contract where the existence of the contract is relied upon in other actions or provisions.[41] But in rescission, as in reformation, to authorize relief for mistake the mistake must have been mutual,[42]

App. Div. 592, 53 N. Y. Suppl. 56; Funch *v.* Ahenheim, 20 Hun 1; Baldwin *v.* Milderberger, 2 Hall 176.

Ohio.— Scioto Fire Brick Co. *v.* Pond, 38 Ohio St. 65; Loffland *v.* Russell, Wright 438.

Pennsylvania.— Fink *v.* Smith, 170 Pa. St. 124, 37 Wkly. Notes Cas. 46, 32 Atl. 566, 50 Am. St. Rep. 750; Muhlenberg *v.* Henning, 116 Pa. St. 138, 9 Atl. 144; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; Horbach *v.* Gray, 8 Watts 492.

Texas.— Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

United States.—Paine *v.* Loeb, 96 Fed. 164, 37 C. C. A. 434.

England.— Clifford *v.* Watts, L. R. 5 C. P. 577, 40 L. J. C. P. 36, 22 L. T. Rep. N. S. 717, 18 Wkly. Rep. 925; Boulton *v.* Jones, 2 H. & N. 564, 3 Jur. N. S. 1156, 27 L. J. Exch. 117, 6 Wkly. Rep. 107.

36. *Alabama.*— Scruggs *v.* Driver, 31 Ala. 274; Boney *v.* Hollingsworth, 23 Ala. 690.

Arkansas.—Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886.

California.— Barfield *v.* Price, 40 Cal. 535.

Connecticut.— Callender *v.* Calegrove, 17 Conn. 1.

Maine.— Barnard *v.* Wheeler, 24 Me. 412.

Minnesota.— Geih *v.* Reynolds, 35 Minn. 331, 28 N. W. 923.

Mississippi.— Harrison *v.* Stowers, Walk. 165.

New York.—Duncan *v.* New York Mut. Ins. Co., 138 N. Y. 88, 33 N. E. 730, 51 N. Y. St. 661, 51 N. E. 661, 20 L. R. A. 386.

Ohio.— Irwin *v.* Wilson, 45 Ohio St. 426, 15 N. E. 209.

Pennsylvania.— Riegel *v.* American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857; Whelen's Appeal, 70 Pa. St. 410.

Tennessee.— King *v.* Doolittle, 1 Head 77.

Texas.— Morrill *v.* Bartlett, 58 Tex. 644.

Vermont.— Montgomery *v.* Ricker, 43 Vt. 165.

United States.—Daniel *v.* Mitchell, 1 Story 172, 6 Fed. Cas. No. 3,563; U. S. *v.* Charles, 74 Fed. 142, 20 C. C. A. 346; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708.

See also CANCELLATION OF INSTRUMENTS, 6 Cyc. 282; EQUITY.

37. See *supra*, VI, B, 6; and, generally, REFORMATION OF INSTRUMENTS.

38. Goodwyn *v.* Perry, 25 La. Ann. 292.

39. Rowland *v.* New York, etc., R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177. See Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

40. *Arkansas.*—Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886.

California.— Barfield *v.* Price, 40 Cal. 535.

Indiana.—Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

Louisiana.—Knight *v.* Lanfear, 7 Rob. 172.

Massachusetts.—Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Thompson *v.* Gould, 20 Pick. 134.

Mississippi.— Harrison *v.* Stowers, Walk. 165.

New Jersey.— Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

Ohio.— Irwin *v.* Wilson, 45 Ohio St. 426, 15 N. E. 209; Hamet *v.* Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Dean *v.* Yates, 22 Ohio St. 388.

Pennsylvania.— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Frevall *v.* Fitch, 5 Whart. 325, 34 Am. Dec. 558.

Texas.— Harrell *v.* De Normandie, 26 Tex. 120.

Vermont.— Bedell *v.* Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871; McCrillis *v.* Allen, 57 Vt. 505; Ketchum *v.* Catlin, 21 Vt. 191.

England.— Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239.

Recovery of money paid by mistake see PAYMENT.

41. Wilson *v.* Queen Ins. Co., 5 Fed. 674, holding that, in an action on a policy of insurance, where the company sets up as a defense that the plaintiff had other insurance contrary to a statement in his application for the policy, the plaintiff may show that the alleged former contract of insurance was void for mistake.

42. *Maryland.*— Renshaw *v.* Lefferman, 51 Md. 271.

New Jersey.— Deave *v.* Carr, 3 N. J. Eq. 513.

Tennessee.— King *v.* Doolittle, 1 Head 77.

Texas.— Ross *v.* Armstrong, 25 Tex. Suppl. 354, 78 Am. Dec. 574.

Virginia.— Watkins *v.* Elliott, 28 Gratt. 374.

See *supra*, VI, B, 7.

material,[43] of fact and not of law,[44] and not due to the complainant's negligence;[45] and the complainant must show injury.[46]

C. Misrepresentation Without Fraud — 1. In General — a. At Law. As a general rule a naked misrepresentation of fact, that is, an innocent misrepresentation or non-disclosure of fact, does not affect the validity of an agreement, unless (1) it belongs to a special class of agreements in which the utmost good faith and accuracy of statement is required, or (2) is between persons in fiduciary or confidential relations, or (3) unless the representation is a condition in the contract or amounts to a warranty. Except in these cases, a misrepresentation has no effect at common law unless it is made with knowledge that it is false, or recklessly and without belief in its truth, so as to render it fraudulent.[47]

b. In Equity. Innocent misrepresentation, however, may be ground for relief in a court of equity. Thus an innocent misrepresentation has frequently been held ground for resisting a suit for specific performance.[48] And it has likewise been held in a number of cases that an innocent misrepresentation of a material fact is ground for rescinding or canceling a contract in equity.[49] And an innocent

43. *New York.*— Smith *v.* Mackin, 4 Lans. 41; Taylor *v.* Fleet, 4 Barb. 95.

Rhode Island.— Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

South Carolina.— Dow *v.* Ker, Speers Eq. 413; Heilbron *v.* Bissell, Bailey Eq. 430; Alexander *v.* Muirhead, 2 Desauss. 162.

Tennessee.— Trigg *v.* Read, 5 Humphr. 529, 42 Am. Dec. 447.

Wisconsin.— Hurd *v.* Hall, 12 Wis. 112.

United States.— Grymes *v.* Sanders, 93 U. S. 55, 23 L. ed. 798.

See *supra*, VI, B, 8, b.

44. See *supra*, VI, B, 9.

45. *Indiana.*— Robinson *v.* Glass, 94 Ind. 211.

Iowa.— McCormick *v.* Molburg, 43 Iowa 561.

Maryland.— Wood *v.* Patterson, 4 Md. Ch. 335.

New York.— Ellis *v.* McCormick, 5 Hilt. 313.

Tennessee.— Berry *v.* Planters' Bank, 3 Tenn. Ch. 69.

United States.— Illingworth *v.* Spaulding, 43 Fed. 827.

See *supra*, VI, B, 4, d.

46. Morse *v.* Beale, 68 Iowa 463, 27 N. W. 461.

47. Anson Contr. 144; Behn *v.* Burness, 1 B. & S. 877, 31 L. J. Q. B. 73, 101 E. C. L. 877 [*reversed* in 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751]; Dickson *v.* Reuter's Telegram Co., 3 C. P. D. 1. And see *infra*, VI, D, 2, g, (I).

48. Lamare *v.* Dixon, L. R. 6 H. L. 414, 428, 43 L. J. Ch. 203, 22 Wkly. Rep. 49, where a wine merchant who was negotiating with another for the lease of a cellar told him that he must have a cellar which was dry, and the other assured him that the cellar was dry, believing this to be the truth, and an agreement for a lease of the cellar was thereupon entered into in which no mention was made as to the condition of the cellar nor warranty made as to the dryness, and the cellar turned out to be damp, and he refused to take the lease. It was held that specific performance would not be granted. The court said: "If the representation was made, and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled." See also Redgrove *v.* Hurd, 20 Ch. D. 12. And see Specific Performance.

49. *Alabama.*— Thompson *v.* Lee, 31 Ala. 292.

Illinois.— Allen *v.* Hart, 72 Ill. 104.

Indiana.— Trenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62.

Iowa.— Wilcox *v.* Iowa Wesleyan University, 32 Iowa 367.

Kentucky.— Foards *v.* McComb, 12 Bush 723.

Maryland.— Keating *v.* Price, 58 Md. 532; Kent *v.* Carcaud, 17 Md. 291; Joice *v.* Taylor, 6 Gill & J. 54, 25 Am. Dec. 329; Taymon *v.* Mitchell, 1 Md. Ch. 496.

Massachusetts.— Spurr *v.* Benedict, 99 Mass. 463.

Michigan.—Converse *v.* Blumrick, 14 Mich. 109, 90 Am. Dec. 230.

Minnesota.— Brooks *v.* Hamilton, 15 Minn. 26.

Missouri.— Florida *v.* Morrison, 44 Mo. App. 529.

New Jersey.—Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

New York.— Hammond *v.* Pennock, 61 N. Y. 145; Alker *v.* Alker, 12 N. Y. Suppl. 676.

Ohio.— Taylor *v.* Leith, 26 Ohio St. 428.

Tennessee.—Bankhead *v.* Alloway, 6 Coldw. 56.

Texas.— Watson *v.* Bulor, 71 Tex. 739, 9 S. W. 867.

United States.— Smith *v.* Richards, 13 Pet. 26, 10 L. ed. 42; Doggett *v.* Emerson, 3 Story 700, 7 Fed. Cas. No. 3,960. But see Southern Development Co. *v.* Silva, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678.

misrepresentation of a material fact is ground for rescinding or reforming the contract in equity on the ground of mistake.[50]

2. Contracts of a Special Nature — a. In General. To the general rule that innocent misrepresentations do not affect the validity of an agreement, there are exceptions in the case of certain special contracts, sometimes said to be *uberrimæ fidei*, which are of such a character that one of the parties must rely on the other for his knowledge of facts, and in which therefore the most perfect good faith is required, so that they may be avoided for any material misstatement or non-disclosure of facts, even though innocent.[51]

b. Particular Contracts. In England, and in most of the United States, contracts of insurance are of a special nature, within this rule, so that an innocent misrepresentation or concealment of material facts will avoid the policy.[52] The ordinary contract of suretyship or guaranty does not fall within the exception.[53] In England contracts for the purchase of shares in corporations are considered within this special class, so that innocent misrepresentation will avoid the contract,[54] but this exception is not recognized in the United States.[55] In England

England.— Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33; O'Rourke *v.* Percival, 2 Ball & B. 58, 12 Rev. Rep. 68; Newbigging *v.* Adam, 34 Ch. D. 582; Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 113, 45 L. T. Rep. N. S. 489, 30 Wkly. Rep. 251; Traill *v.* Baring, 4 De G. J. & S. 318, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 10 L. T. Rep. N. S. 215, 12 Wkly. Rep. 678, 69 Eng. Ch. 247; Price *v.* Macaulay, 2 De G. M. & G. 339, 19 Eng. L. & Eq. 162, 51 Eng. Ch. 265.

50. Wilcox *v.* Iowa Wesleyan University, 32 Iowa 367; Holmes *v.* Clark, 10 Iowa 423; Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446; Taylor *v.* Ashton, 11 M. & W. 400.

51. Anson Contr. 157.

52. *Louisiana.*— Walden *v.* Louisiana Ins. Co., 12 La. 134, 32 Am. Dec. 116.

Maryland.— Wineland *v.* New Haven Security Ins. Co., 53 Md. 276; Mutual Benefit L. Ins. Co. *v.* Weis, 34 Md. 582; U. S. Fire & M. Ins. Co. *v.* Kimberly, 34 Md. 224, 6 Am. Rep. 325; Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Neptune Ins. Co. *v.* Robinson, 11 Gill & J. 256; Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136, 20 Am. Dec. 424.

Massachusetts.— Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Lewis *v.* Eagle Ins. Co., 10 Gray 508; Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. 42; Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547.

New York.— Armour *v.* Hamburg Transatlantic F. Ins. Co., 90 N. Y. 450; Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. 359 (where the contract was one of reinsurance); Fowler *v.* Ætna F. Ins. Co., 6 Cow. 673, 16 Am. Dec. 460; Ely *v.* Hallett, 2 Cai. 57.

North Carolina.—Bobbitt *v.* Liverpool, etc., Ins. Co., 66 N. C. 70, 8 Am. Rep. 494.

Ohio.—Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324.

South Carolina.— Stoney *v.* Union Ins. Co., Harp. 235.

United States.— New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934; Moulor *v.* American L. Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. ed. 447; Ætna L. Ins. Co. *v.* France, 91 U. S. 510, 23 L. ed. 401; McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98; Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596; Vale *v.* Phœnix Ins. Co., 1 Wash. 283, 28 Fed. Cas. No. 16,811.

England.— Ionides *v.* Pender, L. R. 9 Q. B. 531, 2 Aspin. 266, 43 L. J. Q. B. 227, 30 L. T. Rep. N. S. 547, 22 Wkly. Rep. 884; Lindneau *v.* Desborough, 8 B. & C. 586, 15 E. C. L. 290, 3 C. & P. 353, 14 E. C. L. 606, 7 L. J. K. B. O. S. 42, 3 M. & R. 45; London Assurance *v.* Mansel, 11 Ch. D. 363, 48 L. J. Ch. 331, 41 L. T. Rep. N. S. 225, 27 Wkly. Rep. 444.

See Insurance.

53. Howe Mach. Co. *v.* Farrington, 82 N. Y. 121, 126 (where it is said: "The rule which prevails in contracts of marine insurance that all material circumstances known to the assured must be disclosed, and that the omission to do so avoids the policy, although the concealment is not fraudulent, does not apply to an ordinary guaranty"); Davies *v.* London, etc., Mar. Ins. Co., 8 Ch. D. 469, 475, 47 L. J. Ch. 511, 38 L. T. Rep. N. S. 478, 26 Wkly. Rep. 794. See Guaranty; Principal and Surety.

54. Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821; New Brunswick, etc., R. Co. *v.* Muggeridge, 1 Dr. & Sm. 381; Anson Contr. 151.

55. Pomeroy Eq. Jur. § 881. See Corporations.

contracts for the sale of land fall within this special class,[56] but the decisions in the United States do not distinguish between sales of personalty and sales of land in this respect, and neither are regarded as within the exception.[57]

3. Parties in Fiduciary or Confidential Relations. The rule that an innocent misrepresentation of fact does not furnish ground for avoiding a contract does not apply where there is a special fiduciary or confidential relation between the parties, as between principal and agent, attorney and client, trustee and *cestui que trust*, guardian and ward, parent and child, and in other cases in which a special relation of confidence exists.[58]

4. Terms or Conditions in Contract. If the matter innocently misrepresented is a term or condition in the contract, or if the party has warranted it to be true, its falsity does not affect the formation of the contract; but it operates to discharge the other party from his obligation or to give him a right of action *ex contractu* for the damages which he has sustained by the breach.[59]

5. Estoppel. The liability which is created by estoppel is to be distinguished from the cases in which innocent misrepresentation gives rise to a liability in damages. Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.[60]

6. Remedies. The test of fraud as opposed to misrepresentation is that the former does, and the latter does not, give rise to an action *ex delicto*.[61] Therefore mere representation, although false and material, if not knowingly false, so as to

56. Anson Contr. 150; Flight *v.* Booth, 1 Bing. N. Cas. 370, 4 L. J. C. P. 66, 1 Scott 190, 27 E. C. L. 680; Jones *v.* Edney, 3 Campb. 285, 13 Rev. Rep. 803.

57. Wilcox *v.* Iowa Wesleyan University, 32 Iowa 367; Williams *v.* Spurr, 24 Mich. 335; Livingston *v.* Peru Iron Co., 2 Paige (N. Y.) 372. See Vendor and Purchaser; and *infra*, VI, D, 2, g, (I).

58. *Illinois.*—Reed *v.* Peterson, 91 Ill. 288; Ward *v.* Armstrong, 84 Ill. 151; Ziegler *v.* Hughes, 55 Ill. 288; Norris *v.* Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Casey *v.* Casey, 14 Ill. 112.

Maryland.— McConkey *v.* Cockey, 69 Md. 286, 14 Atl. 465; Smith *v.* Davis, 49 Md. 470.

New York.— Brewster *v.* Hatch, 122 N. Y. 349, 25 N. E. 505, 33 N. Y. St. 527, 19 Am. St. Rep. 498.

Rhode Island.— James *v.* Steere, 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164.

United States.— Baker *v.* Humphreys, 101 U. S. 494, 25 L. ed. 1065; Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732.

See *infra*, VI, F; and Attorney and Client, 4 Cyc. 960; Guardian and Ward; Husband and Wife; Parent and Child; Trusts.

59. Kennedy *v.* Panama, etc., Royal Mail Co., L. R. 2 Q. B. 580, 8 B. & S. 571, 36 L. J. Q. B. 260, 17 L. T. Rep. N. S. 62, 15 Wkly Rep. 1039; Behn *v.* Burness, 1 B. & S. 877, 31 L. J. Q. B. 73, 101 E. C. L. 877 [*reversed* in 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751]. See *infra*, IX, and Sales.

Illustrations.— Thus in Behn *v.* Burness, 1 B. & S. 877, 31 L. J. Q. B. 73, 101 E. C. L. 877 [*reversed* in 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751], where by a charter-party dated October 17, it was agreed that the ship, then in the port of Amsterdam, should proceed to a certain place and there load a cargo to carry to another place, and at that date the ship was not in the port of Amsterdam, and did not arrive there until October 23, it was held that the words amounted to a condition giving the charterer a right to repudiate the contract. And in Bannerman *v.* White, 10 C. B. N. S. 844, 8 Jur. N. S. 282, 31 L. J. C. P. 28, 4 L. T. Rep. N. S 740, 9 Wkly. Rep. 784, 100 E. C. L. 844, where B offered hops for sale to W, and W inquired if any sulphur had been used on them, and B said no, but was mistaken, and W then purchased the hops and afterward repudiated the contract on the ground that, as subsequently discovered by both parties, sulphur had been used in their treatment, and the jury found that the statement that the sulphur had not been used was not wilfully false, it was held that the statement was a condition, a breach of which discharged W. So, in Wolcott *v.* Mount, 38 N. J. L. 496, 20 Atl. 425, where a person sold another a quantity of seed as "early strap leaf red top," honestly believing it to be so, and the seed on being planted turned out to be of a different and inferior kind, whereby the purchaser lost his crop, it was held that the seller was liable in damages, as the representation was a warranty.

60. Pickard *v.* Sears, 6 A. & E. 469, 2 N. & P. 488, 33 E. C. L. 257; The Bell Ottumwa, 78 Fed. 643. See Estoppel.

61. Anson Contr. 146.

constitute fraud, will not support an action for damages,[62] unless it is a term or condition in the contract, or the parties stand in a fiduciary relation.[63] In contracts *uberrimæ fidei*, in which innocent misrepresentation avoids the contract, such a misrepresentation may be set up as a defense to defeat an action at law on the contract.[64] The same is true where the parties occupied a fiduciary or confidential relation.[65] And as we have seen an innocent misrepresentation may be ground for rescinding or reforming a contract in equity, or for refusing to compel specific performance.[66]

D. Fraud — 1. Definition. Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it to his damage.[67] It differs from mere misrepresentation in that it has the element of knowledge;[68] and its most frequent example in the law of contracts is the making of false representations to induce consent to an agreement.[69]

2. What Constitutes Fraud[70]**— a. In General.** It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity, and with intent that it shall be acted upon by another in entering into a contract, and which is so acted upon, constitutes fraud, and will entitle the party deceived thereby to avoid the contract or to maintain an action for the damages sustained.[71] A literal speaking of the truth, if intended to accomplish a

62. *Kansas.*— Da Lee *v.* Blackburn, 11 Kan. 190.

Massachusetts.—Tucker *v.* White, 125 Mass. 344.

New Jersey.— Cowley *v.* Smith, 46 N. J. L. 380, 50 Am. Rep. 432.

New York.— Wakeman *v.* Dalley, 51 N. Y. 27, 10 Am. Rep. 551.

England.— Newbigging *v.* Adams, 34 Ch. D. 592; Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 118, 45 L. T. Rep. N. S. 489, 30 Wkly. Rep. 251.

Contra, Holcomb *v.* Noble, 69 Mich. 396, 37 N. W. 497; Davis *v.* Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774. See also Florida *v.* Morrison, 44 Mo. App. 529; Brewster *v.* Hatch, 122 N. Y. 349, 25 N. E. 505, 33 N. Y. St. 527, 19 Am. St. Rep. 498.

Set-off and counter-claim.— In some states, while the action for damages is denied, the defendant may set off damages in an action for the price. Hitchcock *v.* Bangham, 44 Mo. App. 42; Mulvey *v.* King, 39 Ohio St. 491; Loper *v.* Robinson, 54 Tex. 510.

Action for innocent representation see Fraud.

63. See *supra,* VI, C, 3, 4.

64. See *supra,* VI, C, 2, and cases there cited.

65. See *supra,* VI, C, 3.

66. See *supra,* VI, C, 1, b.

67. Anson Contr. 163. And see Southern Development Co. *v.* Silva, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678; Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33. And see Fraud.

68. See *infra,* VI, D, 2, g.

69. See the cases cited in the notes following.

70. Fraud inducing particular contracts see Corporations (subscriptions to stock and sales of stock); Landlord and Tenant (leases); Sales; Vendor and Purchaser; and other specific titles.

71. *Alabama.*—Burroughs *v.* Pacific Guano Co., 81 Ala. 255, 1 So. 212; Martin *v.* Martin, 35 Ala. 560; Adams *v.* Shelby, 10 Ala. 478.

California.— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Connecticut.— Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101; Ives *v.* Carter, 24 Conn. 392.

Georgia.— Reese *v.* Wyman, 9 Ga. 430.

Illinois.— Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503; Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; School Directors *v.* Boomhour, 83 Ill. 17.

Indiana.— Ledbetter *v.* Davis, 121 Ind. 119, 22 N. E. 744.

Iowa.— Salm *v.* Israel, 74 Iowa 314, 37 N. W. 387; Nixon *v.* Carson, 38 Iowa 338.

Kentucky.— Campbell *v.* Hellman, 15 B. Mon. 508, 61 Am. Dec. 195. And see Coffey *v.* Hendrick, 65 S. W. 127, 23 Ky. L. Rep. 1328, holding that a purchase of territory for the sale of a book could be rescinded for a false and fraudulent representation that the book was copyrighted.

Louisiana.— McLaughlin *v.* Richardson, 2 La. 78.

Maine.— Irving *v.* Thomas, 18 Me. 418; Bean *v.* Herrick, 12 Me. 262, 28 Am. Dec. 176.

Maryland.— Benesch *v.* Weil, 69 Md. 276, 14 Atl. 666; Pendegast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539; Gardner *v.* Lewis, 7 Gill 377.

Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Lewis *v.* Jewell, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454; Litchfield *v.* Hutchinson, 117 Mass. 195; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

fraud, may be as fraudulent as a falsehood.[72] It has been recently held in England that where a document containing a number of statements intentionally gives a false impression as a whole, upon which persons are induced to act, it is in a legal sense false and fraudulent, although no specific statement contained therein considered by itself may be proved to be false.[73] False representations, not sufficient to sustain an indictment for false pretenses, may be sufficient to vitiate a contract thereby obtained.[74]

b. Failure to Disclose Facts — (i) *In General.* As a general rule the mere failure of a party to a contract to disclose facts is not such fraud as will entitle the other party to avoid the contract.[75] There must be a positive misstatement of fact or such a partial and fragmentary statement of fact that the withholding of

Michigan.— Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44; Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702.

Minnesota.— Burr *v.* Willson, 22 Minn. 206.

Missouri.— Raley *v.* Williams, 73 Mo. 310.

New Hampshire.— Stewart *v.* Stearns, 63 N. H. 99, 56 Am. Rep. 496; Jones *v.* Emery, 40 N. H. 348.

New Jersey.— Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

New York.— Dambmann *v.* Schulting, 75 N. Y. 55; Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Mead *v.* Bunn, 32 N. Y. 275; Sandford *v.* Handy, 23 Wend. 260.

Ohio.— Loffland *v.* Russell, Wright 438.

Pennsylvania.— Friend *v.* Lamb, 152 Pa. St. 529, 24 Atl. 577, 34 Am. St. Rep. 672; Barber *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

South Carolina.— Lowry *v.* Pinson, 2 Bailey 324, 23 Am. Dec. 140.

Tennessee.— Walker *v.* Dunlop, 5 Hayw. 271, 9 Am. Dec. 787.

Texas.— Crayton *v.* Munger, 9 Tex. 285.

Vermont.— Kendall *v.* Wilson, 41 Vt. 567; Morris *v.* Gill, N. Chipm. 63, 1 Am. Dec. 694.

Virginia.— Ratliff *v.* Vandikes, 89 Va. 307, 15 S. E. 864; Chieves *v.* Gary, 24 Gratt. 414.

Wisconsin.— Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255; Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507; Harran *v.* Klaus, 79 Wis. 383, 48 N. W. 479.

United States.— Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; Hingston *v.* L. P. Smith, etc., Co., 114 Fed. 294, 52 C. C. A. 206.

England.— Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024; Venezuela Cent. R. Co. *v.* Kisch, L. R. 2 H. L. 99, 36 L. J. Ch. 849, 16 L. T. Rep. N. S. 500, 15 Wkly. Rep. 821.

See 11 Cent. Dig. tit. "Contracts," § 420.

Action for deceit see FRAUD.

False representations as to contents or character of writing by which one is induced to sign the same see *supra*, VI, B, 4.

72. Mulligan *v.* Bailey, 28 Ga. 507; Denny *v.* Gilman, 26 Me. 149; Buford *v.* Caldwell, 3 Mo. 477.

73. Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794.

74. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259.

75. *Alabama.*— Eastman *v.* Hobbs, 26 Ala. 741; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Connecticut.— West *v.* Anderson, 9 Conn. 107, 21 Am. Dec. 737.

District of Columbia.— Fisher *v.* Lighthall, 4 Mackey 82, 54 Am. Rep. 258.

Georgia.— Tillinghast *v.* Banks, 14 Ga. 649.

Illinois.— Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294.

Indiana.— Lucas *v.* Coulter, 104 Ind. 81, 3 N. E. 622.

Kansas.— Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171.

Kentucky.— Mills *v.* Lee, 6 T. B. Mon. 91, 17 Am. Dec. 118.

Massachusetts.— Coddington *v.* Goddard, 16 Gray 436.

Michigan.— Williams *v.* Spurr, 24 Mich. 335.

Minnesota.— Cochrane *v.* Halsey, 25 Minn. 52.

New Jersey.— Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426.

New York.— People's Bank *v.* Bogart, 81 N. Y. 101, 37 Am. Rep. 481; Dambmann *v.* Schulting, 75 N. Y. 55.

North Carolina.— Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435.

Ohio.— Hadley *v.* Clinton County Imp. Co., 13 Ohio St. 502, 82 Am. Dec. 454.

Pennsylvania.— Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992; Butler's Appeal, 26 Pa. St. 63; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

Virginia.— Rison *v.* Newberry, 90 Va. 513, 18 S. E. 916.

United States.— Cleveland *v.* Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. ed. 384; Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. ed. 214.

England.— Peek *v.* Gurney, L. R. 6 H. L. Cas. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Keates *v.* Cadogan, 10 C. B. 591, 15 Jur. 428, 20 L. J. C. P. 76, 70 E. C. L. 591; Baker *v.* Cartwright, 10 C. B. N. S. 124, 7 Jur. N. S. 1247, 30 L. J. C. P. 364, 100 E. C. L. 124; Turner *v.* Green, [1895] 2 Ch. 205, 64 L. J. Ch. 539, 72 L. T. Rep. N. S. 763, 13 Reports 551, 43 Wkly. Rep. 537; Beachey *v.* Brown, E. B. & E. 796, 96 E. C. L. 796; Fletcher *v.* Krell, 42 L. J. Q. B. 55, 28 L. T. Rep. N. S. 105.

that which is not stated makes that which is stated absolutely false,[76] or the relationship of the parties must be such that the fullest disclosure is called for, or there must be a duty on the party to disclose what he knows on the subject.[77]

(II) *Active Concealment or Non-Disclosure.* The rule that non-disclosure of facts does not constitute fraud does not apply where there is an active concealment of facts. This is a fraud. By an active concealment is meant either (1) a representation good as far as it goes, but accompanied with such a suppression of facts as makes it convey a misleading impression,[78] or (2) an attempt by one party

Lease of premises.— It has been held for example that it is not fraud for the lessor of premises to fail to disclose the fact that they are in a ruinous condition and unfit for habitation, although he may know that they are required by the lessee for immediate occupation. Keates *v.* Cadogan, 10 C. B. 591, 600, 15 Jur. 428, 20 L. J. C. P. 76, 70 E. C. L. 591. "It is not pretended," said the court in this case, "that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit." See also Fisher *v.* Lighthall, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; Lucas *v.* Coulter, 104 Ind. 81, 3 N. E. 622; Foster *v.* Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; O'Brien *v.* Capwell, 59 Barb. (N. Y.) 497; Robbins *v.* Mount, 4 Rob. (N. Y.) 553. And see Landlord and Tenant. And so it was held where the landlord concealed the fact that the premises had been formerly occupied as a brothel. Meeks *v.* Bowerman, 1 Daly (N. Y.) 100. *Contra,* Staples *v.* Anderson, 3 Rob. (N. Y.) 327; Cornfoot *v.* Fowke, 4 Jur. 919, 9 L. J. Exch. 297, 6 M. & W. 358.

Sale of land.— Failure of the purchaser of land to disclose to the vendor the fact that there is mineral under the land does not amount to fraud, where there is no special relation of confidence. Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435; Butler's Appeal, 26 Pa. St. 63; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661; Fox *v.* Mackreth, 2 Bro. Ch. 400, 29 Eng. Reprint 224. As to concealment by the purchaser of land see also Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992. And see Vendor and Purchaser.

Failure to disclose insolvency.— It has repeatedly been held that a purchaser of goods on credit is under no duty to disclose his financial condition, if no inquiry is made by the seller, and that mere failure to disclose the fact that he is insolvent is not such fraud as will entitle the seller to rescind.

Alabama.—La Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 158.

Connecticut.— Morrill *v.* Blackman, 42 Conn. 324.

Illinois.— Reticker *v.* Katzenstein, 26 Ill. App. 33.

Maryland.— Diggs *v.* Denny, 86 Md. 116, 37 Atl. 1037; Powell *v.* Bradlee, 9 Gill & J. 220.

Michigan.— Frisbee *v.* Chickering, 115 Mich. 185, 73 N. W. 112; Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373.

Missouri.— Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205.

New York.— Hotchkin *v.* Malone Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050, 38 N. Y. St. 754; Morris *v.* Talcott, 96 N. Y. 100; Nichols *v.* Pinner, 18 N. Y. 295; Swarthout *v.* Merchant, 47 Hun 106.

North Carolina.—Wilson *v.* White, 80 N. C. 280.

Ohio.— Talcott *v.* Henderson, 31 Ohio St. 162, 27 Am. Rep. 501.

Tennessee.— Hallacher *v.* Henlein, (Tenn. Ch. 1896) 39 S. W. 869.

And see Sales.

No intention to pay.— According to the weight of authority, however, this does not apply where the purchaser has no intention to pay for the goods. See *infra,* VI, D, 2, d.

76. See *infra,* VI, D, 2, b, (II).

77. See *infra,* VI, D, 2, b, (III).

78. *Alabama.*— Griel *v.* Lomax, 89 Ala. 420, 6 So. 741.

Iowa.— Coles *v.* Kennedy, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. Rep. 503.

Kentucky.— Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265; Beard *v.* Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362.

Maine.—Atwood *v.* Chapman, 68 Me. 38, 28 Am. Rep. 5.

Massachusetts.— Kidney *v.* Stoddart, 7 Metc. 252.

Michigan.— Busch *v.* Wilcox, 82 Mich. 315, 46 N. W. 940.

Missouri.— Grigsby *v.* Stapleton, 94 Mo. 423, 7 S. W. 421.

New Hampshire.— Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

New Jersey.— Lomerson *v.* Johnston, 47 N. J. Eq. 312, 314, 20 Atl. 675, 24 Am. St. Rep. 410, where it was said: "In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to

to draw the other's attention from a fact or to cover it from view.[79] In the first case the non-disclosure has the effect of either impliedly representing that the fact concealed does not exist or of rendering the facts disclosed absolutely false. In the second case the conduct of the party, outside of an actual representation, is a fraud on the other.[80]

(III) *WHERE THERE IS A DUTY TO DISCLOSE.* The rule that failure to disclose facts is not fraud does not apply where the circumstances are such as to impose a duty to disclose them; and there is such a duty where the parties stand in a fiduciary relationship to each other,[81] or where one party knows that the other

him who, seeing the misapprehension, seeks to profit by it, a case of false representation."

New York.— Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Morris *v.* Budlong, 16 Hun 570.

Ohio.— Hadley *v.* Clinton County Imp. Co., 13 Ohio St. 502, 82 Am. Dec. 454.

Tennessee.— Baker *v.* Seahorn, 1 Swan 52, 55 Am. Dec. 724.

Vermont.— Maynard *v.* Maynard, 49 Vt. 297; Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625; Howard *v.* Gould, 28 Vt. 523, 67 Am. Dec. 728.

United States.—Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

England.— Peek *v.* Gurney, L. R. 6 H. L. Cas. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Drysdale *v.* Mace, 2 Sm. & G. 225.

Illustrations.— This rule has been applied where the purchaser of a life-interest having obtained medical reports upon the life showed the vendor the unfavorable reports and suppressed the favorable ones (Boswell *v.* Coaks, 27 Ch. D. 424 [*reversed* in 11 App. Cas. 232, 55 L. J. Ch. 761, 55 L. T. Rep. N. S. 32]); when a debtor obtained a composition by not disclosing that he had recently come into property by the death of his father, whom he represented as refusing to help him (Gilbert *v.* Endean, 9 Ch. D. 259, 39 L. T. Rep. N. S. 404, 27 Wkly. Rep. 252); where the defendant, being desirous of purchasing certain stock from the plaintiff, of the value of which he knew she was ignorant, for the purpose of misleading her and inducing her to sell the stock at less than its face value, told her of a fact calculated in itself to depreciate the value of the stock, but omitted to disclose other facts within his knowledge which would have given her correct information of such value (Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625); where a purchaser of goods on credit, on being questioned as to his financial condition, states his assets correctly, but does not disclose all his liabilities (Newell *v.* Randall, 32 Minn. 171, 19 N. W. 972, 5 Am. Rep. 562; Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264); and where the promoter of a corporation represented to one, as an inducement to his subscription to the capital stock, that a certain person of reputation for business sagacity had agreed to subscribe for a large amount of the stock, without disclosing the fact that the stock had been given such person as a gratuity for the use of his name (Coles *v.* Kennedy, 81 Iowa 360, 40 N. W. 1088, 25 Am. St. Rep. 503).

79. *California.*— Roseman *v.* Canovan, 43 Cal. 110.

Illinois.— Cogel *v.* Kniseley, 89 Ill. 598; Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294.

Indiana.— Firestone *v.* Werner, 1 Ind. App. 293, 27 N. E. 623.

Massachusetts.— Savage *v.* Stevens, 126 Mass. 207; Matthews *v.* Bliss, 22 Pick. 48.

New York.—Smith *v.* Countryman, 30 N. Y. 655.

Pennsylvania.— Croyle *v.* Moses, 90 Pa. St. 250, 35 Am. Rep. 654.

Tennessee.— Smith *v.* Click, 4 Humphr. 186.

England.— Schneider *v.* Heath, 3 Camph. 506, 14 Rev. Rep. 506; Baglehole *v.* Walters, 3 Camph. 154, 13 Rev. Rep. 778; Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797.

Illustrations.— This rule has been applied where a person sold a vessel with all faults, and before the sale had taken her from the ways on which she lay and placed her afloat in a dock for the purpose of preventing an examination of the bottom, which he knew to be unsound (Schneider *v.* Heath, 3 Camph. 506, 14 Rev. Rep. 506); where a person in order to sell a log of mahogany turned it so as to conceal a hole in the underneath side (Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797); and where defendant in payment of a horse delivered bank-bills to plaintiff, which were known to defendant to be worthless at the time and unknown to plaintiff, with an agreement that if the notes were not returned in a given time, defendant should not be bound to receive them, it being held that this was a fraud, and that plaintiff had a right to recover the value of the horse, although he did not return the notes within the time limited (Smith *v.* Click, 4 Humphr. (Tenn.) 186).

80. See the cases above cited.

81. Bench *v.* Sheldon, 14 Barb. (N. Y.) 66; McPherson *v.* Watt, 3 App. Cas. 254; Luddy *v.* Peard, 33 Ch. D. 500, 55 L. J. Ch. 884, 55 L. T. Rep. N. S. 137, 35 Wkly. Rep. 44; Bagnall *v.* Carlton, 6 Ch. D. 371, 47 L. J.

relies on him to tell him truly as to the facts of the case, in which case a duty arises not to conceal anything material to the bargain, and this, although the parties do not stand in what is generally described as a fiduciary relation.[82] Thus in sales of personal property, the seller is bound to disclose material latent defects known to him, both as to title and quality.[83] And the owner of land must disclose defects in the title or other defects peculiarly within his knowledge and presumably unknown to the purchaser.[84] As a general rule, however, a purchaser

Ch. 30, 37 L. T. Rep. N. S. 481, 26 Wkly. Rep. 243. And see *infra*, VI, F.

82. *Alabama.*— Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Florida.— White *v.* Walker, 5 Fla. 478.

Illinois.— Mitchell *v.* McDougall, 62 Ill. 498; Fish *v.* Cleland, 33 Ill. 238.

Kentucky.— Beard *v.* Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362; Peebles *v.* Stephens, 3 Bibb 324, 6 Am. Dec. 660; Waters *v.* Mattingly, 1 Bibb 244, 4 Am. Dec. 631.

Missouri.— McAdams *v.* Cates, 24 Mo. 223; Manter *v.* Truesdale, 57 Mo. App. 435; Dameron *v.* Jamison, 4 Mo. App. 299.

Pennsylvania.— Croyle *v.* Moses, 90 Pa. St. 250, 35 Am. Rep. 654.

Tennessee.— George *v.* Johnson, 6 Humphr. 36, 44 Am. Dec. 288; White *v.* Cox, 3 Hayw. 79.

Vermont.— Paddock *v.* Strobridge, 29 Vt. 470.

Virginia.— Rison *v.* Newberry, 90 Va. 513, 18 S. E. 916.

United States.— Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439; Loewer *v.* Harris, 57 Fed. 368, 6 C. C. A. 394.

England.— Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 461, 15 Wkly. Rep. 877; Phillips *v.* Foxall, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293, 27 L. T. Rep. N. S. 231, 20 Wkly. Rep. 900; Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455.

Illustrations.— This rule has been applied where a person bought a reversionary interest knowing but not disclosing the death of the tenant for life (Turner *v.* Harvey, Jac. 169, 4 Eng. Ch. 169); where a lessee for lives contracted for the renewal of the lease knowing and not disclosing the fact that the surviving life was at the point of death (Ellard *v.* Llandaff, 1 Ball & B. 241, 12 Rev. Rep. 23); where one purchased a life policy knowing that the insured was dangerously ill and not disclosing the fact (Jones *v.* Keene, 2 M. & Rob. 348); where one employed to sell a picture refused to state the name of the owner, and after becoming aware that the buyer was under a delusion as to the ownership, which enhanced the price, made the sale to him (Hill *v.* Gray, 1 Stark. 434, 18 Rev. Rep. 802, 2 E. C. L. 167); where a holder of negotiable paper in negotiating it concealed the fact that the maker had failed (Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404); where a landlord on letting a house concealed the fact that the premises were infected with a contagious disease, or that there was a nuisance in the premises prejudicial to life or health (Cesar *v.* Karutz, 60 N. Y. 229, 19 Am. Rep. 164; Wallace *v.* Lent, 1 Daly (N. Y.) 481; Minor *v.* Sharon, 112 Mass. 477, 17 Am. Rep. 122; Sutton *v.* Temple, 13 L. J. Exch. 17, 12 M. & W. 52. *Contra*, Westlake *v.* De Graw, 25 Wend. (N. Y.) 669).

83. See SALES.

84. *Alabama.*— Bryant *v.* Boothe, 30 Ala. 311, 68 Am. Dec. 117.

Illinois.— Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456.

Indiana.— Firestone *v.* Werner, 1 Ind. App. 293, 27 N. E. 623.

Massachusetts.— Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551.

Michigan.— Knowlton *v.* Amy, 47 Mich. 204, 10 N. W. 201.

England.— Nottingham Patent Brick, etc., Co. *v.* Butler, 16 Q. B. D. 778, 55 L. J. Q. B. 280, 54 L. T. Rep. N. S. 444, 34 Wkly. Rep. 405; Caballero *v.* Henty, L. R. 9 Ch. 447, 43 L. J. Ch. 635, 30 L. T. Rep. N. S. 314, 22 Wkly. Rep. 446; Torrance *v.* Bolton, L. R. 8 Ch. 118, 42 L. J. Ch. 177, 27 L. T. Rep. N. S. 738, 21 Wkly. Rep. 134; Shirley *v.* Stratton, 1 Bro. Ch. 440, 28 Eng. Reprint 1226; *In re* Bannister, 12 Ch. D. 834; Edwards *v.* McLeay, Coop. 308, 2 Swanst. 287, 14 Rev. Rep. 261, 10 Eng. Ch. 308; Mostyn *v.* West Mostyn Coal, etc., Co., 1 C. P. D. 145, 45 L. J. C. P. 401, 34 L. T. Rep. N. S. 325, 24 Wkly. Rep. 401; Gibson *v.* D'Este, 8 Jur. 94, 2 Y. & C. 542, 21 Eng. Ch. 542.

See VENDOR AND PURCHASER.

Parties on unequal footing as to knowledge. — Where one party to a contract acts with full knowledge as to his own property as well as the other property for which he is bargaining, while the other party, on account of nonresidence, can scarcely be said to know his own property, and knows nothing whatever of the property he is trading for, the first is held to the strictest and fullest disclosures.

Illinois.— Witherwax *v.* Riddle, 121 Ill. 140, 13 N. E. 545.

Indiana.— Harris *v.* McMurray, 23 Ind. 9.

Iowa.— Ryan *v.* Ashton, 42 Iowa 365.

Kentucky.— Akers *v.* Martin, (1901) 61 S. W. 465, where the purchaser of land represented to the vendor, his sister, who lived in another state and was ignorant of the condition of the land, that the land had upon it no timber of any value, when in fact there were upon the land more than two hundred trees, which he had already contracted to sell

of property is under no duty to disclose a fact which, unknown to the other party, increases the value of the property.[85] In like manner the mere silence of the seller of property, when the buyer is exaggerating its value or quality, is not a fraud.[86]

c. Representation of Opinion. As a rule a mere representation of opinion, although erroneous, is not a fraud against which the law will relieve.[87] Expressions of opinion by the vendor of property, relative to the title, the quantity, or the value, etc., if they do not amount to a misstatement of matters of fact will not, although the opinion is erroneous or ill founded, entitle the purchaser to relief on the ground of fraud.[88] As a general rule the mere assertion that prop-

at five dollars per tree, and which constituted the chief value of the land.

Nebraska.— McKnight *v.* Thompson, 39 Nebr. 752, 58 N. W. 453; Cressler *v.* Rees, 27 Nebr. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

New York.— Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

North Carolina.— Saunders *v.* Hatterman, 24 N. C. 32, 37 Am. Dec. 404.

Wisconsin.— Horton *v.* Lee, 106 Wis. 439, 82 N. W. 360.

United States.— Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357; Merriam *v.* Lapsley, 2 McCrary (U. S.) 606, 12 Fed. 457.

85. Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992; Phillips *v.* Homfray, L. R. 6 Ch. 770; Smith *v.* Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221, 25 L. T. Rep. N. S. 329, 19 Wkly. Rep. 1059; Fox *v.* Mackreth, 2 Bro. Ch. 400, 29 Eng. Reprint 224; Turner *v.* Harvey, Jac. 169, 4 Eng. Ch. 169. See McMullen *v.* Hoffman, 75 Fed. 547 (holding that one making a bid for a public work was under no obligation to disclose to the city information as to the cost); Dolman *v.* Nokes, 22 Beav. 402 (holding that where a first mortgagee with power of sale purchased the interest of a second mortgagee at a reduced sum, without disclosing that he had arranged for a sale of the property at a price sufficient to cover both mortgages, the non-disclosure was not fraud). And see SALES; VENDOR AND PURCHASER.

86. See SALES.

87. *Alabama.*— Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Georgia.— Dortic *v.* Dugas, 55 Ga. 484; Payne *v.* Smith, 20 Ga. 654.

Massachusetts.— Bryant *v.* Ocean Ins. Co., 22 Pick. 200.

Pennsylvania.— Coil *v.* Pittsburgh Female College, 40 Pa. St. 439.

Washington.— English *v.* Grinstead, 12 Wash. 670, 42 Pac. 121.

Wisconsin.— McClellan *v.* Scott, 24 Wis. 81.

United States.— Johansson *v.* Stephanson, 154 U. S. 625, 14 S. Ct. 1180, 23 L. ed. 1009; Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800; Smith *v.* Richards, 13 Pet. 26, 10 L. ed. 42; Livingston *v.* Maryland Ins. Co., 7 Cranch 506, 3 L. ed. 421; Robinson *v.* Cathcart, 3 Cranch C. C. 377, 20 Fed. Cas. No. 11,947 [*modified* in 5 Pet. 264, 8 L. ed. 120]; Clason *v.* Smith, 3 Wash. 156, 5 Fed. Cas. No. 2,868.

England.— Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280.

88. *Georgia.*— Dortic *v.* Dugas, 55 Ga. 484.

Illinois.— Drake *v.* Latham, 50 Ill. 270.

Indiana.— Curry *v.* Keyser, 30 Ind. 214.

Missouri.— Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380.

Nebraska.— Moore *v.* Scott, 47 Nebr. 346, 66 N. W. 441.

Wisconsin.— Hardy *v.* Stonebraker, 31 Wis. 640.

Statements held statements of opinion.— That the subject-matter of the sale was "good oil land" (Watts *v.* Cummins, 59 Pa. St. 84); that land offered for sale was "very fertile and improvable" (Dimmock *v.* Hallett, L. R. 2 Ch. 21, 12 Jur. N. S. 953, 36 L. J. Ch. 146, 15 L. T. Rep. N. S. 374, 15 Wkly. Rep. 93); that a patent was a valuable and useful improvement (Bain *v.* Whitey, 107 Ala. 223, 18 So. 217); as to the harvest which land sown in certain crops will produce (Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58); as to the cubic contents of a piece of grading which one employs another to do (East *v.* Worthington, 88 Ala. 537, 7 So. 189); as to what it will cost to build a house (Sweney *v.* Davidson, 68 Iowa 386, 27 N. W. 278); as to the speed of a horse (State *v.* Cass, 52 N. J. L. 77, 18 Atl. 972); that a stallion will not produce sorrel colts (Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437); as to solvency and credit (Yaeger Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398; Homer *v.* Perkins, 124 Mass. 431, 27 Am. Rep. 677; Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264); that certain land was suitable for building purposes (Wren *v.* Moncure, 95 Va. 369, 28 S. E. 588); that a patent is valid and covers a certain described method of manufacture (Huber *v.* Guggenheim, 89 Fed. 598); that land was first-class orange land and would raise oranges (Lee *v.* McClelland, 120 Cal. 147, 52 Pac. 300); that the seller has been offered a certain sum for his property (Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086); that lots were smooth and level and suitable for building purposes, when in fact they were not as they had been represented, but were "badly washed into deep gullies" and one of them was "in a boggy gorge, thirty feet

erty is worth so much is an expression of opinion and does not affect the validity of the contract,[89] but statements of fact affecting the value of property and the like do not fall within this rule.[90] To assert that property costs so much is a statement of fact, and by the weight of authority constitutes such fraud as entitles the purchaser to rescind.[91] Where one party possesses special learning or knowl-

below the level of the street" while another was "on a steep declivity" (Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787); and that a tract of land was the best ranch in Ione valley and very rich and productive; that it would produce fifty bushels of wheat to the acre; that one portion of it was good alfalfa land, and another portion was rich in mineral deposits (Rendell *v.* Scott, 70 Cal. 514, 11 Pac. 779).

89. *Alabama.*— Lockwood *v.* Fitts, 90 Ala. 150, 7 So. 467.

Colorado.— Wier *v.* Johns, 14 Colo. 493, 24 Pac. 262; Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40.

Connecticut.— Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644.

Delaware.— Pearce *v.* Carter, 3 Houst. 385; Stayton *v.* Morris, 4 Harr. 357.

Illinois.— Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416; Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Noetling *v.* Wright, 72 Ill. 390.

Indiana.— Shade *v.* Creviston, 93 Ind. 591; Cagney *v.* Cuson, 77 Ind. 494.

Kansas.— Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171.

Kentucky.— Belz *v.* Keller, (1886) 1 S. W. 420; Marshall *v.* Peck, 1 Dana 609; Moore *v.* Turberville, 2 Bibb 602, 5 Am. Dec. 642.

Maine.— Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

Massachusetts.— Deming *v.* Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Homer *v.* Perkins, 124 Mass. 431, 27 Am. Rep. 677; Morse *v.* Shaw, 124 Mass. 59; Parker *v.* Moulton, 114 Mass. 99, 19 Am. Rep. 315; Hemmer *v.* Cooper, 8 Allen 334; Nowlan *v.* Cain, 3 Allen 261; Gordon *v.* Parmelee, 2 Allen 212; Medbury *v.* Watson, 6 Metc. 246, 39 Am. Dec. 726.

Michigan.— Johnson *v.* Seymour, 79 Mich. 156, 44 N. W. 344.

Minnesota.— Doran *v.* Eaton, 40 Minn. 35, 41 N. W. 244.

Missouri.— Anderson *v.* McPike, 86 Mo. 293; Union Nat. Bank *v.* Hunt, 76 Mo. 439.

New York.— Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Ellis *v.* Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Davis *v.* Meeker, 5 Johns. 354.

Pennsylvania.— Geddes' Appeal, 80 Pa. St. 442.

Vermont.— Shanks *v.* Whitney, 66 Vt. 405, 29 Atl. 367.

United States.— Gordon *v.* Butler, 105 U. S. 553, 26 L. ed. 1166; Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

See SALES; VENDOR AND PURCHASER.

90. Statements held statements of fact.— That an old stock of goods was "fresh and new" (Jackson *v.* Collins, 39 Mich. 557); that a certain furnace will heat a house (Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, 41 N. Y. St. 320); that a building is fireproof (Hickey *v.* Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824); that another person will sell for less (Smith *v.* Smith, 166 Pa. St. 563, 31 Atl. 343); that the makers of a note are wealthy and respectable men (Alexander *v.* Dennis, 9 Port. (Ala.) 174, 33 Am. Dec. 309); that a farm yielded a certain quantity of hay (Wardell *v.* Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383); as to the amount of ore which had been taken out of a mine (Gifford *v.* Carvill, 29 Cal. 589); that the present lessee was "a most desirable tenant" (Smith *v.* Land, etc., Property Corp., 28 Ch. D. 7, 49 J. P. 182, 51 L. T. Rep. N. S. 718); as to the earnings of a street railroad (Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794); that old and shop-worn goods were new (Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444); that notes of a third person given in part payment of the price were "as good as gold" (Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402); that a book is copyrighted, made by the seller of territory for the sale of the book (Coffey *v.* Hendrick, 65 S. W. 127, 23 Ky. L. Rep. 1328); a statement by the seller of a business and stock of goods that the private marks on the tags on his goods were designation of cost, when they were his retail prices, it being held that although the representation was incidentally as to value the significance of the marks was matter of fact, not of opinion (Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814); a statement by the owner and operator of a hotel to induce complainants to buy it for six thousand dollars that it was worth from six thousand dollars to eight thousand dollars; that it would earn one hundred dollars per month, and had earned that, aside from the bar, for the five months prior, during which time he had operated it (Miller *v.* Voorheis, 115 Mich. 356, 73 N. W. 383); and a statement made to a party who was making a contract to dredge a harbor by the other party, who had done a portion of the work and had access to the chart showing soundings, as to the thickness of the rock to be removed, the statement having been made after soundings had been taken in the harbor for the purpose of ascertaining the character of the work, and a chart thereof made with which the party making the statement was familiar, and the party to whom it was made was not (Hingston *v.* L. P. Smith, etc., Co., 114 Fed. 294, 52 C. C. A. 206). And see SALES; VENDOR AND PURCHASER.

91. *Colorado.*— Zang *v.* Adams, 23 Colo. 408, 48 Pac. 509.

Connecticut.— Ives *v.* Carter, 24 Conn. 392.

edge on the subject with respect to which his opinions are given, such opinions are construed in a different way, and a false statement of them when deception is designed and injury follows from reliance on the opinion is a fraud.[92] A wilful misstatement of opinion by an expert may constitute fraud.[93]

d. Representation of Intention or Expectation. A representation of intention or expectation as to some future act or performance, although it may have induced the agreement, is not a sufficient ground for a charge of fraud merely because it is not afterward carried into effect.[94] It must have been made with

Illinois.— Bunn *v.* Schnellbacker, 163 Ill. 328, 45 N. E. 227. But see Tuck *v.* Downing, 76 Ill. 71; Banta *v.* Palmer, 47 Ill. 99.

Iowa.— Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664; Salm *v.* Israel, 74 Iowa 314, 37 N. W. 387.

Maryland.— Pendergast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539.

Michigan.— Jackson *v.* Collins, 39 Mich. 557.

New York.— Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Weidner *v.* Phillips, 39 Hun 1; Sandford *v.* Handy, 23 Wend. 260.

England.— Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221, 22 Wkly. Rep. 492; Harvey *v.* Young, Yelv. 21*a*.

Contra, Sowers *v.* Parker, 59 Kan. 12, 51 Pac. 888; Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814; Burns *v.* Mahannah, 39 Kan. 87, 17 Pac. 319; Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171; Richardson *v.* Noble, 77 Me. 390; Bishop *v.* Small, 63 Me. 12; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212; Cooper *v.* Lovering, 106 Mass. 77; Hemmer *v.* Cooper, 8 Allen (Mass.) 334; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726. And see SALES; VENDOR AND PURCHASER.

92. *Colorado.*— Baun *v.* Holton, 4 Colo. App. 406, 36 Pac. 154, where the court said: "It is no douht true that, as between seller and buyer, statements of value hy the former ought not to be taken as trustworthy by the latter, and that the law will not help a purchaser who accepts exaggerated or false statements of value made by a vendor; but this rule does not hold good where a confidential relation exists between the parties, or where one of the parties professes to have special knowledge of the value of the property, and of which the other, being ignorant, to the knowledge of the former, trusts to his good faith. In both of these cases representations of value may be treated as representations of fact."

Illinois.— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241. And see Murray *v.* Tolman, 162 Ill. 417, 44 N. E. 748 [*reversing* 54 Ill. App. 420], where the seller of stock of a corporation, who was president of the bank of which the purchaser was a customer, and was also the organizer of the corporation and a large stock-holder, represented to the purchaser, who had no knowledge of the corporation, that the stock was worth fifty per cent above its par value, and would pay dividends of twenty-five per cent, which representations, as he had good reason to know, were untrue, and relying upon such representations the purchaser bought the stock. It was held that he was entitled to a rescission of the contract.

Kansas.— Robbins *v.* Barton, 50 Kan. 120, 31 Pac. 686.

Massachusetts.—Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Cheney *v.* Gleason, 125 Mass. 166.

Michigan.— Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Minnesota.— Hedin *v.* Minneapolis Medical, etc., Co., 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628, 35 L. R. A. 417; Griffin *v.* Farrier, 32 Minn. 474, 21 N. W. 553.

New York.— Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

United States.— Gordon *v.* Butler, 105 U. S. 553, 26 L. ed. 1166.

93. Conlan *v.* Roener, 52 N. J. L. 53, 18 Atl. 858.

94. *Alabama.*— Birmingham Warehouse, etc. *v.* Elyton Land Co., 93 Ala. 549, 9 So. 235.

Arkansas.— Hirsch *v.* Hirsch, 21 Ark. 342.

California.— Lawrence *v.* Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29.

Connecticut.— Houghs *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.

Illinois.— Day *v.* Ft. Scott Invest., etc., Co., 153 Ill. 293, 38 N. E. 567; Haenni *v.* Bleisch, 146 Ill. 262, 34 N. E. 153; People *v.* Healey, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; Gray *v.* Suspension Car Truck Mfg. Co., 127 Ill. 187, 19 N. E. 874; Tuck *v.* Downing, 76 Ill. 71; Gage *v.* Lewis, 68 Ill. 604; Warren *v.* Doolittle, 61 Ill. 171.

Indiana.— Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Burt *v.* Bowles, 69 Ind. 1; Fouty *v.* Fouty, 34 Ind. 433; McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11.

Kansas.— Fackler *v.* Ford, McCahon 21.

Maine.— Long *v.* Woodman, 58 Me. 49; Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494.

Maryland.— Robertson *v.* Park, 76 Md. 118, 24 Atl. 411.

Massachusetts.— Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158; Knowlton *v.* Keenan, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282; Mooney *v.* Miller, 102 Mass. 217; Gordon *v.* Parmelee, 2 Allen 212.

Michigan.— Macklem *v.* Fales, (1902) 89 N. W. 581, 8 Detroit Leg. N. 1154.

intent to deceive.[95] Where the statement of intention can be construed as really a statement of fact, it is treated as a fraud if false, as where there is a false statement of intention.[96] It has repeatedly been held that one who purchases goods on credit impliedly represents that he intends to pay for them, and if he not only fails to disclose his insolvency, but intends at the time not to pay for them, there

Minnesota.— Hone *v.* Woodruff, 1 Minn. 418.

Missouri.— Peltz *v.* Eichele, 62 Mo. 171; Saunders *v.* McClintock, 46 Mo. App. 216.

Nebraska.— Perkin *v.* Lougee, 6 Nebr. 220.

New Hampshire.— Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

New Jersey.— Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

New York.— Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Ellis *v.* Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505; Construction Reporter Co. *v.* Crowninshield, 16 Misc. 381, 38 N. Y. Suppl. 72.

Pennsylvania.— Smith *v.* Smith, 166 Pa. St. 563, 31 Atl. 343; Grove *v.* Hodges, 55 Pa. St. 504.

Tennessee.— Farrar *v.* Bridges, 3 Humphr. 566.

Texas.— Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

Virginia.— Wren *v.* Moncure, 95 Va. 369, 28 S. E. 588; Lambert *v.* Crystal, etc., Co., (1897) 27 S. E. 462.

West Virginia.— Love *v.* Teter, 24 W. Va. 741.

Wisconsin.— Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161; McClellan *v.* Scott, 24 Wis. 81.

United States.— Southern Development Co. *v.* Silva, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678; Gordon *v.* Butler, 105 U. S. 553, 26 L. ed. 1166; Sawyer *v.* Pritchett, 19 Wall. 146, 22 L. ed. 105; Greene *v.* Societe Anonyme, etc., 81 Fed. 64; White *v.* Ewing, 69 Fed. 451, 16 C. C. A. 296; Burton *v.* Platter, 53 Fed. 901, 4 C. C. A. 95.

England.— Feret *v.* Hill, 15 C. B. 207, 2 C. L. R. 1366, 18 Jur. 1014, 23 L. J. C. P. 185, 2 Wkly. Rep. 493, 80 E. C. L. 207; *Ex p.* Burrell, 1 Ch. D. 552, 45 L. J. Bankr. 68, 34 L. T. Rep. N. S. 198, 24 Wkly. Rep. 353.

Illustrations.— This rule has been applied for example to representations by a patent owner in granting a license that no more favorable terms "would be given" to any other manufacturer than were offered to the proposed licensee (Huber *v.* Guggenheim, 89 Fed. 598); representations by a person soliciting subscriptions to the stock of a certain association, that they had arranged to buy the Nashua Telegraph and were going to have the Associated Press news (Shattuck *v.* Robbins, 68 N. H. 565, 44 Atl. 694); and representations by the vendors of lots in a proposed town as to industries to be established and public improvements to be made by them and others (Livermore *v.* Middlesboro Town-Land Co., 106 Ky. 140, 50 S. W. 6, 20 Ky. L. Rep. 1704). See also Macklem *v.* Fales, (Mich. 1902) 89 N. W. 581, 8 Detroit Leg. N. 1154, holding that in an action to enforce a written contract contemplating the organization of a corporation for the manufacture and sale of a harrow, representations by plaintiff to defendants at the time the contract was made that the harrow could be put on the market at a certain price per section were as to future possibilities and not present facts, and hence were not fraudulent misrepresentations vitiating the contract.

95. Miller *v.* Howell, 2 Ill. 499, 32 Am. Dec. 36; Roscoe *v.* Safford, 61 N. Y. App. Div. 289, 70 N. Y. Suppl. 309.

96. Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911, where the directors of a company, in a prospectus inviting subscriptions for debentures to be issued by the company, falsely stated that the objects of the issue were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company, when the real object was to raise money to pay off pressing liabilities. Cotton, L. J., said: "It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact." Bowen, L. J., concurring, said: "A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." See also Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794, holding that a statement by the purchaser of a street railroad that in carrying out its plan of reorganization it intended to and would place the line in first-class condition, made to the owners of another line to induce a consolidation of the two, was not only a promise, but also a representation of an existing fact as to its intention, which authorized a rescission of the contract of consolidation by the other parties, where the promise was not only not fulfilled, but it was shown that the promisor had no such intention at the time.

is such fraud on the part of the purchaser as will entitle the seller to rescind the contract.[97]

e. Representation of Law. As a rule false representation, to constitute fraud, must be a representation of fact, and an erroneous representation or statement of a matter of law is not a fraud.[98] False representations as to the legal effect of an instrument are no bar to an action thereon, as a party signing such an instrument is presumed to know its contents, and has no right to rely upon the representations of the other party as to its legal effect.[99] The rule does not apply, however, when there is a relation of trust or confidence between the parties, or the representation is made to a person who is unable to judge of the true character and effect of the contract.[1] As has been pointed out ignorance of foreign laws, which

97. *Connecticut.*— Ayres *v.* French, 41 Conn. 142; Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Illinois.— Farwell *v.* Hanchett, 120 Ill. 573, 11 N. E. 875; Allen *v.* Hartfield, 76 Ill. 358.

Indiana.— Brower *v.* Goodyer, 88 Ind. 572.

Louisiana.— Yeager Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398.

Maine.— Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

Maryland.— Harris *v.* Alcock, 10 Gill & J. 226.

Massachusetts.— Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731; Dow *v.* Sanborn, 3 Allen 181.

Michigan.— Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347; Ross *v.* Miner, 64 Mich. 204, 31 N. W. 185, 67 Mich. 410, 35 N. W. 60; Shipman *v.* Seymour, 40 Mich. 274.

Minnesota.— Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

Missouri.— Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Elsass *v.* Harrington, 28 Mo. App. 300.

New Hampshire.— Stewart *v.* Emerson, 52 N. H. 301.

New York.— Whitten *v.* Fitzwater, 129 N. Y. 626, 29 N. E. 298, 41 N. Y. St. 379; Wright *v.* Brown, 67 N. Y. 1; Devoe *v.* Brandt, 53 N. Y. 462; Hennequin *v.* Naylor, 24 N. Y. 139; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Bach *v.* Tuch, 10 N. Y. Suppl. 884, 32 N. Y. St. 941.

North Carolina.— Des Farges *v.* Pugh, 93 N. C. 31, 53 Am. Rep. 446.

Ohio.— Wilmot *v.* Lyon, 49 Ohio St. 296, 34 N. E. 720; Talcott *v.* Henderson, 31 Ohio St. 162, 27 Am. Rep. 501.

Rhode Island.— Dalton *v.* Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905.

Tennessee.— Belding *v.* Frankland, 8 Lea 67, 41 Am. Rep. 630.

United States.— Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Fechheimer *v.* Baum, 37 Fed. 167; Jaffrey *v.* Brown, 29 Fed. 476; Carnahan *v.* Bailey, 28 Fed. 519.

England.— *Ex p.* Whittaker, L. R. 10 Ch. 446.

Contra, Bell *v.* Ellis, 33 Cal. 620; Smith *v.* Smith, 21 Pa. St. 367, 60 Am. Dec. 51.

See SALES.

Mere failure to disclose insolvency, where there is no intent not to pay and no inquiry is made, does not constitute fraud. See *supra,* VI, D, 2, h.

98. *Alabama.*— Beall *v.* McGehee, 57 Ala. 438; Ross *v.* Drinkard, 35 Ala. 434; Townsend *v.* Cowles, 31 Ala. 428.

California.— People *v.* San Francisco, 27 Cal. 655.

Georgia.— Sims *v.* Ferrill, 45 Ga. 585.

Illinois.— Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Drake *v.* Latham, 50 Ill. 270.

Indiana.— New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; May *v.* Johnson, 3 Ind. 449; Russell *v.* Branham, 8 Blackf. 277; Platt *v.* Scott, 6 Blackf. 389, 39 Am. Dec. 436.

Kentucky.— Underwood *v.* Brockman, 4 Dana 309, 29 Am. Dec. 407; Fitzgerald *v.* Peck, 4 Litt. 125.

Missouri.— American Ins. Co. *v.* Capps, 4 Mo. App. 571.

South Carolina.— Lowndes *v.* Chisolm, 2 McCord Eq. 455, 16 Am. Dec. 667.

Wisconsin.— Gormely *v.* South Side Gymnastic Assoc., 55 Wis. 350, 13 N. W. 242.

See 11 Cent. Dig. tit. "Contracts," § 427.

99. *Indiana.*—New Albany R. Co. *v.* Fields, 10 Ind. 187; Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488, 68 Am. Dec. 653.

Maine.— Thompson *v.* Phœnix Ins. Co., 75 Me. 55, 46 Am. Rep. 357.

Missouri.— American Ins. Co. *v.* Clapp, 4 Mo. App. 571.

New York.— Starr *v.* Bennett, 5 Hill 303.

Pennsylvania.— Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206.

United States.— Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

1. *Georgia.*— Sims *v.* Ferrill, 45 Ga. 585.

Indiana.— Lamb *v.* Lamb, 130 Ind. 273, 275, 30 N. E. 36, 30 Am. St. Rep. 227, where a man with personalty of the value of forty thousand dollars falsely represented to a woman whom he was about to marry, and over whom he had acquired complete influence, the effect of a marriage settlement by which she released all of her rights in his estate and became entitled to receive therefrom the mere sum of two hundred dollars, the man having taken the woman to his own legal adviser, who said the instrument was all right. It was held that the rule that a false representation as to the legal effect of a written instrument will not entitle the person deceived to relief had no application. "If the only fraud," said the court, "was in mis-

include the laws of a sister state, is regarded as ignorance of fact and not of law, and misrepresentation in regard thereto is misrepresentation of fact.[2] And if the representation, although involving a matter of law, can be resolved into a representation of fact, it will be treated as a representation of fact instead of law.[3]

f. Fraud of Third Party Inducing Contract. A contract cannot be set aside because of the fraud of a third person, in which the other party to the contract was not implicated.[4] In other words the representation must be made by the other party to the contract or by his agent or with his command or consent,[5] or must be subsequently ratified by him.[6]

g. Knowledge and Intent — (i) *Knowledge of Falsity of Representation* — (a) *In General.* In order that a false representation may amount to fraud, it must be made with knowledge of its falsity, or with what is equivalent to such knowledge. A representation made with a belief in its truth, although not true in point of fact, is not as a rule a legal fraud,[7] although as we have seen if

representing the legal effect of the written contract, there could be no recovery in this case unless the situation and relationship of the parties are such as to take the case out of the ordinary rule. It is established law that where parties deal at arms-length in respect to ordinary business matters, the false representation of the legal effect of a written instrument will not constitute fraud. . . . The question here is whether the rule extends over a case where parties occupy a relationship such as that which existed between the appellant and the appellee. We think it clear that it does not."

Kentucky.— Headley *v.* Pickering, (1901) 64 S. W. 527, 23 Ky. L. Rep. 905; Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 17 Ky. L. Rep. 385, 53 Am. St. Rep. 426, 28 L. R. A. 478.

Michigan— Berry *v.* Whitney, 40 Mich. 65.

New Jersey.— Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

New York.— Cooke *v.* Nathan, 16 Barb. 342.

Texas.— Moreland *v.* Atchison, 19 Tex. 303.

2. Bethell *v.* Bethell, 92 Ind. 318; Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Wood *v.* Roeder, 50 Nebr. 476, 70 N. W. 21; King *v.* Doolittle, 1 Head (Tenn.) 77; Boyers *v.* Pratt, 1 Humphr. (Tenn.) 90. See *supra*, VI, B, 9, b, (III).

3. Ross *v.* Drinkard, 35 Ala. 434; Burns *v.* Lane, 138 Mass. 350.

4. *Illinois.*— Witherwax *v.* Riddle, 121 Ill. 140, 13 N. E. 545; Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Dec. 147; Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615.

Louisiana.—Prescott *v.* Cooper, 37 La. Ann. 553.

Michigan.— Coveney *v.* Pattullo, (1902) 89 N. W. 968.

New York.— Brooks *v.* Dick, 135 N. Y. 652, 32 N. E. 230, 48 N. Y. St. 555. And see Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156.

Vermont.— Adams *v.* Soule, 33 Vt. 538.

England.— Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237; Slim *v.* Croucher, 2 Giff. 37. And see Master *v.* Miller, 1 Anstr. 225, 2 H. Bl. 141, 4 T. R. 320, 337, 2 Rev. Rep. 399, where Buller, J., said: "It is a common saying in our law books, that fraud vitiates everything. . . . But still we must recollect, that the principle which I have mentioned is always applied *ad hominem*. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that as against the person who has committed the fraud, and who endeavors to avail himself of it, the contract shall he considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and *bona fide* contract between two others."

5. Fenter *v.* Obaugh, 17 Ark. 71; Schramm *v.* O'Connor, 98 Ill. 539; Rockford, etc., R. Co. *v.* Shunick, 65 Ill. 223. See Briggs *v.* Dunne, 168 Ill. 226, 48 N. E. 48, where A authorized his tenant to make certain false representations respecting the leased premises to any person bearing a letter from A instructing him to show the premises to the bearer. B called at said premises without any letter and stated that he was a prospective purchaser, whereupon the tenant made said representations. It was held that the landlord was bound by them. See also Barcus *v.* Hannibal, etc., Plankroad Co., 26 Mo. 102; Horter *v.* Herndon, 12 Tex. Civ. App. 637, 35 S. W. 8. And see PRINCIPAL AND AGENT.

6. Forster *v.* Wilshusen, 14 Misc. (N. Y.) 520, 35 N. Y. Suppl. 1083, 70 N. Y. St. 701. See PRINCIPAL AND AGENT.

7. Needles *v.* Bank, 81 Mo. 569, 51 Am. Rep. 251; Griswold *v.* Sabin, 51 N. H. 167, 12 Am. Rep. 76; Mamlock *v.* Fairbanks, 46 Wis. 415, 1 N. W. 167, 32 Am. Rep. 716; Evans *v.* Collins, 5 Q. B. 804, Dav. & M. 72, 7 Jur. 743, 12 L. J. Q. B. 339, 48 E. C. L. 804; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33; Rawlings *v.* Bell, 1 C. B. 951, 9 Jur. 973, 14 L. J. C. P. 265, 50 E. C. L. 951; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Taylor *v.* Ashton, 7 Jur. 978, 12 L. J. Exch. 363, 11

the representation is of a material fact and induces the contract, it is in some cases, even when innocently made, a good ground for setting aside the contract.[8] Fraud is proved when it is shown that a false representation has been made (1) with knowledge of its falsity, (2) without belief in its truth, or (3) recklessly, and regardless of whether it be true or false. The second and third cases, as has been well said, are really the same, for one who makes a statement under the conditions last mentioned can have no real belief in the truth of what he states.[9]

(B) *Representation Not Believed to Be True.* If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.[10] Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.[11] Where a party makes a misrepre-

M. & W. 401; Ormrod *v.* Huth, 14 L. J. Exch. 366, 14 M. & W. 651; Shrewsbury *v.* Blount, 2 M. & G. 475, 2 Scott N. R. 588, 40 E. C. L. 700.

8. Shackelford *v.* Hendley, 1 A. K. Marsh. (Ky.) 496, 10 Am. Dec. 753; French *v.* Vining, 102 Mass. 135, 2 Am. Rep. 440; Bower *v.* Fenn, 90 Pa. St. 359, 35 Am. Rep. 662. See *supra*, VI, C.

9. Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33.

10. Reese River Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024. And see the following cases:

Alabama.— Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203.

California.— Alvarez *v.* Brannan, 7 Cal. 503, 68 Am. Dec. 274.

Georgia.— Woodruff *v.* Saul, 70 Ga. 271.

Illinois.— Ruff *v.* Jarrett, 94 Ill. 475; School Directors *v.* Boomhour, 83 Ill. 17; Allen *v.* Hart, 72 Ill. 104; Case *v.* Ayers, 65 Ill. 142; Johnson *v.* Beeney, 9 Ill. App. 64.

Indiana.— Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62.

Iowa.— Hunter *v.* French League Safety Cure Co., 96 Iowa 573, 65 N. W. 828.

Kansas.— Wickham *v.* Grant, 28 Kan. 517.

Kentucky.— Waters *v.* Mattingly, 1 Bibb 244, 4 Am. Dec. 631.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Litchfield *v.* Hutchison, 117 Mass. 195; Fisher *v.* Mellen, 103 Mass. 503; Stone *v.* Denny, 4 Metc. 151.

Michigan.— Stone *v.* Covell, 29 Mich. 359; Bristol *v.* Braidwood, 28 Mich. 191; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Minnesota.—Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533; Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612; Bullett *v.* Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Missouri.— Hamlin *v.* Avell, 120 Mo. 188, 25 S. W. 516; Nauman *v.* Oberton, 90 Mo. 666, 3 S. W. 380; Walsh *v.* Morse, 80 Mo. 568; Caldwell *v.* Henry, 76 Mo. 254; Dulaney *v.* Rogers, 64 Mo. 201; Ring *v.* Chas. Voegel Paint, etc., Co., 44 Mo. App. 111.

Nebraska.— Leavitt *v.* Sizer, 35 Nebr. 80, 52 N. W. 832.

New Jersey.— Snyder *v.* Findley, 1 N. J. L. 921, 1 Am. Dec. 193.

New York.— Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923; Marsh *v.* Falker, 40 N. Y. 562; Wilkinson *v.* Herbert, 13 N. Y. St. 436.

North Carolina.— Thompson *v.* Tate, 5 N. C. 97, 3 Am. Dec. 678.

Pennsylvania.— Bower *v.* Fenn, 90 Pa. St. 359, 35 Am. Rep. 662.

Tennessee.— Donelson *v.* Young, Meigs 155.

Texas.— Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

Vermont.— Cabot *v.* Carlisle, 42 Vt. 121, 1 Am. Rep. 313.

Wisconsin.— Cotzhausen *v.* Simon, 47 Wis. 103, 1 N. W. 473.

United States.— Lynch *v.* Mercantile Trust Co., 5 McCrary 623, 18 Fed. 486.

England.— Cann *v.* Willson, 39 Ch. D. 39, 57 L. J. Ch. 1034, 37 Wkly. Rep. 23; Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899.

11. *Alabama.*— Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56.

Florida.— Ladd *v.* Chaires, 5 Fla. 395.

Georgia.— Terhune *v.* Dever, 36 Ga. 648; Reese *v.* Wyman, 9 Ga. 430; Smith *v.* Mitchell, 6 Ga. 458.

Illinois.— Lockbridge *v.* Foster, 5 Ill. 569.

Iowa.— Hunter *v.* Friend League Safety Cure Co., 96 Iowa 573, 65 N. W. 828; May *v.* Snyder, 22 Iowa 525.

Kentucky.—Shackelford *v.* Hendley, 1 A. K. Marsh. 496, 10 Am. Dec. 753.

Maine.— Harding *v.* Randall, 15 Me. 332.

Maryland.— Taymon *v.* Mitchell, 1 Md. Ch. 496.

Massachusetts.— Hazard *v.* Irwin, 18 Pick. 95.

Michigan.— Beebe *v.* Young, 14 Mich. 136.

Minnesota.— Brooks *v.* Hamilton, 15 Minn. 26.

Missouri.— Florida *v.* Morrison, 44 Mo. App. 529; Yeater *v.* Hines, 24 Mo. App. 619.

New York.— Indianapolis, etc., R. Co. *v.* Tyng, 63 N. Y. 653; Hammond *v.* Pennock,

sentation of a fact supposed to be peculiarly within his knowledge, whether he knew it to be false or made the assertion recklessly, without knowing whether it was true or false, is wholly immaterial.[12]

(c) *Representation Unreasonably Believed to Be True.* In England a misstatement of fact believed to be true is not a fraud, even though the belief is not based on reasonable grounds,[13] and this rule has been followed by some courts in this country.[14] Other courts, however, have held that a positive affirmation made

61 N. Y. 145; Marsh *v.* Falker, 40 N. Y. 262; Hubbard *v.* Briggs, 31 N. Y. 518; Bennett *v.* Judson, 21 N. Y. 238; Sharp *v.* New York, 40 Barb. 256; Craig *v.* Ward, 36 Barb. 377; Busch *v.* Busch, 12 Daly 476; Alker *v.* Alker, 12 N. Y. Suppl. 676; People *v.* Sully, 5 Park. Crim. 142.

Ohio.— Parmlee *v.* Adolph, 28 Ohio St. 10.

Pennsylvania.— Hunt *v.* Moore, 2 Pa. St. 105.

Tennessee.— Lewis *v.* McLemore, 10 Yerg. 206.

Texas.— Haldeman *v.* Chambers, 19 Tex. 1.

Virginia.— McMullin *v.* Sanders, 79 Va. 356; Linhart *v.* Foreman, 77 Va. 540.

Wisconsin.— Krause *v.* Busacker, 105 Wis. 350, 81 N. W. 406; Beetle *v.* Anderson, 98 Wis. 5, 73 N. W. 560; Montreal River Lumber Co. *v.* Mihills, 80 Wis. 541, 50 N. W. 507; Cotzhausen *v.* Simon, 47 Wis. 106, 1 N. W. 473; Bird *v.* Kleiner, 41 Wis. 134.

United States.— Cooper *v.* Schlesinger, 111 U. S. 148, 4 S. Ct. 360, 28 L. ed. 382; Smith *v.* Richards, 13 Pet. 26, 10 L. ed. 42; Hough *v.* Richardson, 3 Story 659, 12 Fed. Cas. No. 6,722; Daniel *v.* Mitchell, 1 Story 172, 6 Fed. Cas. No. 3,562; Smith *v.* Babcock, 2 Woodb. & M. 246, 22 Fed. Cas. No. 13,009.

12. Mitchell *v.* Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; and other cases in the two preceding notes.

Illustrations.— Where two persons in a bank, upon treaty with an incoming partner, joined in presenting to him a false statement of the affairs of the bank, by which he was induced to become a partner, and the statement was false to the knowledge of one of them, who was acquainted with the affairs of the bank, but not to the knowledge of the other, who joined in it in reliance upon his partner, it was held that the incoming partner was entitled to rescind the contract and to claim restitution against both partners. As regards the innocent partner, it was explained to be at least a representation of a fact of which he knew nothing whatever, whether it was true or not, and it was said in substance that if, on the treaty for a purchase, one party makes a representation, he cannot be afterward heard to say that he knew nothing about the matter; nor can he be allowed to retain any benefit which he might have acquired from the representation which he has made. Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237. See also Donelson *v.* Young, Meigs (Tenn.) 155, where a machinist sold a machine sent by himself which was wholly worthless, representing it to be a good one. It was held to be a fraud, although, through want of skill in his business, he was ignorant that the machine was not a good one. And see Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313, where a vendor of land to induce the sale stated the quantity as of his own knowledge, and the vendee relying on such statement purchased, the statement being untrue, although not to the knowledge of the vendor. It was held that the vendor in representing as a fact that as to which he only had a belief was guilty of fraud and liable to the vendee for the damage sustained.

13. Collins *v.* Evans, 5 Q. B. 820, Dav. & M. 669, 8 Jur. 345, 13 L. J. Q. B. 180, 48 E. C. L. 820; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33. In the case last cited defendants were directors of a tramway company, which had power by a special act to make tramways, and with the consent of the board of trade to use steam power to move the carriages. In order to obtain the special act, the plans of the company required the approval of the board of trade, and the directors assumed that as their plans had been approved by the board before their act was passed the consent of the board to the use of steam power, which they had to obtain after the act was passed, would be given as of course. They issued a prospectus in which they called attention to their right to use steam power as one of the important features of their undertaking. The consent of the board of trade was refused, the company was wound up, and a shareholder brought an action of deceit against the directors. It was held that as the prospectus expressed the honest belief of the directors they were not liable, even though it was a belief for which no reasonable ground existed.

14. *Arkansas.*— Morton *v.* Scull, 23 Ark. 289.

Georgia.— Terrell *v.* Bennett, 18 Ga. 404.

Illinois.— Merwin *v.* Arbuckle, 81 Ill. 501.

Iowa.— Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; McKown *v.* Fergason, 47 Iowa 636; Wilcox *v.* Iowa Wesleyan University, 32 Iowa 367; Holmes *v.* Clark, 10 Iowa 423.

Kansas.— Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978.

Maine.— Kingsbury *v.* Taylor, 29 Me. 508, 50 Am. Dec. 607.

New Hampshire.— Pettigrew *v.* Chellis, 41 N. H. 95.

New York.— Oberlander *v.* Spiess, 45 N. Y.

by one of his own knowledge implies a representation that he has knowledge of the truth of the affirmation, and if false it is fraudulent.[15]

(D) *Representation Subsequently Becoming False.*[16] If a person make a representation believing it to be true, but afterward he discovers it to be false, he must not allow the party to go on and act on the faith of the representation; and if he does so he is guilty of fraud.[17]

(II) *INTENT*—(A) *That Representation Be Acted Upon.* It is essential, to constitute fraud, that the representation shall have been made with the intention that it should be acted upon by the injured party.[18] If, however, there is that

175; Lawton *v.* Goodrich, 4 Silv. Supreme 24, 7 N. Y. Suppl. 76, 26 N. Y. St. 25.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716; Cox *v.* Highley, 100 Pa. St. 249.

United States.— Lord *v.* Goddard, 13 How. 198, 14 L. ed. 111; Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 574.

See FRAUD.

Negligence and forgetfulness.— The same is true when a party was negligent or ought to have known or remembered the fact but did not. East *v.* Matheny, 1 A. K. Marsh. (Ky.) 192, 10 Am. Dec. 721; Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J. Ch. 559, 1 Wkly. Rep. 295.

15. *Indiana.*— Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

Massachusetts.— Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Litchfield *v.* Hutchinson, 117 Mass. 197.

Minnesota.—Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533; Bullitt *v.* Farrar, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138; Brooks *v.* Hamilton, 15 Minn. 26.

Missouri.— Raley *v.* Williams, 73 Mo. 310; McBeth *v.* Craddock, 28 Mo. App. 380.

New Jersey.— State *v.* Cases, 52 N. J. L. 77, 18 Atl. 972; Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

Vermont.— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

Wisconsin.— Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507.

See FRAUD.

16. Representation subsequently becoming true see *infra*, VI, D, 2, j.

17. Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510; Traill *v.* Baring, 4 De G. J. & S. 318, 328, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 10 L. T. Rep. N. S. 215, 12 Wkly. Rep. 678, 69 Eng. Ch. 247 (where it was said: "If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, . . . it is the imperative duty of the party who has made the representation to communicate . . . the alteration of those circumstances; and that this Court will not hold the party . . . bound unless such a communication has been made"). See also Patten *v.* Glatz, 87 Fed. 283; Loewen *v.* Harris, 57 Fed. 368.

Illustrations.—Thus in Guilford School Tp. *v.* Roberts, (Ind. 1902) 62 N. E. 711, where a woman applied for a position as schoolteacher, and in her first interview with the school trustee stated that she was not married, and did not intend to be married during the school year, the trustee telling her that he would not employ a married woman as a teacher, and two months thereafter she signed the contract in her maiden name, at which time she had been married four days, without the knowledge of the trustee, it was held that the contract was voidable for fraud. So in Loewen *v.* Harris, 57 Fed. 368, it was held that concealment by the owner of a business enterprise of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale was actionable, when the purchaser had no opportunity of discovering the decline, and had agreed to buy on the faith of representations as to the prior rate of profit, telling the seller that he would not buy if there had been a decline. And in Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216, it was held that a statement made in an application for life insurance, whether a warranty or only a representation, speaks from the time of the delivery of the policy, and if after the statement is made a material change occurs in the condition of the applicant, covered by such statement, before the contract is consummated, an absolute duty rests upon the applicant to make disclosure of the fact. See INSURANCE.

18. *Iowa.*— Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98.

Maine.— Carter *v.* Harden, 78 Me. 528, 7 Atl. 392.

Maryland.— Buschman *v.* Codd, 52 Md. 202.

Massachusetts.— Hunnewell *v.* Duxbury, 154 Mass. 281, 28 N. E. 267, 13 L. R. A. 738; Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938; Davison *v.* Nichols, 11 Allen 514.

Minnesota.— Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

New Jersey.— Vreeland *v.* New Jersey Store Co., 29 N. J. Eq. 188.

New York.— Victor *v.* Henlien, 33 Hun 549; Bach *v.* Tuch, 10 N. Y. Suppl. 884, 32 N. Y. St. 941.

Ohio.— Wells *v.* Cook, 16 Ohio St. 67, 88 Am. Dec. 436.

Virginia.— Barnett *v.* Barnett, 83 Va. 504,

intention, express or implied, it is not necessary that the representation shall have been made directly to the injured party.[19]

(B) *Intent to Defraud.* If a representation is false to the knowledge of the party making it, and is made with intent that it shall be acted upon by the other party, and is acted upon to his injury, it is a fraud, whether the party making it intended to defraud or not.[20]

h. Materiality of Representation — (1) *In General.* The misrepresentation must be material, that is, it must have been an inducement to the contract, otherwise it will not be a ground for avoiding it.[21] It is not enough that it may

509, 2 S. E. 733, where it was said: "The untruth of a representation made to the party on some former occasion, and for a different purpose, cannot be relied on as a ground either for rescinding a contract, or for maintaining an action of deceit."

Washington.— Thorp *v.* Smith, 18 Wash. 277, 279, 51 Pac. 381, where it was said: "The respondent has cited many authorities on the proposition, substantially, that where a third party conspires with an agent to defraud a principal, such third party is liable to the principal for the damages resulting, and this must be conceded, but we think that the general rule is well settled that a party complaining of deception must show that such third party made such false representations with the intention that he should act upon them, and that it is not enough to show that false representations were made with a knowledge of their falsity." See also Tacoma *v.* Tacoma Light, etc., Co., 16 Wash. 288, 47 Pac. 738.

United States.— Marshall *v.* Hubbard, 117 U. S. 415, 6 S. Ct. 806, 29 L. ed. 919; Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121; Sigafus *v.* Porter, 84 Fed. 430; Plattsburg First Nat. Bank *v.* Sowles, 46 Fed. 731.

England.— Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024; Barry *v.* Croskey, 2 Johns. & H. 1.

19. See *supra*, V, C, 2; and FRAUD.

20. *Massachusetts.*—Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Litchfield *v.* Hutchinson, 117 Mass. 195.

Minnesota.— Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

Missouri.— Dulaney *v.* Rogers, 64 Mo. 201.

United States.— Lynch *v.* Mercantile Trust Co., 5 McCrary 623, 18 Fed. 486.

England.— Foster *v.* Charles, 6 Bing. 396, 19 E. C. L. 183, 7 Bing. 105, 107, 20 E. C. L. 55, 8 L. J. C. P. O. S. 118, 4 M. & P. 61, 741, 31 Rev. Rep. 446 (where it was said that "it is fraud in law if a party make representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad"); Dickson *v.* Reuter's Telegram Co., 3 C. P. D. 1.

See FRAUD.

Illustrations.— Thus where a person accepted a bill of exchange drawn on another person, representing himself to have authority from that other to accept, and honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act, but he knew that he had no such authority, and the bill was dishonored at maturity, it was held that he was liable to an indorsee, who had given value for the bill on the strength of the representation. Polhill *v.* Walter, 3 B. & Ad. 114, 1 L. J. K. B. 92, 23 E. C. L. 59. So also a purchaser of goods is liable for false statements as to his financial condition, although he intends and expects to pay for them. Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40. See SALES.

21. *Arkansas.*— Righter *v.* Roller, 31 Ark. 170; Hughes *v.* Sloan, 8 Ark. 146.

California.— Nounnan *v.* Sutter County Land Co., 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; Purdy *v.* Bullard, 41 Cal. 444. And see Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

Colorado.— Larimer County Land Imp. Co. *v.* Cowan, 5 Colo. 320.

Illinois.— Young *v.* Young, 113 Ill. 430.

Indiana.— Connersville *v.* Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214. And see Gatling *v.* Newell, 9 Ind. 572.

Maine.— Palmer *v.* Bell, 85 Me. 352, 27 Atl. 250.

Massachusetts.—Dawe *v.* Morris, 149 Mass. 188, 21 N. E. 313, 14 Am. St. Rep. 404, 4 L. R. A. 158.

Michigan.— Davis *v.* Davis, 97 Mich. 419, 56 N. W. 774.

Minnesota.— Winston *v.* Young, 52 Minn. 1, 53 N. W. 1015.

Missouri.— Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295.

Nebraska.— Clark *v.* Tennant, 5 Nebr. 549.

New York.— Curtiss *v.* Howell, 39 N. Y. 211; Taylor *v.* Scoville, 3 Hun 301; Canary *v.* Russell, 9 Misc. 558, 30 N. Y. Suppl. 122, 61 N. Y. St. 665.

North Carolina.—Gilmer *v.* Hanks, 84 N. C. 317.

Pennsylvania.— Clark *v.* Everhart, 63 Pa. St. 347.

Tennessee.— Leiker *v.* Henson, (Tenn. Ch. 1896) 41 S. W. 862.

Texas.— Lemmon *v.* Hanley, 28 Tex. 219.

Virginia.— Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733.

Wisconsin.— Blewett *v.* McRea, 88 Wis. 280, 60 N. W. 258.

United States.— Smith *v.* Richards, 13 Pet. 26, 10 L. ed. 42; Buckner *v.* Street, 5 McCrary 59, 15 Fed. 365.

England.— Geddes *v.* Pennington, 5 Dow 159, 3 Eng. Reprint 1287; Vernon *v.* Keys,

have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place. It may be stated as a rule that it is always material if, had it been known to be false, the contract would not have been entered into.[22]

(II) *Representation as to One of Several Matters.* A misrepresentation as to one of several matters, which is material, or a representation including several matters which is false in one material point, is sufficient to vitiate the whole agreement.[23] It is not sufficient for the party to show that there were other representations or inducements in operation, without further proving that the agreement was due to them only, to the entire exclusion of the false representation.[24] And although the misrepresentation affects part only of the agreement, it in general vitiates it *in toto*; the party who made it is not entitled, by waiving the part affected, to enforce the rest.[25]

i. Reliance on Representation — (I) *In General.* If the representation was not relied upon by the party it is of no effect, for it has not deceived him.[26]

12 East 632; Green *v.* Gosden, 5 Jur. 1010, 11 L. J. C. P. 4, 3 M. & G. 446, 4 Scott N. R. 13, 42 E. C. L. 237.

See 11 Cent. Dig. tit. "Contracts," § 421.

22. *Colorado.*— Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

Maryland.— McAleer *v.* Horsey, 35 Md. 439.

Massachusetts.— Holst *v.* Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; Powers *v.* Fowler, 157 Mass. 318, 32 N. E. 166.

Michigan.— Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Missouri.— Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295.

Nebraska.— American Bldg., etc., Assoc. *v.* Bear, 48 Nebr. 455, 67 N. W. 500.

Vermont.— Stone *v.* Rohie, 66 Vt. 245, 29 Atl. 257.

Wisconsin.— Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161.

England.— Pulsford *v.* Richards, 17 Beav. 87, 96, 17 Jur. 865, 22 L. J. Ch. 559, 1 Wkly. Rep. 295 (where it was said: "To use the expression of the Roman law, . . . it must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract: the proper interpretation of which appears to me to be, the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether"); Vernon *v.* Keys, 12 East 632 (holding the representation immaterial, where the buyer of goods, in negotiating the purchase, alleged falsely, as the reason for the limited amount of his offer, that his partner would not consent to his giving more); Green *v.* Gosden, 5 Jur. 1010, 11 L. J. C. P. 4, 3 M. & G. 446, 4 Scott N. R. 13, 42 E. C. L. 237 (where upon the negotiation for a loan of money, the lenders represented that it was lent by a joint-stock loan company, but in fact it was lent by themselves only, who called themselves the company, which did not otherwise exist, it being held that the representation was immaterial, as the real inducement to the borrower was the advance of the money).

23. Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510; Hallows *v.* Fernie, L. R. 3 Eq. 520, 36 L. J. Ch. 267.

24. *Illinois.*— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Ruff *v.* Jarrett, 94 Ill. 475; Snively *v.* Meixsell, 97 Ill. App. 365.

Massachusetts.— Safford *v.* Grout, 120 Mass. 20.

Minnesota.— Burr *v.* Willson, 22 Minn. 206.

Missouri.—Saunders *v.* McClintock, 46 Mo. App. 216.

New York.— Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Morgan *v.* Skiddy, 62 N. Y. 319.

South Carolina.— Lebby *v.* Ahrens, 26 S. C. 275, 2 S. E. 387.

England.— Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899 [*reversed* in 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33]; Matter of Royal British Bank, 3 De G. & J. 387, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 7 Wkly. Rep. 217, 60 Eng. Ch. 301.

25. Leake Contr. 379.

26. *California.*— Colton *v.* Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

Florida.— Stephens *v.* Orman, 10 Fla. 9.

Georgia.— Boyce *v.* Watson, 20 Ga. 517.

Illinois.— Hana *v.* Reyburn, 84 Ill. 533; Tuck *v.* Downing, 76 Ill. 71; Hall *v.* Jarvis, 65 Ill. 302.

Indiana.— Craig *v.* Hamilton, 118 Ind. 565, 21 N. E. 315; Hagee *v.* Grossman, 31 Ind. 223; Gatling *v.* Newell, 9 Ind. 572.

Kentucky.— Mechanics', etc., Ins. Co. *v.* Floyd, 49 S. W. 543, 20 Ky. L. Rep. 1538.

Maryland.— Buschman *v.* Codd, 52 Md. 202; Ely *v.* Stewart, 2 Md. 408.

Deceit which does not deceive, it has been said, is not fraud, and it would seem as reasonable to defend an action brought for the price of goods on the ground that the seller was a man of immoral character as to maintain that a contract was voidable by reason of a deceit practised by one party but in no way affecting the judgment of the other.[27]

(II) *Party Relying on His Own Judgment.* Where the party does not rely upon the representation, as where he either does not believe it or relies upon his own judgment or the result of his own inquiries in the matter, there is no fraud as to him.[28] A case of this kind arises where a seller of goods knowingly

Massachusetts.— Crehore *v.* Crehore, 97 Mass. 330, 93 Am. Dec. 98.

Minnesota.— Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Mississippi.— Harris *v.* Ransom, 24 Miss. 504.

Missouri.— Priest *v.* White, 89 Mo. 609, 1 S. W. 361; Andrews *v.* McPike, 86 Mo. 293; Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84; Ring *v.* Chas. Vogel Paint, etc., Co., 44 Mo. App. 111.

Nebraska.— Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660.

New York.— Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376, 21 N. Y. St. 791; Long *v.* Warren, 68 N. Y. 426.

Oregon.— Abilene Nat. Bank *v.* Nodine, 26 Oreg. 53, 37 Pac. 47; Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

Virginia.— Max Meadow Land, etc., Co. *v.* Brady, 92 Va. 71, 22 S. E. 845.

West Virginia.— Ludington *v.* Renick, 7 W. Va. 273.

Wisconsin.— Fowler *v.* McCann, 86 Wis. 427, 56 N. W. 1085; Sheldon *v.* Davidson, 85 Wis. 138, 55 N. W. 161; Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255; Van Trott *v.* Wiese, 36 Wis. 439; Risch *v.* Von Lillienthal, 34 Wis. 250.

United States.— Slaughter *v.* Gerson, 13 Wall. 379, 20 L. ed. 627; Brady *v.* Evans, 78 Fed. 558, 24 C. C. A. 236; Columbian Equipment Co. *v.* Highland Ave., etc., R. Co., 74 Fed. 920; Richardson *v.* Walton, 49 Fed. 888.

England.— Tatton *v.* Wade, 18 C. B. 371, 86 E. C. L. 371; Peek *v.* Derry, 37 Ch. D. 541, 57 L. J. Ch. 347, 59 L. T. Rep. N. S. 78, 36 Wkly. Rep. 899; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 50 J. P. 52, 55 L. J. Ch. 650, 53 L. T. Rep. N. S. 369, 33 Wkly. Rep. 911; Smith *v.* Chadwick, 20 Ch. D. 27, 51 L. J. Ch. 597, 46 L. T. Rep. N. S. 702, 30 Wkly. Rep. 661; Attwood *v.* Small, 6 Cl. & F. 232, 2 Jur. 200, 7 Eng. Reprint 684; Horsfall *v.* Thomas, 1 H. & C. 90, 8 Jur. N. S. 721, 31 L. J. Exch. 322, 6 L. T. Rep. N. S. 462, 10 Wkly. Rep. 650.

Illustrations.— In Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121, the holder of a policy of life insurance determined to surrender it and obtain its surrender value, at the same time taking a new policy. For the purpose of effecting the change he went to the office of the agent of the company, where he was examined by its physician, who rejected him as an applicant for new insurance on the ground that he had an affection of the heart. At the same time the physician stated to him that the disease was not in itself dangerous and would not cause his death, but would prevent him from obtaining insurance in any other company, and advised him to retain the policy he then held. The insured, however, surrendered the policy, and he and his wife, who was the beneficiary, executed a release thereof. In fact his disease, as the physician knew, was likely to cause his death at any time, and did so within a few days thereafter. It was held that the wife could not avoid the release because of the false statement made by the physician, as it was not the inducement to its execution, nor intended to be so, although if the physician had stated the truth within his knowledge, it might have prevented the surrender of the policy.

27. Anson Contr. 175.

28. *Alabama.*— Darby *v.* Kroell, 92 Ala. 607, 8 So. 384.

Georgia.— Reese *v.* Wyman, 9 Ga. 430.

Illinois.— Dady *v.* Condit, 163 Ill. 511, 45 N. E. 224; Bartlett *v.* Blaine, 83 Ill. 25, 25 Am. Rep. 346; Fauntleroy *v.* Wilcox, 80 Ill. 477.

Indiana.—Hagee *v.* Grossman, 31 Ind. 223; Denny *v.* Woods, 2 Ind. App. 301, 28 N. E. 443.

Iowa.— Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

Michigan.— Pratt *v.* Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703.

Minnesota.— Cobb *v.* Wright, 43 Minn. 83, 44 N. W. 662.

Mississippi.— Hall *v.* Thompson, 1 Sm. & M. 401.

Missouri.— Wade *v.* Ringo, 122 Mo. 322, 25 S. W. 901.

New York.— Taylor *v.* Guest, 58 N. Y. 262.

North Carolina.—Black *v.* Black, 110 N. C. 398, 14 S. E. 971; Brown *v.* Gray, 51 N. C. 103, 72 Am. Dec. 563.

Oregon.— Wimer *v.* Smith, 22 Oreg. 469, 30 Pac. 416.

Virginia.— Shoemaker *v.* Coke, 83 Va. 1, 1 S. E. 387.

West Virginia.— Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

Wisconsin.— Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179.

United States.— Farrar *v.* Churchill, 135 U. S. 609, 10 S. Ct. 771, 34 L. ed. 246; Southern Development Co. *v.* Silva, 125 U. S. 247,

makes false representations to the buyer as to their quality, but the buyer in making the purchase relies on a test of their quality made of one selected by him.[29] So one who contracts for the purchase of real estate after representations and statements of the vendor as to its character and value, but after he has visited and examined it for himself, and has had the means and opportunity of verifying such statements, cannot avoid the contract on the ground that they were false or exaggerated.[30]

(III) *Representation Known to Be False.* A representation which the other party knows to be untrue cannot have induced the contract or have been relied upon by him and is not a ground for avoiding it.[31]

(IV) *Lapse of Time.* The fact that a considerable time elapsed after a representation was made, and before the party complaining of it acted, does not necessarily show that he did not act upon it.[32]

(V) *Right to Rely on Representations*—(A) *In General.* There are certain representations, known as "dealer's talk," on which persons are not supposed to rely, and which cannot be set up as fraud. Of this character are representations amounting merely to commendatory expressions or exaggerated statements as to value, prospects, and the like, as where a seller puffs up the value and quality of his goods, or a man, to induce another to contract with him, holds out flattering prospects of gain. They are not such statements as reasonable men are in the habit of relying upon in making up their minds to enter into the agreement, and do not constitute fraud.[33]

(B) *Where Means of Knowledge Are at Hand.* Where the means of knowledge of the truth of the representation are at the party's hand, he will be presumed to have had such knowledge, and the court will not generally relieve him.[34]

8 S. Ct. 881, 31 L. ed. 678; Marshall *v.* Hubbard, 117 U. S. 415, 6 S. Ct. 806, 29 L. ed. 919; Ming *v.* Wolfolk, 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740.

England.—Arkwright *v.* Newbold, 17 Ch. D. 301, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455.

29. Hagee *v.* Grossman, 31 Ind. 223. See Sales.

30. Farrar *v.* Churchill, 135 U. S. 609, 10 S. Ct. 771, 34 L. ed. 246; Brown *v.* Smith, 109 Fed. 26. See Vendor and Purchaser.

31. *Indiana.*— Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476.

Maine.— Berry *v.* Bakeman, 44 Me. 164.

Maryland.— Ely *v.* Stewart, 2 Md. 408.

Mississippi.— Bell *v.* Henderson, 6 How. 311; Anderson *v.* Burnett, 5 How. 165, 35 Am. Dec. 425.

New York.—Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Hunt *v.* Singer, 1 Daly 209; Rich *v.* Mayer, 7 N. Y. Suppl. 69, 26 N. Y. St. 107.

North Carolina.— Foy *v.* Haughton, 83 N. C. 467.

Oregon.— Kelley *v.* Highfield, 15 Oreg. 277, 14 Pac. 744.

England.— Dyer *v.* Hargrave, 10 Ves. Jr. 505, 8 Rev. Rep. 36. In this case a farm was sold under the description of being in a "ring fence," but it appeared that the purchaser saw the farm before the purchase, had lived in the neighborhood, and must have known whether it did lie in a ring-fence or not. It was held that he was liable on the contract, notwithstanding the farm was so misdescribed.

32. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938, holding that where it appeared that a person made false representations as to the value of shares of stock, for the purpose of inducing another to buy the same, it could not be said as a matter of law that such representations could not have continued to operate in the plaintiff's mind and influence him in purchasing stock eleven months afterward.

33. *Alabama.*— Lockwood *v.* Fitts, 90 Ala. 150, 7 So. 467.

Arkansas.— Wilson *v.* Strayhorn, 26 Ark. 28; Hawkins *v.* Campbell, 6 Ark. 513.

Illinois.— Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88.

Indiana.— Gatling *v.* Newell, 9 Ind. 572.

Kansas.— Burns *v.* Mahannah, 39 Kan. 87, 17 Pac. 319.

Maryland.— Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

Massachusetts.— Deming *v.* Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113.

Michigan.— Jackson *v.* Collins, 39 Mich. 557.

United States.— Southern Development Co. *v.* Silva, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678.

See Sales; Vendor and Purchaser.

34. *Arkansas.*— Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727.

California.— Lee *v.* McClelland, 120 Cal. 147, 52 Pac. 300; Blen *v.* Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 Am. Dec. 132.

District of Columbia.— Sanders *v.* Lyon, 2 MacArthur 452.

But while this rule has been laid down generally in a number of cases it is not uniformly followed. On the contrary many cases hold that a person cannot escape the consequences of a deliberate false representation, made with intent to deceive, and which did deceive, by showing that the other party had the opportunity to ascertain the truth for himself.[35] And certainly when false representa-

Florida.— Stephens *v.* Orman, 10 Fla. 9.

Georgia.— Hunt *v.* Hardwick, 68 Ga. 100.

Illinois.— Moore *v.* Recek, 163 Ill. 17, 44 N. E. 868.

Indiana.— Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

Iowa.— Mansfield *v.* Watson, 2 Iowa 111.

Kentucky.— Marshall *v.* Peck, 1 Dana 609; Moore *v.* Turbeville, 2 Bibb 602, 5 Am. Dec. 642.

Louisiana.— Watson *v.* Planters' Bank, 22 La. Ann. 14.

Massachusetts.— Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215, holding that one proposing to buy an interest in a business and a stock of goods, and having ample opportunity to examine and investigate, may not rely on the seller's representations as to the value of the goods or the extent of the business.

Minnesota.— Brooks *v.* Hamilton, 15 Minn. 26.

New Jersey.— Pidcock *v.* Swift, 51 N. J. Eq. 405, 27 Atl. 470, where it was said: "If the defendant did not know what was going on, it is because he shut his mind so as not to perceive what he knew he would perceive if he kept it open. It is a principle of sound law, as well as of good morals, that a man who shuts his eyes to avoid seeing what he believes he will see if he keeps them open, shall be held to have seen what he would have seen had he not shut them."

New York.— Long *v.* Warren, 68 N. Y. 426 [*criticized*, however, in Schumaker *v.* Mather, 133 N. Y. 590, 30 N. E. 755, 44 N. Y. St. 754, and Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40]; Starr *v.* Bennett, 5 Hill 303.

Pennsylvania.— Phipps *v.* Buckman, 30 Pa. St. 401.

South Carolina.— Montgomery *v.* Scott, 9 S. C. 20, 30 Am. Rep. 1.

Vermont.— McDaniels *v.* Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406; Williams *v.* Hicks, 2 Vt. 36, 19 Am. Dec. 693.

Virginia.— Rowland Lumber Co. *v.* Ross, 100 Va. 275, 40 S. E. 922, 4 Va. Supreme Ct. 191, holding that where a dredging company offered to dredge a channel for a lumber company to a proposed site for a lumber shed, and the latter acknowledged receipt of the bid for the digging of a channel six hundred feet long and forty feet wide, and it appeared that the whole environment and physical conditions of the proposed channel were obvious and open to inspection, a claim by the dredging company that it was misled by the lumber company's misrepresentations as to the locality and the depth of the water at such point could not be sustained.

Wisconsin.— Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

United States.— Slaughter *v.* Gerson, 13 Wall. 379, 20 L. ed. 627 (where it is said that "where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations"); Illingworth *v.* Spaulding, 43 Fed. 827.

England.— Bayly *v.* Merrel, Cro. Jac. 386, where a person induced another to carry goods for him at so much per hundred weight by a false statement of the weight of the goods, and it was held no fraud, because the carrier might have ascertained the correct weight for himself.

35. *Alabama.*—Burroughs *v.* Pacific Guano Co., 81 Ala. 255, 1 So. 212.

Arkansas.— Graham *v.* Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Gammill *v.* Johnson, 47 Ark. 335, 1 S. W. 610.

California.— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Illinois.— Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503; Linington *v.* Strong, 107 Ill. 295, 302 (where is was said: "While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he can not escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care"). See also Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615.

Indiana.— Ledbetter *v.* Davis, 121 Ind. 119, 22 N. E. 744; Cross *v.* Herr, 96 Ind. 96; Hagee *v.* Grossman, 31 Ind. 223; Matlock *v.* Todd, 19 Ind. 130.

Iowa.— Brett *v.* Van Auken, 99 Iowa 553, 68 N. W. 891; Clark *v.* Ralls, (1885) 24 N. W. 567; Hale *v.* Philbrick, 42 Iowa 81.

Massachusetts.—Lewis *v.* Jewell, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454.

Michigan.— Jackson *v.* Collins, 39 Mich. 557.

Minnesota.— Shrimpton *v.* Philbrick, 53 Minn. 366, 55 N. W. 551; Erickson *v.* Fisher, 51 Minn. 300, 53 N. W. 638; Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056; Maxfield *v.* Schwartz, 45 Minn. 150, 47 N. W. 448,

tions are made by one, and the other has not equal facilities for ascertaining the truth, he has a right to rely upon them, and his neglect to investigate does not affect his rights.[36] So a party has a right to rely on a statement made by the other party as to a matter within the latter's knowledge, where the only other information obtainable would be a statement of another.[37] In general where a misrepresentation has in fact been made, the burden of proof lies upon the party making it to show not only that the other party had the means of information, but that he relied upon his own information or judgment and was not in fact misled by the misrepresentation,[38] unless it was understood that the other party should make an investigation and act upon his own judgment.[39]

10 L. R. A. 606; Porter *v.* Fletcher, 25 Minn. 493; Burr *v.* Willson, 22 Minn. 206.

Missouri.— Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

New York.— Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117.

North Carolina.— Walsh *v.* Hall, 66 N. C. 233.

North Dakota.— Fargo Gas, etc., Co. *v.* Fargo Gas, etc., Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593.

Tennessee.— Perkins *v.* McGavock, Cooke 415.

Vermont.— Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832; Kendall *v.* Wilson, 41 Vt. 567.

Virginia.—Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824.

Washington.— Tacoma *v.* Tacoma Light, etc., Co., 17 Wash. 458, 50 Pac. 55; Rathbone *v.* Frost, 9 Wash. 162, 37 Pac. 298.

Wisconsin.— Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516; Warder *v.* Whitish, 77 Wis. 430, 46 N. W. 540; McClellan *v.* Scott, 24 Wis. 81.

United States.— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444; McAlister *v.* Barry, Brun. Col. Cas. 24, 15 Fed. Cas. No. 8,656, 3 N. C. 473.

England.— Aaron's Reefs *v.* Twiss, [1896] A. C. 273, 65 L. J. P. C. 54, 74 L. T. Rep. N. S. 794; Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510.

36. *Alabama.*— Pierce *v.* Wilson, 34 Ala. 596.

Illinois.— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241 (where a person negotiating for the purchase of an invention from the inventor knew nothing about the facts, and had no ready means of information, and the invention could not be properly tested except by experts, it being held that he had a right to rely on the inventor's representation as to the value of the invention); Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503.

Iowa.— Hale *v.* Philbrick, 42 Iowa 81.

Massachusetts.— David *v.* Park, 103 Mass. 501.

Michigan.—Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Missouri.— Cottrill *v.* Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

New Hampshire.— Stewart *v.* Stearns, 63 N. H. 99, 56 Am. Rep. 496.

New York.— Dambmann *v.* Schulting, 75 N. Y. 55; Meal *v.* Bunn, 32 N. Y. 275.

Pennsylvania.— Sutton *v.* Morgan, 158 Pa. St. 204, 27 Atl. 894, 38 Am. St. Rep. 841.

Texas.— Jones *v.* Jones, 2 Tex. App. Civ. Cas. § 3.

Vermont.— Kendall *v.* Wilson, 41 Vt. 567.

Wisconsin.— Warder *v.* Whitish, 77 Wis. 430, 46 N. W. 540.

United States.— Hingston *v.* L. P. Smith, etc., Co., 114 Fed. 294, 52 C. C. A. 206, holding that a party making a contract to dredge a harbor, and being some distance from the harbor at the time, was entitled to rely on the representations of the other party, who had done a portion of the work, and had access to the chart showing soundings, as to the thickness of the rock to be removed, and was not required to investigate the facts himself.

England.— Dobell *v.* Stevens, 3 B. & C. 623, 5 D. & R. 490, 3 L. J. K. B. O. S. 89, 10 E. C. L. 283; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237. See Lysney *v.* Selby, 2 Ld. Raym. 1118, where the vendor of a reversionary estate represented the rents to be greater than they in fact were, and the purchaser bought on the faith of the representation, without inquiring of the tenants, it being held that the vendor was responsible for the misrepresentation.

37. Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794.

38. Leake Contr. 387.

39. Munkres *v.* McCaskill, 64 Kan. 516, 68 Pac. 42, holding that where, in an agreement for the sale of property, it is expressly stipulated that the contract, when made, shall not be binding upon the parties thereto, but is made subject to an investigation of the property of one party by the other, and made to depend upon the result of such investigation proving satisfactory to the other party, the party so agreeing to make investigation assumes the responsibility of making such full and complete examination of the property as he may desire to satisfy himself as to the truth or falsity of the representations made by the other party, and the advisability of making the exchange; and if, after making an examination of the property, he signifies his satisfaction therewith by closing the trade and exchanging title papers, he cannot rescind the contract upon the ground that he was induced to make it in reliance upon false rep-

j. Damage Must Be Shown. As in an action for deceit,[40] so also in order to avoid a contract for false representations, it is essential that the party complaining shall have been prejudiced or injured by the fraud.[41] Thus it has been held that a purchaser cannot recover damages for fraud when he was induced to pay less than the actual value of the goods,[42] and that a party cannot avoid a security which he has given for a debt clearly due, because he was induced to give it by the false representations of the creditor, made in ignorance of the facts, rather than from a settled purpose to deceive.[43] It has also been held, although there are conflicting decisions, that a representation that was false at the time it was made, but which by a change of circumstances had become a true representation at the time it was acted upon, cannot be set up as constituting fraud.[44]

3. Effect of Fraud — a. Contract Voidable and Not Void. On discovering the fraud by which he was induced to enter into a contract, the party defrauded may elect whether he will treat the contract as binding or refuse to be bound by it; but until he so elects it continues valid. An agreement procured by fraud is voidable and not void.[45] A contract obtained by fraud, being voidable and not

resentations made by the other party to induce the trade, unless some fraud was practised upon him by the other party which prevented his making a full, fair, and complete examination of the property.

40. See Fraud.

41. *Alabama.*— Bomar *v.* Rosser, 131 Ala. 215, 31 So. 430, where a person purchased an interest in a patent, on the representation to him that certain other persons had or would purchase interests, and join in the organization of a company to put it on the market, and they failed to do so, but the evidence showed that other persons of equal responsibility did purchase interests, it being held that unless the alleged representation resulted in damages he could not avoid paying the consideration.

California.—London, etc., Ins. Co. *v.* Liebes, 105 Cal. 203, 38 Pac. 691; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386; Morrison *v.* Lods, 39 Cal. 381.

Illinois.— Schubart *v.* Chicago Gas Light, etc., Co., 41 Ill. App. 181.

Michigan.— Johnson *v.* Seymour, 79 Mich. 156, 44 N. W. 344.

Minnesota.—Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767.

Nebraska.— Lorenzen *v.* Kansas City Invest. Co., 44 Nebr. 99, 62 N. W. 231.

Texas.— Moore *v.* Cross, 87 Tex. 557, 29 S. W. 1051.

But see Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101.

42. Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517. See also Alden *v.* Wright, 47 Minn. 225, 49 N. W. 767.

43. Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

44. Leake Contr. 375; Johnson *v.* Seymour, 79 Mich. 156, 44 N. W. 344 (holding that a sale could not be avoided by the purchaser because of the seller's false representation that there was no mortgage thereon, where the seller had the mortgage released as soon as his attention was called to it); Ship *v.* Crosskill, L. R. 10 Eq. 73, 39 L. J. Ch. 550, 22 L. T. Rep. N. S. 315, 18 Wkly. Rep. 618 (holding that where a company issued a prospectus falsely representing that more than half the capital had been subscribed, by which a person was induced to apply for shares, the representation not being true at the time the prospectus was issued, but having become true at the time of his application, there was no misrepresentation entitling him to relief). See also Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271; Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750.

Conflicting decisions.— It is also held that fraud avoids a contract *ab initio*, and the party committing it can take no advantage of it, nor acquire any rights or interest by means of it, and therefore if the vendor of mortgaged goods, knowing of the mortgage, conceal it from the vendee, the vendee may, on discovering the fraud, treat the contract as void and rescind it by returning or offering to return the property and demanding that given in exchange for it; and that the vendor cannot defeat his right to rescind by afterward procuring a release of the property from the mortgage. Merritt *v.* Robinson, 35 Ark. 483; Thomas *v.* Coultas, 76 Ill. 493. See also Stevenson *v.* Marble, 84 Fed. 23, where the seller of stock and bonds of a corporation falsely and fraudulently represented that the mortgage securing the stock was a first and only mortgage, and it was held that he could not defeat the buyer's suit to rescind the contract by showing that after the suit was brought he paid off and procured the cancellation of the prior encumbrances.

45. *Kansas.*— Myton *v.* Thurlow, 23 Kan. 212.

Kentucky.—Smith *v.* Hornback, 4 Litt. 232, 14 Am. Dec. 122.

Massachusetts.— Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57; Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

New Hampshire.— Concord Bank *v.* Gregg, 14 N. H. 331.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, 41 N. Y. St. 320; Baird *v.* New York, 96 N. Y. 567; Cobb *v.* Hatfield, 46 N. Y. 533.

void, may be ratified by the party who was induced by the fraud to enter into the contract.[46]

b. Remedies of Party Defrauded — (i) *Affirming Contract and Suing For Damages.* When a party has been induced to enter into a contract by false and fraudulent representations, he has several remedies. He may affirm the contract, keeping what he has received under it, and maintain an action to recover the damages which he has sustained by reason of the fraud, or set up such damages as a defense or by way of counter-claim, if sued upon the contract by the other party. Affirmance of the contract is not a waiver of the fraud and does not bar the right to recover such damages,[47] but bars a subsequent rescission merely.[48]

South Carolina.— McCorkle *v.* Doby, 1 Strobh. 396, 47 Am. Dec. 360.

United States.— Foreman *v.* Bigelow, 4 Cliff. 508, 9 Fed. Cas. No. 4,934.

England.— Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 41 L. J. Exch. 17, 25 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189.

46. Wellington *v.* Jackson, 121 Mass. 157; Murray *v.* Riggs, 15 Johns. (N. Y.) 571; Pearsall *v.* Chapin, 44 Pa. St. 9; Jesup *v.* Illinois Cent. R. Co., 43 Fed. 483.

47. *Arkansas.*—Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

Illinois.— Peck *v.* Brewer, 48 Ill. 54.

Indiana.— Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 45 L. R. A. 89; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919. And see St. John *v.* Hendrickson, 81 Ind. 350, 352, 353, where the court said: "There may be a waiver of a right to recover damages for the loss resulting from false and fraudulent representations by an express affirmance. It is essential to such a waiver, that the party should possess full knowledge of the fraud practiced upon him; that he should intend to confirm the contract and abandon all right to recover for the loss resulting from the fraud. . . . We fully recognize and approve the rule that a party may retain what he received, stand to his bargain, and recover for the loss caused him by the fraud. . . . We neither hold nor mean to hold, that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that, where a party with full knowledge of all the material facts does an act which indicates his intention to stand to the contract and waive all right of action for the fraud, he can not maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. . . . It is only equivalent to a ratification when made with full knowledge of the fraud and of all material facts, and with the intention of abiding by the contract, and waiving all right to recover for the deception."

Iowa.— Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664.

Maryland.— Applegarth *v.* Robertson, 65 Md. 493, 4 Atl. 896.

Michigan.— Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Gilchrist *v.* Manning, 54 Mich. 210, 19 N. W. 959.

Minnesota.— Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612.

Missouri.— Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380; Parker *v.* Marquis, 64 Mo. 38.

Nebraska.— Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196.

New York.—Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, 41 N. Y. St. 320 (holding that a tenant who had leased a house on the false representations of the landlord that the furnace would heat the house did not, by payment of the rent, waive his right to sue the landlord for damages sustained on account of such false representations); Miller *v.* Barber, 66 N. Y. 558; Cook *v.* Soule, 56 N. Y. 420 (holding that in an action to recover rent the lessee had a right to set up as a counter-claim damages arising from the breach of an agreement in the lease on the part of the lessor to keep the premises in repair, and that the fact that he had paid the rent except for the last quarter did not deprive him of the right to counter-claim his damages for the entire year, and recover a verdict for any excess of such damages over the rent); Griffing *v.* Diller, 66 Hun 633, 21 N. Y. Suppl. 407, 50 N. Y. St. 435; Whitney *v.* Allaire, 4 Den. 554 [*affirmed* in 1 N. Y. 305]; Allaire *v.* Whitney, 1 Hill 484.

North Carolina.— Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447.

Vermont.— Childs *v.* Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

United States.— Simon *v.* Goodyear Metallic Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413; South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

England.— Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145; Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317, 42 L. T. Rep. N. S. 194, 28 Wkly. Rep. 677; Clarke *v.* Dickson, E. B. & E. 148, 4 Jur. N. S. 715, 27 L. J. Q. B. 223, 96 E. C. L. 148; Reg. *v.* Saddlers' Co., 10 H. L. Cas. 404, 9 Jur. N. S. 1081, 32 L. J. Q. B. 337, 9 L. T. Rep. N. S. 60, 11 Wkly. Rep. 1004.

Compare, however, Wilson *v.* Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.

See Fraud.

48. See *infra*, VI, D, 3, c, (III).

(II) *Rescission of Contract*—(A) *Rescinding and Suing For Damages.* Instead of affirming the contract the party defrauded may, subject to the limitations hereafter stated,[49] rescind the contract and sue, in the same manner as if he had affirmed it, for any damages sustained by reason of the fraud.[50]

(B) *Recovery of Money or Property.* Or he may rescind the contract and recover the money he has paid or the property he has given into the hands of the other party in pursuance of the contract,[51] even in the hands of third persons, unless they are *bona fide* purchasers for value, without notice of the fraud.[52]

(C) *Setting Up Fraud as a Defense.* Or he may rescind and set up the fraud as a defense to a suit brought against him on the contract either at law for damages[53] or in equity for specific performance.[54]

(D) *Rescission or Cancellation in Equity.* Or he may sue in equity in a proper case to cancel or rescind the contract, and also to recover what he has parted with and for other equitable relief.[55]

49. See *infra*, VI, D, 3, c.

50. Peck *v.* Brewer, 48 Ill. 54; Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Wardell *v.* Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383. See FRAUD.

51. *Georgia.*— Hamilton *v.* Grangers', etc., Ins. Co., 67 Ga. 145; Grangers' Ins. Co. *v.* Turner, 61 Ga. 561.

Illinois.— Booth *v.* Smith, 18 Ill. App. 266.

Maryland.— Benesch *v.* Weil, 69 Md. 276, 14 Atl. 666.

Massachusetts.—Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Dow *v.* Sanborn, 3 Allen 181; Wiggin *v.* Day, 9 Gray 97; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

Michigan.— Sherman *v.* American Stove Co., 85 Mich. 169, 48 N. W. 537.

Missouri.— Ramsey *v.* Thompson Mfg. Co., 116 Mo. 313, 22 S. W. 719.

New Hampshire.— Sleeper *v.* Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.

New York.— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, 41 N. Y. St. 320; Pike *v.* Wieting, 49 Barb. 314; King *v.* Phillips, 8 Bosw. 603; Hall *v.* Naylor, 6 Duer 71; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323.

Pennsylvania.— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525; Mackinley *v.* McGregor, 3 Whart. 369, 31 Am. Dec. 522; Hoffman *v.* Strohecker, 7 Watts 86, 32 Am. Dec. 740.

Tennessee.— Belding *v.* Frankland, 8 Lea 67, 41 Am. Rep. 630.

Wisconsin.— Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255.

See SALES; VENDOR AND PURCHASER.

Recovery of money paid in cases of fraud see PAYMENT.

52. See *infra*, VI, D, 3, (VII).

53. *Illinois.*— Union Dist. No. 2 *v.* Boomhour, 83 Ill. 17.

Iowa.— Nixon *v.* Carson, 38 Iowa 338.

Louisiana.— McLaughlin *v.* Richardson, 2 La. 78.

Maine.— Irving *v.* Thomas, 18 Me. 418.

Maryland.— Gardner *v.* Lewis, 7 Gill 377.

New Hampshire.—Jones *v.* Emery, 40 N. H. 348.

New York.— Mead *v.* Bunn, 32 N. Y. 275.

Ohio.— Loffland *v.* Russell, Wright 438.

South Carolina.—Lowry *v.* Pinson, 2 Bailey 324, 23 Am. Dec. 140.

Texas.— Crayton *v.* Munger, 9 Tex. 285.

Vermont.— Morris *v.* Gill, 1 D. Chipm. 49.

Virginia.— Chieves *v.* Gary, 24 Gratt. 414.

Wisconsin.— Harran *v.* Klaus, 79 Wis. 383, 48 N. W. 479.

Defense of fraud in action on contract under seal see *infra*, VI, D, 3 b, (IV).

54. McShane *v.* Hazlehurst, 50 Md. 107; Chute *v.* Quincy, 156 Mass. 189, 30 N. E. 550; Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672; Brown *v.* Pitcairn, 148 Pa. St. 387, 24 Atl. 52, 33 Am. St. Rep. 834; Ratliff *v.* Vandikes, 89 Va. 307, 15 S. E. 864. See SPECIFIC PERFORMANCE.

55. *Alabama.*— Lester *v.* Mahan, 25 Ala. 445, 60 Am. Dec. 530.

Connecticut.— Ashmead *v.* Colby, 26 Conn. 287.

Illinois.— Castle *v.* Kemp, 124 Ill. 307, 16 N. E. 255; Wilson *v.* Haecker, 85 Ill. 349; Borders *v.* Kattleman, 34 Ill. App. 582.

Indiana.— State *v.* Holloway, 8 Blackf. 45.

Iowa.— Coles *v.* Kennedy, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. Rep. 503.

Kansas.— Nairn *v.* Ewalt, 51 Kan. 355, 32 Pac. 1110.

Kentucky.— Rhea *v.* Yoder, Sneed 37.

Maine.— Herrin *v.* Libbey, 36 Me. 350; Junkins *v.* Simpson, 14 Me. 364.

Maryland.— Negley *v.* Hagerstown Mfg., etc., Co., 86 Md. 692, 39 Atl. 506; Jackson *v.* Hodges, 24 Md. 468.

Massachusetts.— Nathan *v.* Nathan, 166 Mass. 294, 44 N. E. 221.

Michigan.— Sheldon Axle Co. *v.* Scofield, 85 Mich. 177, 48 N. W. 511; Sherman *v.* American Stove Co., 85 Mich. 169, 48 N. W. 537.

Minnesota.— Adolph *v.* Minneapolis, etc., R. Co., 58 Minn. 178, 59 N. W. 959; Tretheway *v.* Hulett, 52 Minn. 448, 54 N. W. 486.

Nebraska.— Wagner *v.* Lewis, 38 Nebr. 320, 56 N. W. 991.

New Hampshire.— Downing *v.* Wherrin, 19 N. H. 9, 49 Am. Dec. 139.

New Jersey.— Burrows *v.* Wene, (1893) 26

(E) *Suing For Breach.* If the party defrauded elects to rescind he cannot sue for breach of the contract.[56] Nor, having made a sale on credit, can he bring assumpsit for the purchase-price, for if he sues in assumpsit he affirms the express contract entered into between the parties, and where there is an express contract the law will not imply another.[57] If there be fraud on the part of the purchaser in respect to the purchase, the vendor may elect either to affirm the sale and sue for the price, or to treat the sale as void and follow the goods or proceeds.[58]

(III) *Reformation in Equity.* The jurisdiction of equity to reform an instrument on the ground of mistake[59] embraces also the jurisdiction to reform in the case of fraud.[60]

(IV) *Contracts Under Seal.* At common law it was held that in a suit on a sealed instrument fraud could not be set up except as to fraud in the execution of the instrument,[61] but the remedy was to resort to a court of equity to have the deed set aside.[62] In England, however, since the act of 1854 giving courts of law power to entertain equitable pleas, such defenses have been permitted, and since the judicature act of 1873 giving the courts of law full equitable powers, the question is no longer a doubtful one.[63] In the United States, in the code states at least, a plea of fraud to a sealed instrument would now be good.[64]

(V) *Fraud in Obtaining Release.* In the case of a release of a cause of action pleaded in bar of the action, it is held in some jurisdictions that the plain-

Atl. 890; Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188. And see Garrison *v.* Technic Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741.

New York.— Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990, 34 N. Y. St. 277; Hasberg *v.* McCarty, 13 Daly 415; Forster *v.* Wilshusen, 14 Misc. 520, 35 N. Y. Suppl. 1083, 70 N. Y. St. 701; Anthony *v.* Day, 52 How. Pr. 35.

North Carolina.— Thigpen *v.* Balfour, 6 N. C. 242.

Pennsylvania.— Williams *v.* Kerr, 152 Pa. St. 560, 25 Atl. 618; Graham *v.* Pancoast, 30 Pa. St. 89.

Texas.— Varner *v.* Carson, 59 Tex. 303.

Virginia.— McClanahan *v.* Ivanhoe Land, etc., Co., 96 Va. 124, 30 S. E. 450; Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; Carey *v.* Coffee-Stemming Mach. Co., (1894) 20 S. E. 778; Bosher *v.* Richmond, etc., Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

Wisconsin.— Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575.

United States.— Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340, 36 L. ed. 82; Barcus *v.* Gates, 89 Fed. 783, 32 C. C. A. 337; Seeley *v.* Reed, 25 Fed. 361; Hough *v.* Richardson, 3 Story 659, 12 Fed. Cas. No. 6,722.

And see Cancellation of Instruments, 6 Cyc. 286.

56. Haynes *v.* Holliday, 7 Bing. 587, 20 E. C. L. 263; Keene *v.* Parsons, 2 Stark. 506, 3 E. C. L. 507.

57. Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139; Bradbury *v.* Anderton, 1 C. M. & R. 486; Strutt *v.* Smith, 1 C. M. & R. 312, 3 L. J. Exch. 357, 4 Tyrw. 1019; Hogan *v.* Shee, 2 Esp. 522; Selway *v.* Fogg, 5 M. & W. 83, 8 L. J. Exch. 199; Smith *v.* Hodson, 2 Smith Lead. Cas. 1372. See Sales.

58. Lloyd *v.* Brewster, 4 Paige (N. Y.) 537, 27 Am. Dec. 88; Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647; Mackinley *v.* McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522. See Sales.

59. See *supra*, VI, B, 6.

60. Rensink *v.* Wiggers, 99 Iowa 39, 68 N. W. 569; West *v.* West, 90 Iowa 41, 57 N. W. 639; Andrews *v.* Gillespie, 47 N. Y. 487; Graham *v.* Quinn, (Tenn. 1897) 43 S. W. 749. See Reformation of Instruments.

61. Jackson *v.* Hills, 8 Cow. (N. Y.) 290; Champion *v.* White, 5 Cow. (N. Y.) 509; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 177; Wyche *v.* Macklin, 2 Rand. (Va.) 426; Edwards *v.* Brown, 1 Cromp. & J. 307, 9 L. J. Exch. O. S. 84, 1 Tyrw. 182, 3 Y. & J. 423. See Bonds, 5 Cyc. 817; Covenants; Deeds.

62. In Taylor *v.* King, 6 Munf. (Va.) 358, 366, 8 Am. Dec. 746, it was sought to defend against a deed in an ejectment suit on the ground that the defendant had been defrauded into making the deed by false statements in respect of the consideration. The court refused to consider the special finding of the jury showing such fraud, saying: "Such circumstances go to shew a want of consideration; and a defendant can not avoid a solemn deed on that ground, by parol, in a Court of law. In that Court, and on such an instrument, the principle that fraud and covin vacates every contract, is to be taken in subordination to another principle, namely, that the party is estopped from averring a matter of the kind against a specialty."

63. See Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121.

64. See Hopkins *v.* Beard, 6 Cal. 664.

tiff cannot by reply set up fraud in the obtaining of the release, but must bring an independent suit in equity to rescind the release for the fraud;[65] while in others it is held that the plaintiff may intercept an affirmative defense of relcase by a count in the petition setting out the fraudulent procurement and asking its cancellation, although he should not be required to do so, nor be reverted to a separate bill in equity for such purpose, as the whole question can logically be determined when the release is pleaded by the defendant, if it is pleaded, by an issue of fraud raised by the reply and tried by the chancellor before the action at law is tried.[66] In other states the whole question, including the fraud in the release, is one for the jury.[67]

c. Limitations to Right to Rescind — (I) *Mode of Election.* The election to rescind may be by express words or by acts evidencing an intention to treat the contract as not binding.[68]

(II) *Laches.* The party may lose his right to rescind by not availing himself of his right within a reasonable time after discovering the fraud,[69] or after he might have discovered it by the use of due diligence.[70] So in equity unreasonable delay in taking steps to set aside a fraudulent contract will have the effect of affirming it.[71] Laches, however, are not imputable to the party defrauded, until

65. George *v.* Tate, 102 U. S. 564, 26 L. ed. 232; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54. See RELEASE.

66. Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668.

67. Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121. See RELEASE.

68. Leake Contr. 388. See *infra*, VI, D, 3, c, (III).

69. *Alabama.*— Young *v.* Arntze, 86 Ala. 116, 5 So. 253.

California.— Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868; Collins *v.* Townsend, 58 Cal. 608.

Illinois.—Day *v.* Ft. Scott Invest., etc., Co., 153 Ill. 293, 38 N. E. 567; Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636; Hall *v.* Fullerton, 69 Ill. 448.

Indiana.—St. John *v.* Hendrickson, 81 Ind. 350; Rose *v.* Hurley, 39 Ind. 77; Gatling *v.* Newell, 9 Ind. 572; Johnson *v.* McLane, 7 Blackf. 501, 43 Am. Dec. 102.

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785.

Maryland.— Foley *v.* Crow, 37 Md. 51; Clements *v.* Smith, 9 Gill 156.

Michigan.— Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203.

Missouri.— Taylor *v.* Short, 107 Mo. 384, 17 S. W. 970; Estes *v.* Reynolds, 75 Mo. 563, 565, in the latter of which cases it was said: "Nor is he permitted to select his own time, consult his own convenience and watch the rise and fall of the market, before exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practiced upon him, such election in order to avail him must have the chief and essential element of promptitude."

New Hampshire.— Willoughby *v.* Moulton, 47 N. H. 205; Weeks *v.* Robie, 42 N. H. 316.

New Jersey.—Conlan *v.* Roemer, 52 N. J. L. 53, 18 Atl. 858.

New York.—Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Schiffer *v.* Dietz, 83 N. Y. 300; Hammond *v.* Pennock, 61 N. Y. 145; Williams *v.* Whittell, 69 N. Y. App. Div. 340, 74 N. Y. Suppl. 820; Ross *v.* Titterton, 6 Hun 280; Masson *v.* Bovet, 1 Den. 69, 43 Am. Dec. 651.

Ohio.— Parmlee *v.* Adolph, 28 Ohio St. 10.

Oregon.— Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858, holding that twenty days after the discovery of the fraud was not an unreasonable delay.

Vermont.— Boughton *v.* Standish, 48 Vt. 594; Matteson *v.* Holt, 45 Vt. 336.

United States.— Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420; Lumley *v.* Wabash R. Co., 71 Fed. 21; Rugan *v.* Sabin, 53 Fed. 415, 3 C. C. A. 578; Cummins *v.* Lods, 1 McCrary 338, 2 Fed. 661.

Notice of the rescission within a reasonable time is essential. Herrin *v.* Libbey, 36 Me. 350; Masson *v.* Bovet, 1 Den. (N. Y.) 69, 43 Am. Dec. 651. But the notice need not be written or formal. Moral School *v.* Harrison, 74 Ind. 93; Morrow *v.* Rees, 69 Pa. St. 368; Suber *v.* Pullin, 1 S. C. 273. Resisting the action on the ground of fraud is a sufficient notice. Dawes *v.* Harness, L. R. 10 C. P. 166, 44 L. J. C. P. 194, 32 L. T. Rep. N. S. 149, 23 Wkly. Rep. 398; Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 41 L. J. Exch. 17, 55 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189. And so is suing to annul the contract or to recover the consideration. Graham *v.* Holloway, 44 Ill. 385; Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024.

Burden of proof see *infra*, XII, I.

70. Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583, 6 So. 467; Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 118, 45 L. T. Rep. N. S. 489, 30 Wkly. Rep. 251.

71. *California.*— Burkle *v.* Levy, 70 Cal. 250, 11 Pac. 643. See Lee *v.* McClelland, 120 Cal. 147, 52 Pac. 300, holding that fraudulent representations inducing the purchase of land are waived where three years afterward the original contract is canceled at the purchaser's request and a new one more advantageous to him agreed to.

he has had such knowledge or means of knowledge as he was bound to avail himself of.[72] And some courts hold that mere want of diligence in discovering the fraud does not deprive the injured party of his right to rescind; that he owes the defrauding party no duty of active vigilance, and that if he acts promptly after actual discovery of the fraud it is sufficient.[73]

(III) *Ratification by Acceptance of Benefits or Otherwise.* The party defrauded will generally lose his right to rescind if he takes any benefit under the contract or does any other act which implies an intention to abide by it or an affirmation of it[74] after he has become aware of the fraud.[75] Bringing an action on the contract or endeavoring to enforce it after knowledge of the fraud

Illinois.—Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636; Eberstein *v.* Willets, 134 Ill. 101, 24 N. E. 967; Hall *v.* Fullerton, 69 Ill. 448; Cox *v.* Montgomery, 36 Ill. 396.

New Jersey.— Coles *v.* Vanneman, 51 N. J. Eq. 323, 18 Atl. 468, 30 Atl. 422; Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

New York.— Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

Tennessee.— Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21; Leiker *v.* Henson, (Tenn. Ch. 1896) 41 S. W. 862.

Washington.— Thomas *v.* McCue, 19 Wash. 287, 53 Pac. 161; Hogan *v.* Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910.

West Virginia.— Whittaker *v.* Southwest Virginia Imp. Co., 34 W. Va. 217, 12 S. E. 507.

United States.—McLean *v.* Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. ed. 804; Hayward *v.* Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855; Grymes *v.* Sanders, 93 U. S. 55, 23 L. ed. 798; Old Colony Trust Co. *v.* Duhuque Light, etc., Co., 89 Fed. 794; Greene *v.* Société Anonyme, etc., 81 Fed. 64; Scheftel *v.* Hays, 58 Fed. 457, 7 C. C. A. 308; Rugan *v.* Sabin, 53 Fed. 415, 3 C. C. A. 578.

England.— Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 31, 41 L. J. Exch. 17, 25 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189, where it is said: "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined." See also Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221, 240, 22 Wkly. Rep. 492, where it is said: "But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

72. Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663; Smith *v.* Smith, 30 Vt. 139; Bowman *v.* Patrick, 36 Fed. 138.

73. Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117.

74. *Alabama.*—Lockwood *v.* Fitts, 90 Ala. 150, 7 So. 467.

California.—Marten *v.* Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107; Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868.

Florida.— Southern L. Ins., etc., Co. *v.* Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Iowa.— Evans *v.* Montgomery, 50 Iowa 325.

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785.

Kentucky.—McCulloch *v.* Scott, 13 B. Mon. 172, 56 Am. Dec. 561.

Maine.— Brinley *v.* Tibbets, 7 Me. 70.

Maryland.— Troup *v.* Appleman, 52 Md. 456; Wyeth *v.* Walzl, 43 Md. 426.

Minnesota.— Crooks *v.* Nippolt, 44 Minn. 239, 240, 46 N. W. 349, where it is said: "The invariable rule is that the right to rescind may be exercised upon discovery of the fraud; but any act of ratification of a contract, after knowledge of facts authorizing a rescission, amounts to an affirmance, and terminates the right to rescind."

New Jersey.— Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

New York.— Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019, 36 N. Y. St. 363; Cobb *v.* Hatfield, 46 N. Y. 533; Thompson *v.* Fuller, 16 N. Y. Suppl. 486, 41 N. Y. St. 224.

North Carolina.—Dellinger *v.* Gillespie, 118 N. C. 737, 24 S. E. 538.

Pennsylvania.— Negley *v.* Lindsay, 67 Pa. St. 217, 5 Am. Rep. 427; Pearsoll *v.* Chapin, 44 Pa. St. 9.

Rhode Island.— Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520.

West Virginia.— Hutton *v.* Dewing, 42 W. Va. 691, 26 S. E. 197.

United States.— Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420; Grymes *v.* Sanders, 96 U. S. 55, 23 L. ed. 798; McKay *v.* Carrington, 1 McLean 50, 16 Fed. Cas. No. 8,841.

75. Rau *v.* Von Zedlitz, 132 Mass. 164; Cherry *v.* Newsom, 3 Yerg. (Tenn.) 369. And see Kraus *v.* Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182, holding that the right to rescind for fraud is not defeated by the vendor's having obtained judgment for the price in ignorance of the fraud.

is an affirmance of it and will bar rescission.[76] So is continuing in the use or occupation of the property[77] or performing his part of the contract.[78] A waiver of the right to disaffirm does not require a consideration, such as is necessary to support a contract. A waiver may often take place in consequence of laches merely or in consequence of acting inconsistently with the idea of insisting on the right which is waived.[79] As we have seen, affirmance of a contract procured by fraud does not waive or bar the right to maintain an action or counter-claim for the damages sustained by reason of the fraud.[80]

(IV) *Parties Must Be Placed In Statu Quo.* The contract can only be rescinded where it is possible to put the parties back in their original position and with their original rights.[81] "A contract voidable for fraud cannot be

76. *Arkansas.*—Mansfield *v.* Wilson, (1890) 13 S. W. 598; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

Colorado.— Wheeler *v.* Dunn, 13 Colo. 428, 22 Pac. 827.

Massachusetts.— Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

Michigan.— Bedier *v.* Reaume, 95 Mich. 518, 55 N. W. 366.

Mississippi.— Goodall *v.* Stewart, 65 Miss. 157, 3 So. 257.

New York.— Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019, 36 N. Y. St. 363; Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 26 N. Y. St. 527, 5 L. R. A. 693; Myers *v.* Taber, 5 Silv. Supreme 598, 7 N. Y. Suppl. 857, 27 N. Y. St. 881.

A suit for money obtained on a fraudulent note is not an affirmance of the contract. Gibson *v.* Stevens, 3 McLean (U. S.) 551, 10 Fed. Cas. No. 5,401.

77. Samples *v.* Guyer, 120 Ala. 611, 24 So. 942; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, 41 N. Y. St. 320; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; Schiffer *v.* Dietz, 83 N. Y. 300.

78. Eibel *v.* Von Fell, 55 N. J. Eq. 670, 28 Atl. 201; People *v.* Stephens, 71 N. Y. 527; Whitney *v.* Allaire, 4 Den. (N. Y.) 554; Kingman *v.* Stoddard, 85 Fed. 740, 29 C. C. A. 413.

Illustrations.— Where a person by deceit induced another to purchase land, paying part cash and giving two notes for the balance, one secured by a mortgage on the land, and after discovery of the fraud the purchaser paid part of the balance by deeding a lot to the vendor and gave a new note and mortgage for the remainder, and defaulting on this, gave a new note and mortgage for the amount of the old one and interest, it was held that his acts subsequently to discovering the fraud amounted to an affirmance of the contract. Ruhl *v.* Mott, 120 Cal. 668, 53 Pac. 304. And where the purchaser of stock in a corporation, after discovering that the representations of an agent of the corporation, on the credit of which he purchased, were false, gave new notes for the purchase-money to the vendor of the stock, who was ignorant of the fraud at the time of sale, it was held that the fraud could not be set up as a defense to the new notes. Moffat *v.* Winslow, 7 Paige (N. Y.) 124.

79. Griffith *v.* Gillum, 31 Mo. App. 33; Waltzer *v.* Lauer, 2 Leg. Rec. (Pa.) 194.

80. See *supra*, VI, D, 3, h, (I).

81. *Arkansas.*— Righter *v.* Roller, 31 Ark. 170; Freeman *v.* Reagan, 26 Ark. 373; Hynson *v.* Dunn, 5 Ark. 395, 41 Am. Dec. 100.

California.— Bohall *v.* Diller, 41 Cal. 532; Purdy *v.* Bullard, 41 Cal. 444.

Georgia.— Lane *v.* Latimer, 41 Ga. 171.

Illinois.— Rigdon *v.* Walcott, 141 Ill. 649, 31 N. E. 158.

Indiana.— Higham *v.* Harris, 108 Ind. 246, 8 N. E. 255; Vance *v.* Schroyer, 79 Ind. 380; Johnson *v.* Cookerly, 33 Ind. 151.

Kansas.—Neal *v.* Reynolds, 38 Kan. 432, 16 Pac. 785.

Louisiana.— Doll *v.* Kathman, 23 La. Ann. 486; Latham *v.* Hicky, 21 La. Ann. 425.

Massachusetts.—Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Snow *v.* Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119; Bassett *v.* Brown, 105 Mass. 551; Thayer *v.* Turner, 8 Metc. 550; Coolidge *v.* Brigham, 1 Metc. 547; Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

Mississippi.— Ketchum *v.* Brennan, 53 Miss. 596.

Missouri.— Estes *v.* Reynolds, 75 Mo. 563.

New Hampshire.— Manahan *v.* Noyes, 52 N. H. 232.

New York.— Curtiss *v.* Howell, 39 N. Y. 211; Bedell *v.* Bedell, 3 Hun 580.

North Carolina.— Stanton *v.* Hughes, 97 N. C. 318, 1 S. E. 852.

Oregon.— Frink *v.* Thomas, 20 Oreg. 265, 25 Pac. 717, 12 L. R. A. 239.

Wisconsin.— Dayton City Nat. Bank *v.* Kusworn, 91 Wis. 166, 62 N. W. 843; Hoffman *v.* King, 70 Wis. 372, 36 N. W. 25; Van Trott *v.* Wiese, 36 Wis. 439.

United States.—Grymes *v.* Sanders, 93 U. S. 51, 23 L. ed. 798; Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847.

England.— Sheffield Nickel, etc., Co. *v.* Unwin, 2 Q. B. D. 214, 46 L. J. Q. B. 299, 36 L. T. Rep. N. S. 246, 25 Wkly. Rep. 493; Oakes *v.* Turquand, L. R. 2 H. L. 325, 36 L. J. Ch. 949, 15 Wkly. Rep. 1201; Urquhart *v.* Macpherson, 3 App. Cas. 831.

In cases of mistake.—It has been held that

avoided when the other party cannot be restored to his status quo: For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages."[82]

(v) *Contract Must Be Rescinded In Toto.* A rescission must be *in toto*. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other.[83]

(vi) *Restoring Consideration*—(a) *In General.* It follows as a general rule that in order to rescind a contract for fraud, the party defrauded must restore or offer to restore the consideration which he has received under the contract.[84]

the same rule applies in the rescission of contracts for mistake. The rule is as to two innocent parties who have performed acts under a mutual misunderstanding that the court will allow either to turn back, if he can take the other back with him; in other words the one party may unravel the contract if he can put the other party *in statu quo*. Therefore the buyer of a chattel who would rescind the sale on this ground and get back his price must restore the chattel to the seller, unless he can show that it is of no intrinsic value, and its loss, no injury to that party.

Georgia.— Lane *v.* Latimer, 41 Ga. 171.

Maryland.— Hooper *v.* Strasburger, 37 Md. 390, 11 Am. Rep. 538. See also Renshaw *v.* Lefferman, 51 Md. 277.

Massachusetts.— Dorr *v.* Eisher, 1 Cush. 271; Coolidge *v.* Brigham, 1 Metc. 547. And see Northampton Nat. Bank *v.* Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283.

New Hampshire.—Cook *v.* Gilman, 34 N. H. 556.

Vermont.— Smith *v.* Smith, 30 Vt. 139.

United States.— Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847. And see Grymes *v.* Sanders, 93 U. S. 55, 23 L. ed. 798.

England.— Clarke *v.* Dickson, E. B. & E. 148, 4 Jur. N. S. 715, 27 L. J. Q. B. 223, 96 E C. L. 148; Blackburn *v.* Smith, 2 Exch. 783, 18 L. J. Exch. 187.

82. Sheffield Nickel, etc., Co. *v.* Unwin, 2 Q. B. D. 214, 46 L. J. Q. B. 299, 36 L. T. Rep. N. S. 246, 25 Wkly. Rep. 493. See *infra*, VI, D, 3, c, (v).

83. *Georgia.*— Hunter *v.* Stembridge, 17 Ga. 243.

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785.

Kentucky.— Brill *v.* Rack, 23 S. W. 511, 15 Ky. L. Rep. 383.

Massachusetts.— Barrie *v.* Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 156.

Michigan.—Merrill *v.* Wilson, 66 Mich. 232, 33 N. W. 716.

Missouri.— Estes *v.* Reynolds, 75 Mo. 563.

New Hampshire.— Burnham *v.* Spooner, 10 N. H. 532.

New York.— Butler *v.* Prentiss, 91 Hun 643, 36 N. Y. Suppl. 301, 71 N. Y. St. 383.

United States.—Grymes *v.* Sanders, 93 U. S. 51, 23 L. ed. 798.

England.— Sheffield Nickel Co. *v.* Unwin, 2 Q. B. D. 214, 46 L. J. Q. B. 299, 36 L. T. Rep. N. S. 246, 25 Wkly. Rep. 493.

84. *Alabama.*—Samples *v.* Guyer, 120 Ala. 611, 24 So. 942; Young *v.* Arntze, 86 Ala. 116, 5 So. 253; Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

California.— Freeman *v.* Kieffer, 101 Cal. 254, 35 Pac. 767; Herman *v.* Haffenegger, 54 Cal. 161.

District of Columbia.— Lyons *v.* Allen, 11 App. Cas. 543.

Georgia.—Stodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174.

Illinois.—Howe Mach. Co. *v.* Rosine, 87 Ill. 105; Wolf *v.* Deitzsch, 75 Ill. 205; Smith *v.* Doty, 24 Ill. 163.

Indiana.—Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 268; Louisville, etc., R. Co. *v.* Herr, 135 Ind. 591, 35 N. E. 556; Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984; Home Ins. Co. *v.* McRichards, 121 Ind. 121, 22 N. E. 875; Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Leake *v.* Ball, 116 Ind. 214, 17 N. E. 918; Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 262, 1 L. R. A. 201; Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 16; Cates *v.* Bales, 78 Ind. 285; Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476; Heaton *v.* Knowlton, 53 Ind. 357; Johnson *v.* McLane, 7 Blackf. 501, 43 Am. Dec. 102; Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; Regenburg *v.* Notectine, 2 Ind. App. 97, 27 N. E. 108. And see Citizens' St. R. Co. *v.* Horton, 18 Ind. App. 335, 48 N. E. 22, where it is said: "It may be regarded as settled in this state that a party claiming to be defrauded into the signing of a contract and agreement, and having received something of value for the execution of the alleged contract, cannot ignore the same, and proceed in the assertion of his original rights as if such contract had not been made, without disaffirming such contract, and substantially restoring or offering to restore the *status quo*."

Kansas.— Cookingham *v.* Dusa, 41 Kan. 229, 21 Pac. 270.

Kentucky.—Carneal *v.* May, 2 A. K. Marsh. 587, 12 Am. Dec. 453.

Maine.— Houghton *v.* Nash, 64 Me. 477.

Massachusetts.— Estabrook *v.* Swett, 116

Thus where a person has been induced by fraud to buy goods, in order to avoid the contract upon the discovery of the fraud, he must return the goods; and if he does not or cannot do so he must pay the price, or at least the value of the goods. After consuming the goods wholly or in part the buyer cannot avoid the contract by which he obtained them, because he can no longer return them.[85] If the party cannot return any property received, he must offer to account for it at the price at which it was estimated in the contract, with interest thereon from the date of receiving such property.[86] If he has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property and recover for what he has expended.[87]

(B) *Exceptions to Rule.* To the rule that one rescinding a contract for fraud must restore what he has received under it, there are exceptions. He is not required to return a thing which is utterly worthless,[88] as for example a forged note.[89] So where the property is diminished in value by natural causes or rea-

Mass. 303; Bartlett *v.* Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Bryant *v.* Isberg, 13 Gray 607, 74 Am. Dec. 655; Northampton *v.* Smith, 11 Metc. 390; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

Michigan.— Young Bros. Mach. Co. *v.* Young, 111 Mich. 118, 69 N. W. 152.

Minnesota.— Carlton *v.* Halett, 49 Minn. 308, 51 N. W. 1053.

Mississippi.— Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663; Jagers *v.* Griffin, 43 Miss. 134.

Missouri.— Barr *v.* Baker, 9 Mo. 850.

Nevada.— Bishop *v.* Stewart, 13 Nev. 25.

New Hampshire.— Sanborn *v.* Batchelder, 51 N. H. 426; Evans *v.* Gale, 17 N. H. 673, 43 Am. Dec. 614.

New Jersey.— Doughten *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556, 4 Atl. 479.

New York.— Francis *v.* New York, etc., R. Co., 108 N. Y. 93, 15 N. E. 192; Gould *v.* Cayuga County Bank, 86 N. Y. 75; Guckenheimer *v.* Angevine, 81 N. Y. 394; Cobb *v.* Hatfield, 46 N. Y. 533; Curtiss *v.* Howell, 39 N. Y. 211; Doyle *v.* New York R. Co., 66 N. Y. App. Div. 398, 72 N. Y. Suppl. 936; Van Liew *v.* Johnson, 4 Hun 415; Anthony *v.* Day, 52 How. Pr. 35; Masson *v.* Bovet, 1 Den. 69, 43 Am. Dec. 651.

Pennsylvania.— Morrow *v.* Rees, 69 Pa. St. 368; Beetems *v.* Burkholder, 69 Pa. St. 249; Babcock *v.* Case, 61 Pa. St. 427, 100 Am. Dec. 654.

South Carolina.— Riggs *v.* Home Mut. F. Protection Assoc., 61 S. C. 448, 39 S. E. 614; Levister *v.* Southern R. Co., 56 S. C. 508, 35 S. E. 207.

Tennessee.— Jopling *v.* Dooley, 1 Yerg. 289, 24 Am. Dec. 450.

Vermont.— Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin.— Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784; Becker *v.* Trickel, 80 Wis. 484, 50 N. W. 406.

England.— Sully *v.* Frean, 10 Exch. 535; Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797.

Compromise and settlement for tort.— This principle applies equally in a case of a contract made in settlement of contractual disputes and the adjustment of rights growing out of torts. Citizens' St. R. Co. *v.* Horton, 18 Ind. App. 335, 48 N. E. 22. See COMPROMISE AND SETTLEMENT.

Freight charges.— A seller suing to recover the goods for fraud must offer to return freight charges paid by the buyer, which were, under the contract of sale, to be credited on the price. Gibson *v.* Lancaster, 90 Tex. 540, 39 S. W. 1078.

Time of offer to restore.— As a rule the offer to restore comes too late if made for the first time at the trial. Herman *v.* Haffenegger, 54 Cal. 161. If a defrauded purchaser has taken the note of a third person in payment, it will not be sufficient to produce it at the trial and offer to restore it then. Bassett *v.* Brown, 105 Mass. 551; Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858. It is held, however, that if the vendor has taken the vendee's own note in payment, he need not offer to restore it before rescinding, but it will be sufficient if he delivers it up at the trial.

Illinois.— Ryan *v.* Brant, 42 Ill. 78.

Massachusetts.— Thurston *v.* Blanchard, 39 Mass. 18, 33 Am. Dec. 700; Manning *v.* Albee, 11 Allen 520.

New York.— Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259.

Rhode Island.— Duval *v.* Mowry, 6 R. I. 479.

Wisconsin.— Hyland *v.* Bohn Mfg. Co., 92 Wis. 163, 65 N. W. 369.

85. Clarke *v.* Dickson, E. B. & E. 148, 4 Jur. N. S. 715, 27 L. J. Q. B. 223, 96 E. C. L. 148. See Jagers *v.* Griffin, 43 Miss. 134. And see SALES.

86. Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115. See Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366; Burrill *v.* Parsons, 71 Me. 282.

87. Farris *v.* Ware, 60 Me. 482.

88. Fitz *v.* Bynum, 55 Cal. 459; Wicks *v.* Smith, 21 Kan. 412, 30 Am. Rep. 433; Babcock *v.* Case, 61 Pa. St. 427, 100 Am. Dec. 654.

89. Haase *v.* Mitchell, 58 Ind. 213.

Consideration worthless.— The rule being that a return is not required where the con-

sonable use, or has been necessarily destroyed or diminished in discovering the fraud, it need not be returned.[90] And so it is where the property has been destroyed or taken from him without his fault.[91] If the defrauded person, by reason of the wrongful conduct of the wrong-doer, is rendered incapable of fully restoring the latter to his former position, to that extent such restoration is not necessary to a rescission.[92] It has also been held that a vendor may rescind the contract without tendering to the vendee the portion of the purchase-money paid,

sideration is totally worthless, the question arises whether this means worthless to the defrauded person or absolutely without value to any one. In Perley *v.* Balch, 23 Pick. (Mass.) 283, 286, 34 Am. Dec. 56, which was a suit on a note given for an ox, defendant alleged that plaintiff made false representations as to the ox; that the ox was diseased, of no value, and worthless for any purpose, but did not offer to return the ox. The court said: "If that property was of no value, whether there was any fraud or not, the note would be *nudum pactum*. The defendant's counsel, not controverting the general rule, objects to the qualification of it. He says, that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract, although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the promisor. If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it is a loss to the seller, he is entitled to remuneration for his loss. . . He cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. In such case the return would be a useless ceremony which the law never requires. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. . . . And, if the property would be of any benefit to the seller, he is equally bound to return it." And in Bassett *v.* Brown, 105 Mass. 551, 558, it was said: "The defendant contends that the stocks were worthless; and therefore it was unnecessary, as it would be useless, to return them. Such unquestionably is the rule of law, if they were absolutely of no value to either party. But it is not sufficient that they were of no intrinsic value, or of no market value. If they were capable of serving any purpose of advantage by their possession or control, or if their loss was a disadvantage to the tenant in any way, he was entitled to have them returned. This rule is held with great strictness in actions at law; as in the case of the casks that contained worthless lime (Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103), and the sack that covered the rejected bale of cotton (Morse *v.* Brackett, 98 Mass. 205, 104 Mass. 494)."

Note of insolvent.— One who rescinds a contract under which he has received a note is bound to restore the note, although the maker is insolvent. Spencer *v.* St. Clair, 57 N. H. 9; Evans *v.* Gale, 21 N. H. 204; Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858; Whitcomb *v.* Denio, 52 Vt. 382.

Where a bank has paid money on a check by mistake, it must tender the check before bringing suit to recover the money paid. Northampton Nat. Bank *v.* Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283.

90. Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; Gatling *v.* Newell, 9 Ind. 572; Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Smith *v.* Love, 64 N. C. 439.

Insolvency of maker of note.— One may rescind by offering to return notes in the condition he received them, notwithstanding the maker of the notes has become insolvent between the time of the contract and the time the fraud was discovered. Whitcomb *v.* Denio, 52 Vt. 382.

That a printing press had been used a little and would not sell quite as well as an unused press cannot deprive the buyer of the same of his right to rescind for fraud. Campbell Printing Press, etc., Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799.

91. *Maryland.*— Groff *v.* Hansel, 33 Md. 161.

New Jersey.— Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449.

New York.—Hammond *v.* Pennock, 61 N. Y. 145.

Pennsylvania.— Flynn *v.* Allen, 57 Pa. St. 482.

United States.— Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471.

92. *Illinois.*— Wilson *v.* Challis, 39 Ill. App. 227.

Massachusetts.— Bartlett *v.* Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101.

Nebraska.— Phenix Iron Works Co. *v.* McEvony, 47 Nebr. 228, 66 N. W. 290, 53 Am. St. Rep. 527.

New York.— Guckenheimer *v.* Angevine, 81 N. Y. 394; Hammond *v.* Pennock, 61 N. Y. 145; Merchants' Nat. Bank *v.* Tracy, 77 Hun 443, 29 N. Y. Suppl. 77, 60 N. Y. St. 650; Masson *v.* Bovet, 1 Den. 69, 43 Am. Dec. 651.

Rhode Island.— Warner *v.* Vallily, 13 R. I. 483.

Wisconsin.— Gates *v.* Raymond, 106 Wis. 657, 82 N. W. 530; Gay *v.* Osborn, 102 Wis. 641, 78 N. W. 1079; Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784; Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

if it appears that the value of the goods claimed does not exceed the balance due the vendors.[93] So where plaintiff sought to rescind a contract of sale on the ground of fraud, he was not required to return payments made on account of the sale, where defendants had disposed of more than enough of the goods to cover the amount paid.[94] Since the doctrine that one must restore what he has received is so frequently used to shield the party guilty of the fraud, it is not strange that the courts have endeavored to put some limits to the doctrine itself. Hence we find several modern cases in which it is ruled that what was received need not be restored, but only credited on the demand, where plaintiff was entitled to receive it irrespective of the assent got by its delivery to him.[95] If a buyer's offer to restore the goods received by him under a sale induced by fraud is met by an absolute refusal of the seller to receive them if tendered, he will be relieved from

93. Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69. And see the following cases:

Massachusetts.— Montgomery *v.* Pickering, 116 Mass. 227.

Nebraska.— Tootle *v.* Chadron First Nat. Bank, 34 Nebr. 863, 52 N. W. 396.

New York.— Schoonmaker *v.* Kelly, 42 Hun 299; Pearse *v.* Pettis, 47 Barb. 276.

Rhode Island.— Sisson *v.* Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

United States.— John V. Farwell Co. *v.* Hilton, 84 Fed. 293, 39 L. R. A. 579.

94. Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784. See also Sloane *v.* Shiffer, 156 Pa. St. 59, 27 Atl. 67, where it appeared that a firm of retail dealers by fraudulent representations induced plaintiffs, wholesale dealers, to sell them goods; that goods were sold at various dates during the succeeding six months; that for about two thirds of the goods notes were given; that some of the earlier notes were paid, but the remaining notes and the book-account were not paid; that the purchasers of the goods confessed judgments to other creditors, and plaintiffs, having identified certain of the goods levied upon, notified the sheriff that they had rescinded the contract of sale, and claimed the goods. On an interpleader the evidence tended to show that the purchasers had received from customers who had purchased some of the goods, more than the amount of the notes paid to plaintiffs. It was held that plaintiffs were not bound to refund the amounts of the notes paid to them. And see Mead *v.* Welch, 67 N. H. 341, 39 Atl. 970, where it was held that persons who had performed services under a contract which they were induced to make by fraud might rescind the contract and recover the reasonable value of their services, without restoring a sum advanced to them on the contract, where such sum was less than the reasonable value of the services performed.

95. O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215; Allerton *v.* Allerton, 50 N. Y. 670; Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; Bebout *v.* Bodle, 38 Ohio St. 500. And see Girard *v.* St. Louis Car-Whee' Co., 46 Mo. App. 79, 105, where a portion of the consideration received on settlement was not paid back when it was sought to rescind the settlement, and the court said: "It is not the law that a party who has been induced by the fraud of the other party, to release his right of action against the latter, must restore the consideration which he has received for the giving of the release, in order to be entitled to set up the fraud in avoidance of the release in an action upon the cause of action thus released. Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120. It is true, as a general proposition of law, that one, who is induced by fraud to enter into a contract with another, must, within a reasonable time after discovering the fraud, notify the other party of its rescission, and restore to him whatever consideration he has received under it. But he is not bound to restore to the other party what he has received under it, where the other party is indebted to him in a larger amount."

The origin of the old rule lay in the fact that a common-law court could not rescind, but could only treat as void that which was absolutely void *ab initio*; and therefore one who had received anything under a fraud practised in gaining assent must return to the rogue what the rogue had given him before he could begin to reclaim what the rogue had got from him. Equity never did require this. A bill in chancery offered to return if the court should so decree. Hoyt *v.* Jacques, 129 Mass. 286; Bloomer *v.* Waldron, 3 Hill (N. Y.) 361; Barker *v.* Walters, 8 Beav. 92; Jervis *v.* Berridge, L. R. 8 Ch. 351, 42 L. J. Ch. 518, 28 L. T. Rep. N. S. 481, 21 Wkly. Rep. 395. The best-considered cases in equity go far to bear out the proposition that there is a remedy in equity to ask the court to rescind without requiring an absolute return before suit, wherever such a return would operate to enhance the completeness of the fraud or abandon the little indemnity that already exists.

Arkansas.— Myrick *v.* Jacks, 33 Ark. 425.

Mississippi.— Brown *v.* Norman, 65 Miss. 369, 4 So. 293.

Oregon.— Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858.

Rhode Island.— Sisson *v.* Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

United States.— Warner *v.* Daniels, 1 Woodb. & M. 90, 29 Fed. Cas. No. 17,181.

the duty of actually returning or tendering them to the seller at the place where the title passed.[96]

(VII) *RESCISSION AS AGAINST THIRD PERSONS.* As a contract induced by false representations is voidable and not void, and is valid until rescinded, if third parties, *bona fide* and for value, acquire property rights in goods obtained by fraud, these rights are valid as against the defrauded party.[97] But if the contract is not voidable but void, as where the fraud was as to the identity of the other party, and there was no intention that he should have title, even a *bona fide* purchaser from him gets no title.[98] And the same is true where possession only and not title is obtained by the defrauding party.[99] Even where the contract is merely voidable, the person defrauded may on rescinding recover property which he parted with from a third person, if the latter is not a purchaser for value, or if he purchased with notice of the fraud.[1]

96. Milliken *v.* Skillings, 89 Me. 180, 183, 36 Atl. 77. In this case it was said: "The word 'offer' is frequently used by courts and text writers as synonymous with 'tender,' and it may be properly so used with reference to articles capable of manual delivery and actually produced. . . . But with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase 'offer to return' is more commonly and more aptly employed to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered."

97. *Alabama.*—Scheuer *v.* Goetter, 102 Ala. 313, 14 So. 774; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140.

Illinois.—Armstrong *v.* Lewis, 38 Ill. App. 164.

Indiana.— Moore *v.* Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170.

Maryland.— Lincoln *v.* Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446; Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437; Hall *v.* Hinks, 21 Md. 406.

Massachusetts.— Hoffman *v.* Noble, 6 Metc. 68, 39 Am. Dec. 711; Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

Mississippi.—Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587, 12 So. 598.

Pennsylvania.—Schwartz *v.* McCloskey, 156 Pa. St. 258, 27 Atl. 300; Dettra *v.* Kestner, 147 Pa. St. 566, 23 Atl. 889; Neff *v.* Landis, 110 Pa. St. 204, 1 Atl. 177.

Virginia.— Jones *v.* Christian, 86 Va. 1017, 11 S. E. 984.

England.— Babcock *v.* Lawson, 4 Q. B. D. 394, 48 L. J. Q. B. 524, 27 Wkly. Rep. 866.

See SALES.

Avoidance of negotiable instrument as against a bona fide holder see COMMERCIAL PAPER, 8 Cyc. 37.

98. Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73; Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406. And see Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

99. *Minnesota.*— Cochran *v.* Stewart, 21 Minn. 435.

New York.— Kinsey *v.* Leggett, 71 N. Y. 387. But see Smith *v.* Clews, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502.

Ohio.— Dean *v.* Yates, 22 Ohio St. 388.

Pennsylvania.— Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334.

Texas.— Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460.

See SALES.

1. *California.*— Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

Connecticut.— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Maryland.— Benesch *v.* Weil, 69 Md. 276, 14 Atl. 666; Ratcliffe *v.* Sangston, 18 Md. 383.

Massachusetts.— Manning *v.* Albee, 14 Allen 7, 92 Am. Dec. 736; Atwood *v.* Dearborn, 1 Allen 438, 79 Am. Dec. 755.

Missouri.— Fletcher *v.* Drath, 66 Mo. 126.

New Hampshire—Sleeper *v.* Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182.

New York.— Parker *v.* Conner, 93 N. Y. 118, 45 Am. Rep. 178; Stevens *v.* Brennan, 79 N. Y. 254; Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Root *v.* French, 13 Wend. 570, 28 Am. Dec. 482.

Pennsylvania.— Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525.

Vermont.— Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin.— Singer *v.* Schilling, 74 Wis. 369, 43 N. W. 101.

See SALES.

Right of recapture.— It is also held that the defrauded vendor may recapture the property if it can be done without unnecessary violence to the person and without breach of the peace. Com. *v.* Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A.

E. Duress — 1. Definition. Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness.[2] It consists not merely in the act of imprisonment or other hardship to which the party was subjected, but in the state of mind produced by those circumstances, and in which the act sought to be avoided was done.[3] Of course the agreement must have been entered into because of the imprisonment, or of fear of the threatened injury or imprisonment; otherwise there is no duress.[4]

2. Effect. A contract made under duress is voidable and not void, for the consent is present, although not such a free consent as the law requires.[5] And the limits to the right of rescission of a contract obtained by fraud[6] apply likewise to agreements voidable for duress. Thus if a person having been constrained by duress to make a contract afterward voluntarily acts upon it or in any way affirms its validity he precludes himself from afterward avoiding it.[7] And duress

623; Hodgeden *v.* Hubbard, 18 Vt. 504, 46 Am. Dec. 167; Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670. And see Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123 [*citing* Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442; Manning *v.* Brown, 47 Md. 506; Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Mussey *v.* Scott, 32 Vt. 82; Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353; Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719]; Stanford *v.* Howard, 103 Tenn. 24, 52 S. W. 140, 76 Am. St. Rep. 635 [*citing* Garrett *v.* Vaughan, 1 Baxt. (Tenn.) 113; Collomb *v.* Taylor, 9 Humphr. (Tenn.) 689; Neely *v.* Lyon, 10 Yerg. (Tenn.) 473; Kegler *v.* Miles, Mart. & Y. (Tenn.) 426, 17 Am. Dec. 819; Hutchison *v.* Edwards, Mart. & Y. (Tenn.) 252].

2. Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134, 137, where it is said: "Actual violence is not necessary to constitute duress, . . . because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent."

3. Blair *v.* Coffman, 2 Overt. 176, 5 Am. Dec. 659. See also Batavian Bank *v.* North, 114 Wis. 637, 90 N. W. 1016, where it is said in the syllabus by the court: "Duress of a person is that condition of such person's mind, caused by wrongful conduct on the part of another, rendering the former incompetent to contract by the exercise of his own free will."

4. *Arkansas.*— Bosley *v.* Shanner, 26 Ark. 280.

Illinois.— Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Schwartz *v.* Schwartz, 29 Ill. App. 516.

Maine.— Whitefield *v.* Longfellow, 13 Me. 146.

Michigan.— Feller *v.* Green, 26 Mich. 70.

Minnesota.— Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359.

New Hampshire.— Alexander *v.* Pierce, 10 N. H. 494.

New York.— Stone *v.* Weiller, 57 Hun 588, 10 N. Y. Suppl. 828, 32 N. Y. St. 936.

Texas.— Diller *v.* Johnson, 37 Tex. 47.

See 11 Cent. Dig. tit. "Contracts," § 435 *et seq.*

Acting "voluntarily."— On a question of duress a charge that "if the jury believed that the person acted voluntarily" their verdict should be for the other party was held erroneous. He might have acted voluntarily, although impelled by fear of imprisonment. Richards *v.* Vanderpoel, 1 Daly (N. Y.) 71.

5. *Connecticut.*— Walbridge *v.* Arnold, 21 Conn. 424.

Illinois.— Taylor *v.* Cottrell, 16 Ill. 93.

Indiana.— Brooks *v.* Berryhill, 20 Ind. 97.

Massachusetts.— Hackett *v.* King, 6 Allen 58; Fisher *v.* Shattuck, 17 Pick. 252; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Minnesota.— Tapley *v.* Tapley, 10 Minn. 448, 83 Am. Dec. 76.

New Hampshire.— Breck *v.* Blanchard, 22 N. H. 303; Severance *v.* Kimball, 8 N. H. 386; Richardson *v.* Duncan, 3 N. H. 508.

New York.— Strong *v.* Grannis, 26 Barb. 122; Richards *v.* Vanderpoel, 1 Daly 71; Foshay *v.* Ferguson, 5 Hill 154.

Ohio.— Moore *v.* Adams, 8 Ohio 372, 32 Am. Dec. 723.

Pennsylvania.— Stouffer *v.* Latshaw, 2 Watts 165, 27 Am. Dec. 297.

Involuntary action.— A contract would be void if the party were under an actual physical constraint, as if his hand was forcibly guided to sign his name or perhaps, as suggested by Pollock, if he were so prostrated by fear as not to know what he was doing, for in these cases there would not be a consent not free, but no consent at all. Pollock Contr. 553. But as the author points out, the latter case is doubtful, for the contract of one so drunk as not to know what he is signing is voidable only and not void. See Drunkards. And see Matthews *v.* Baxter, L. R. 8 Exch. 132, 42 L. J. Exch. 73, 28 L. T. Rep. N. S. 169, 21 Wkly. Rep. 389.

6. See *supra*, VI, D, 3, c.

7. *Florida.*— Ferrari *v.* Board of Health, 24 Fla. 390, 5 So. 1.

Iowa.— Bartle *v.* Breniger, 37 Iowa 139.

as in the case of fraud,[8] cannot be set up against the rights of a third person acquired for value and without notice,[9] although it is otherwise of course where he does not pay value or has notice.[10]

3. Common-Law Divisions of Duress — a. In General. The common law divides the subject of duress into two classes: (1) Duress by imprisonment, and (2) duress *per minas*. This classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present day.[11]

b. Duress of Imprisonment. Duress of imprisonment arises where a person is actually imprisoned (1) for an improper purpose without just cause,[12] (2) for a just cause without lawful authority,[13] and (3) for a just cause and under proper authority but for an improper purpose.[14] Hence it is only where the imprison-

Maryland.—Bissett *v.* Bassett, 1 Harr. & M. 211.

Nebraska.—Sornborger *v.* Sanford, 34 Nebr. 498, 52 N. W. 368; Sanford *v.* Sornborger, 26 Nebr. 295, 41 N. W. 1102.

New Jersey.— Bodine *v.* Morgan, 37 N. J. Eq. 426.

Ohio.— Doolittle *v.* McCullough, 7 Ohio St. 299.

South Carolina.— Felder *v.* Johnson, 1 Bailey 624.

England.—Ormes *v.* Beadel, 2 De G. F. & J. 333, 6 Jur. N. S. 1003, 30 L. J. Ch. 1, 3 L. T. Rep. N. S. 344, 9 Wkly. Rep. 25, 63 Eng. Ch. 257.

8. See *supra*, VI, D, 3, c, (VII).

9. *California.*— Deputy *v.* Stapleford, 19 Cal. 302.

Georgia.— Hogan *v.* Moore, 48 Ga. 156.

Massachusetts.— Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Robinson *v.* Gould, 11 Cush. 55.

Texas.— Cook *v.* Moore, 39 Tex. 255.

Virginia.— Talley *v.* Robinson, 22 Gratt. 888.

But see Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155; Belote *v.* Henderson, 5 Coldw. (Tenn.) 471, 98 Am. Dec. 432.

As to negotiable instruments see Commercial Paper.

10. Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803. See Brown *v.* Peck, 2 Wis. 261, holding that a deed obtained under duress will be set aside by a court of equity, notwithstanding the duress was without the consent of the grantee, especially where the grantee does not occupy the position of an innocent purchaser.

11. Price *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134.

12. *Connecticut.*— Sharon *v.* Gager, 46 Conn. 189.

Illinois.—Schommer *v.* Farwell, 56 Ill. 542; Bane *v.* Detrick, 52 Ill. 19; Taylor *v.* Cottrell, 16 Ill. 93; Mayer *v.* Oldham, 32 Ill. App. 233; Shenk *v.* Phelps, 6 Ill. App. 612.

Massachusetts.— Taylor *v.* Jaques, 106 Mass. 291; Hackett *v.* King, 6 Allen 58; Tilley *v.* Damon, 11 Cush. 247; Fisher *v.* Shattuck, 17 Pick. 252; Watkins *v.* Baird, 6 Mass. 506, 4 Am. Dec. 170.

Michigan.— Holbrook *v.* Cooper, 44 Mich. 373, 6 N. W. 850; Seiber *v.* Price, 26 Mich. 518.

Missouri.— Holmes *v.* Hill, 19 Mo. 159.

Nebraska.—Hullhorst *v.* Scharner, 15 Nebr. 57, 17 N. W. 259.

New Hampshire.— Clark *v.* Pease, 41 N. H. 414; Breck *v.* Blanchard, 22 N. H. 303; Alexander *v.* Pierce, 10 N. H. 494; Shaw *v.* Spooner, 9 N. H. 197, 32 Am. Dec. 348; Severance *v.* Kimball, 8 N. H. 386; Richardson *v.* Duncan, 3 N. H. 508.

New York.— Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741; Osborn *v.* Robbins, 36 N. Y. 365; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Strong *v.* Grannis, 26 Barb. 122; Osborne *v.* Robbins, 4 Abb. Pr. N. S. 15.

North Carolina.— Meadows *v.* Smith, 42 N. C. 7.

Pennsylvania.— Work's Appeal, 59 Pa. St. 444.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

South Carolina.— Meek *v.* Atkinson, 1 Bailey 84, 19 Am. Dec. 653.

United States.— Baker *v.* Morton, 12 Wall. 150, 20 L. ed. 262; Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134.

See 11 Cent. Dig. tit. "Contracts," § 431 *et seq.*

13. *Indiana.*— Coffelt *v.* Wise, 62 Ind. 451.

Maine.— Bowker *v.* Lowell, 49 Me. 429; Whitefield *v.* Longfellow, 13 Me. 146.

Massachusetts.— Tilley *v.* Damon, 11 Cush. 247.

New York.— Thompson *v.* Lockwood, 15 Johns. 256.

South Carolina.— Meek *v.* Atkinson, 1 Bailey 84, 19 Am. Dec. 653.

Texas.— Phelps *v.* Zuschlag, 34 Tex. 371.

United States.— Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134; U. S. *v.* Tichenor, 8 Sawy. 142, 12 Fed. 415.

England.— Stepney *v.* Lloyd, Cro. Eliz. 647.

See 11 Cent. Dig. tit. "Contracts," §§ 438, 439.

14. *Alabama.*— Hatter *v.* Greenlee, 1 Port. 222, 26 Am. Dec. 370.

Massachusetts.— Watkins *v.* Baird, 6 Mass. 506, 4 Am. Dec. 170.

Michigan.— Seiber *v.* Price, 26 Mich. 518.

Mississippi.— Fossett *v.* Wilson, 59 Miss. 1.

New Hampshire.— Severance *v.* Kimball, 8 N. H. 386; Richardson *v.* Duncan, 3 N. H. 508.

ment is with lawful authority, for a just cause, and for a proper purpose, that it cannot be called duress.[15] Imprisonment is the restraint of one's liberty, whether in prison or elsewhere, for "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of a common prison."[16]

c. Duress Per Minas — (i) *In General.* Duress *per minas* arises when a person (1) is threatened with loss of life, (2) is threatened with loss of limb, (3) is

New York.— Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141.

Texas.— Phelps *v.* Zuschlag, 34 Tex. 371.

Wisconsin.— Fay *v.* Oatley, 6 Wis. 42.

United States.— Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134.

See 11 Cent. Dig. tit. "Contracts," § 436 *et seq.*

Unlawful detention.— And although the imprisonment be originally lawful, yet if the party detain the prisoner unlawfully it is duress. Whitefield *v.* Longfellow, 13 Me. 146; Huscombe *v.* Standing, Cro. Jac. 187.

So maltreatment while under arrest on a well-founded charge will invalidate an act produced by such maltreatment. Hatter *v.* Greenlee, 1 Port. (Ala.) 222, 26 Am. Dec. 370.

Imprisonment to enforce a private demand is duress, although the imprisonment may be otherwise legal.

California.— Morrill *v.* Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207.

Connecticut.— Sharon *v.* Gager, 46 Conn. 189.

Illinois.— Bane *v.* Detrick, 52 Ill. 19; Shenk *v.* Phelps, 6 Ill. App. 612.

Iowa.— Nevada First Nat. Bank *v.* Bryan, 62 Iowa 42, 17 N. W. 165.

Kansas.— Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 270, 26 L. R. A. 803.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Bryant *v.* Peck, 154 Mass. 460, 28 N. E. 678; Harris *v.* Carmody, 131 Mass. 51, 41 Am. Rep. 188; Hackett *v.* King, 6 Allen 58.

Michigan.— Seiber *v.* Price, 26 Mich. 518.

Missouri.— Miller *v.* Bryden, 34 Mo. App. 602.

New Hampshire.— Shaw *v.* Spooner, 9 N. H. 197, 32 Am. Dec. 348; Richardson *v.* Duncan, 3 N. H. 508.

New York.—Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 27 N. Y. St. 733, 15 Am. St. Rep. 447, 6 L. R. A. 491; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741; Osborn *v.* Robbins, 36 N. Y. 365.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Texas.— Morrison *v.* Faulkner, 80 Tex. 128, 15 S. W. 797.

Wisconsin.— Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946; Fay *v.* Oatley, 6 Wis. 42.

15. *Arkansas.*— Marvin *v.* Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191.

Connecticut.— Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

Georgia.— Smith *v.* Atwood, 14 Ga. 402; Gresham *v.* Landens, Ga. Dec., Pt. II, 149.

Illinois.— Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Heaps *v.* Dunham, 95 Ill. 583; Taylor *v.* Cottrell, 16 Ill. 93.

Indiana.— Legg *v.* Leyman, 8 Blackf. 148.

Maine.— Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Bowker *v.* Lowell, 49 Me. 429; Soule *v.* Bonney, 37 Me. 128; Eddy *v.* Herrin, 17 Me. 338, 35 Am. Dec. 261; Whitefield *v.* Longfellow, 13 Me. 146.

Massachusetts.— Felton *v.* Gregory, 130 Mass. 176; Grimes *v.* Briggs, 110 Mass. 446.

Michigan.— Prichard *v.* Sharp, 51 Mich. 432, 16 N. W. 798; Rood *v.* Winslow, 2 Dougl. 68.

Mississippi.— Stebbins *v.* Niles, 25 Miss. 267.

Nebraska.— Sanford *v.* Sornborg, 26 Nebr. 295, 41 N. W. 1102; Sieber *v.* Weiden, 17 Nebr. 582, 24 N. W. 215; Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694.

New Hampshire.— Nealley *v.* Greenough, 25 N. H. 325; Alexander *v.* Pierce, 10 N. H. 494.

New Jersey.— State *v.* Such, 53 N. J. L. 351, 21 Atl. 852; Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

New York.— Knapp *v.* Hyde, 60 Barb. 80; Lazzarone *v.* Oishei, 2 Misc. 200, 21 N. Y. Suppl. 267, 49 N. Y. St. 520; Shephard *v.* Watrous, 3 Cai. 166 (holding that an agreement to submit a matter to reference by the defendant under a legal arrest or a settlement made by him is not void on the ground of duress).

Pennsylvania.— Stouffer *v.* Latshaw, 2 Watts 165, 27 Am. Dec. 297; *In re* Buzzard, 13 Lanc. Bar 127.

South Carolina.— Meek *v.* Atkinson, 1 Bailey 84, 19 Am. Dec. 653; *In re* Pinson, 11 Rich. Eq. 110.

Texas.— Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297; Obert *v.* Landa, 59 Tex. 475; Landa *v.* Obert, 45 Tex. 539.

Wisconsin.— Wolff *v.* Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115.

United States.— Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304 [*reversing* 2 Woods 372, 19 Fed. Cas. No. 11,205]; Kelsey *v.* Hobby, 16 Pet. 269, 10 L. ed. 961.

See 11 Cent. Dig. tit. "Contracts," § 431 *et seq.*

Fear of consequence of crime.— Where the only coercion influencing the person's mind is the fear of the consequences of his own criminal act this is not legal duress. Felton *v.* Gregory, 130 Mass. 176; Sieber *v.* Weiden, 17 Nebr. 582, 24 N. W. 215.

16. Leake Contr. 351.

What constitutes arrest or imprisonment see ARREST, 3 Cyc. 873; FALSE IMPRISONMENT.

threatened with mayhem, or (4) is threatened with imprisonment, and only in these cases at common law.[17]

(II) *Threats of Imprisonment.* Fear of imprisonment is sufficient to constitute duress[18] "for the law has a special regard for the safety and liberty of a man."[19] To constitute duress by a threat of imprisonment for a supposed crime there must be a threat importing an illegal or wrongful imprisonment, or a resort to a criminal prosecution for an improper purpose or from a wrongful motive, accompanied with such circumstances as would indicate a prompt or immediate execution of the threat.[20] Mere threats of criminal prosecution are not enough,

17. *Arkansas.*— Burr *v.* Burton, 18 Ark. 214.

Illinois.— Bane *v.* Detrick, 52 Ill. 19.

Indiana.—Adams *v.* Stringer, 78 Ind. 175.

Louisiana.— Mollere *v.* Harp, 36 La. Ann. 471.

Nebraska.—Hullhorst *v.* Scharner, 15 Nebr. 57, 17 N. W. 259.

New York.— Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Anderson *v.* Anderson, 74 Hun 56, 26 N. Y. Suppl. 492, 57 N. Y. St. 868.

South Dakota.— Bueter *v.* Bueter, 1 S. D. 94, 45 N. W. 208, 8 L. R. A. 562.

Tennessee.— McCartney *v.* Wade, 2 Heisk. 369; Wilkerson *v.* Bishop, 7 Coldw. 24.

Wisconsin.— Magoon *v.* Reber, 76 Wis. 392, 45 N. W. 112.

United States.— U. S. *v.* Huckabee, 16 Wall. 414, 21 L. ed. 457; Baker *v.* Morton, 12 Wall. 150, 20 L. ed. 262; Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134.

See 11 Cent. Dig. tit. "Contracts," § 436 *et seq.*

18. *Illinois.*— Bane *v.* Detrick, 52 Ill. 19 (holding that a contract was voidable for duress, where a party having a warrant for an arrest issued by a justice of one state for an offense committed in another state threatened to execute it, unless the accused should enter into the contract, and the contract was entered into to avoid the threatened arrest); Shenk *v.* Phelps, 6 Ill. App. 612 (where a creditor extorted from his debtor's father a note for the amount of the son's debt by arresting the debtor on a criminal charge).

Indiana.— Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695 (where plaintiff induced defendant, who was in ill health, to go into a secluded place, where he was charged with an offense of which he was not guilty, and persuaded that a person who was with and assisted plaintiff was a police officer, having power to arrest, and in consequence of a threat of immediate arrest and imprisonment, defendant executed certain promissory notes, it being held duress rendering the notes voidable); Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711.

Kansas.— Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939.

Maine.— Whitefield *v.* Longfellow, 13 Me. 146.

Nebraska.—Hullhorst *v.* Scharner, 15 Nebr. 57, 17 N. W. 259, holding that a note and mortgage could be avoided for duress, where they were obtained from an irregular medical practitioner by threats to send him to the penitentiary for indelicate treatment of the daughter of the holder while treating her for supposed suppression of the menses.

New York.— Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141 (holding it duress avoiding the agreement where a prisoner on execution was informed by the sheriff that he was directed to release him if he would sign an agreement not to sue the creditor for false imprisonment, and that if he did not sign he would have to stay in jail a long time, and he signed and was discharged); Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Maricle *v.* Brooks, 5 N. Y. Suppl. 210, 21 N. Y. St. 534; Foshay *v.* Ferguson, 5 Hill 154.

Ohio.— James *v.* Roberts, 18 Ohio 548.

Tennessee.— McCartney *v.* Wade, 2 Heisk. 369; Wilkerson *v.* Bishop, 7 Coldw. 24.

Texas.— Morrison *v.* Faulkner, 80 Tex. 128, 15 S. W. 797; Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297; Wood *v.* Willis, 32 Tex. 670.

United States.— U. S. *v.* Huckabee, 16 Wall. 414, 21 L. ed. 457; Baker *v.* Morton, 12 Wall. 150, 20 L. ed. 262.

England.— Rex *v.* Southerton, 6 East 126, 8 Rev. Rep. 428.

See 11 Cent. Dig. tit. "Contracts," §§ 439, 440.

19. Coke Litt. 253*b*.

20. *Illinois.*— Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Taylor *v.* Cottrell, 16 Ill. 73.

Maine.— Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Eddy *v.* Herrin, 17 Me. 378, 35 Am. Dec. 261.

Missouri.— Davis *v.* Luster, 64 Mo. 43.

Nebraska.—Sanford *v.* Sornberger, 26 Nebr. 295, 41 N. W. 1102.

New Jersey.— Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

New York.— Weber *v.* Barrett, 125 N. Y. 18, 25 N. E. 1068, 34 N. Y. St. 1010; Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Kissock *v.* House, 23 Hun 35; Foshay *v.* Ferguson, 5 Hill 154.

North Carolina.— Simmons *v.* Mann, 92 N. C. 12.

Pennsylvania.— Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706.

Texas.— Landa *v.* Obert, 45 Tex. 539.

See 11 Cent. Dig. tit. "Contracts," §§ 438, 439.

In the relation of husband and wife or

but there must be a reasonable ground for apprehension that the threats will be carried into execution, and it must also appear that the threats operated upon the mind of the party so as to overcome his will.[21] So a threat to prosecute at some indefinite time in the future would not be duress, particularly if the threatened person knew that the other had no present means of executing it by arresting him, and that he had a defense and could make it.[22] Written securities extorted by means of threats of prosecution for criminal offenses of which the party threatened was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided.[23] On the other hand the law does not permit a criminal who has stolen property to defend against the debt, or its written acknowledgment or securities given for the debt, on the ground of threatened prosecution or imprisonment.[24] But in a suit to set aside the transaction the court may order a rescission or reconveyance on payment of the actual sum due.[25]

(III) *Threats of Injury to Property.* A threat to destroy, injure, or detain goods or chattels, or to trespass upon lands is not, according to the English decisions,[26] and a number of cases in the United States,[27] such legal duress as will

parent and child, it has been held that each may avoid a contract induced and obtained by threats of imprisonment of the other, whether the imprisonment threatened is a lawful or an unlawful one; but "duress," it is said, is not the proper word to describe such a transaction. It rather falls under the rule which renders void contracts obtained through undue influence. Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 27 N. Y. St. 733, 15 Am. St. Rep. 447, 6 L. R. A. 491. See *infra*, VI, F.

21. *Maine.*— Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556.

Michigan.— Feller *v.* Green, 26 Mich. 70.

Minnesota.— Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359.

Missouri.— Buchanan *v.* Sahlein, 9 Mo. App. 552.

New Jersey.— Bodine *v.* Morgan, 37 N. J. Eq. 426.

New York.— Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Stone *v.* Weiller, 57 Hun 588, 10 N. Y. Suppl. 828, 32 N. Y. St. 936.

Pennsylvania.— Miller *v.* Miller, 68 Pa. St. 486.

Wisconsin.— Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679, holding that a threat to send to prison is not duress when the threat does not specify an offense for which one might be imprisoned.

See 11 Cent. Dig. tit. "Contracts," § 439.

22. Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321.

23. Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 290.

24. Holt *v.* Agnew, 67 Ala. 360; Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Beath *v.* Chapoton, 115 Mich. 506, 73 N. W. 806; Bodine *v.* Morgan, 37 N. J. Eq. 426.

25. Beath *v.* Chapoton, 115 Mich. 506, 73 N. W. 806. See Rood *v.* Winslow, 2 Dougl. (Mich.) 68, Walk. (Mich.) 340, where a person who had been convicted of larceny and sentenced to pay a fine of one thousand dollars, and was confined in prison, executed a mortgage to the county for one thousand dollars, in consideration of which he was pardoned, and afterward filed a bill in equity to set aside the foreclosure sale on the ground of duress. A decree was entered for the amount actually due. See also Briggs *v.* Withey, 24 Mich. 136, where a mortgage for five thousand dollars given to settle a charge of adultery was held valid to the amount of two thousand dollars which was actually due.

26. Smith *v.* Monteith, 2 D. & L. 358, 9 Jur. 310, 14 L. J. Exch. 22, 13 M. & W. 427; Atlee *v.* Backhouse, 3 M. & W. 633, 1 H. & H. 135, 7 L. J. Exch. 234. And see Skeate *v.* Beale, 11 A. & E. 983, 989, 4 Jur. 766, 9 L. J. Q. B. 233, 3 P. & D. 587, 39 E. C. L. 516, where the court said: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to, the person and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

27. *Alabama.*— Lehman *v.* Shackleford, 50 Ala. 437.

Colorado.— McClair *v.* Wilson, 18 Colo. 82, 31 Pac. 502.

Illinois.— Bane *v.* Detrich, 52 Ill. 19.

Kentucky.— Hazlerigg *v.* Donaldson, 2 Metc. 445; Edwards *v.* Handley, Hard. 602, 3 Am. Dec. 745.

constitute a ground for setting aside a contract made under its influence. The reason given for this is that the constraint which takes away free agency and destroys the power of withholding assent to a contract must be one which is imminent and without immediate means of prevention, and such as would operate on a person of a reasonable firmness of purpose. To avoid a contract on the ground of duress, the threats, according to the common-law doctrine, must be such as to strike with fear a person of common firmness and constancy of mind, and a person threatened with loss of property ought to have sufficient resolution to resist such a threat and to rely upon the law for his remedy.[28] As we shall see, however, this doctrine has been much modified by the later cases on equitable principles.[29]

d. What Is Not Legal Duress. Duress by mere advice, direction, influence, and persuasion is not recognized in law.[30] Nor can a charge of legal duress be predicated upon a threat to injure one's credit,[31] to withhold payment of a debt, to refuse performance of a contract,[32] or to foreclose or exercise the power of sale on a mortgage;[33] a threat of arrest or arrest on civil process on a legal claim, when such arrest is allowed by law;[34] or a threat of, or the bringing of, a lawsuit or civil

Maine.— Seymour *v.* Prescott, 69 Me. 376; Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556.

Maryland.— Gotwait *v.* Neal, 25 Md. 434.

Massachusetts.— Wilcox *v.* Howland, 23 Pick. 167; Fisher *v.* Shattuck, 17 Pick. 252. See Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367.

Mississippi.— Bingham *v.* Sessions, 6 Sm. & M. 13.

Missouri.— Wilkerson *v.* Hood, 65 Mo. App. 491.

Nebraska.— Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321.

New Hampshire.—Alexander *v.* Pierce, 10 N. H. 494.

New York.— Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Wallach *v.* Hoexter, 17 Abb. N. Cas. 26; Foshay *v.* Ferguson, 5 Hill 154.

Pennsylvania.— Miller *v.* Miller, 68 Pa. St. 486.

United States.— U. S. *v.* Huckabee, 16 Wall. 414, 21 L. ed. 457; French *v.* Shoemaker, 14 Wall. 314, 20 L. ed. 852; Baker *v.* Morton, 12 Wall. 150, 20 L. ed. 262; Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134; *In re* Meyer, 100 Fed. 775, 3 Am. Bankr. Rep. 772.

See 11 Cent. Dig. tit. "Contracts," § 432.

28. Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134; and other cases in the notes preceding.

29. See *infra*, VI, E, 4, e.

30. Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241.

No amount of persuasion to influence one to exercise his will to some particular end can constitute duress. Batavia Bank *v.* North, 114 Wis. 637, 90 N. W. 1016.

31. Bancroft *v.* Bancroft, 110 Cal. 374, 40 Pac. 488, 42 Pac. 896; Coleman *v.* Merchants' Nat. Bank, 6 Ohio Dec. (Reprint) 1063, 10 Am. L. Rec. 50.

32. *California.*— Bancroft *v.* Bancroft, 110 Cal. 374, 40 Pac. 488, 42 Pac. 896.

Colorado.—Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

Indiana.— Tucker *v.* State, 72 Ind. 242.

Kansas.— See McCormick *v.* Dalton, 53 Kan. 146, 35 Pac. 1113. In this case, after A had begun work under a parol contract for grading one mile of road-bed, B presented a written contract for one-half mile only. On A's refusal to sign the contract, B said to A's men, "I will stand good for no more work you do for" A. A being unable to continue the work unless B paid the men, he signed the contract. It was held that the contract was not signed under duress.

Michigan.— Goebel *v.* Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511; Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105.

Minnesota.— Cable *v.* Foley, 45 Minn. 421, 47 N. W. 1135.

New York.— Doyle *v.* Trinity Church, 133 N. Y. 372, 31 N. E. 221, 45 N. Y. St. 205; Secor *v.* Clark, 117 N. Y. 350, 22 N. E. 754, 27 N. Y. St. 109.

Pennsylvania.— Miller *v.* Miller, 68 Pa. St. 486.

Texas.— Alexander *v.* Trufant, (Tex. Civ. App. 1895) 34 S. W. 152.

Vermont.— Hibbard *v.* Mills, 46 Vt. 240.

Wisconsin.— Williams *v.* Phelps, 16 Wis. 80.

United States.— Domenico *v.* Alaska Packers' Assoc., 112 Fed. 554.

See 11 Cent. Dig. tit. "Contracts," § 431 *et seq.*

33. *Arkansas.*— Vick *v.* Shinn, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26.

Indiana.— Buck *v.* Axt, 85 Ind. 512.

Kansas.— Kimball Co. *v.* Raw, 7 Kan. App. 17, 51 Pac. 789.

Minnesota.— Nutting *v.* McCutcheon, 5 Minn. 382.

South Carolina.—Shuck *v.* Interstate Bldg., etc., Assoc., 63 S. C. 134, 41 S. E. 28.

34. *Georgia.*— Smith *v.* Atwood, 14 Ga. 402.

process.[35] Nor can a charge of duress be based upon merely speaking wrongly to a woman, without threats of personal violence,[36] mere vexation and annoyance,[37] mere pecuniary distress,[38] or the refusal to surrender property on which one has a lien.[39] And there is no duress where a man induces his wife to mortgage her separate estate by threatening to withdraw himself from her society if she refuses,[40] where a husband threatens that unless his wife signs his note as surety he will poison himself,[41] or where a widow of a decedent threatens that she will take his body to a certain place for burial, unless his mother assigns a policy on his life.[42]

4. The Modern Equitable Rule — a. The Old Rule. As has been seen, by the common-law rule duress was a defense to be set up in a court of law in an action on the instrument; and hence its limits were strictly defined. In the early history

Illinois.— Taylor *v.* Cottrell, 16 Ill. 93.
Louisiana.— Wood *v.* Fitz, 10 Mart. 196.
Maine.— Bunker *v.* Steward, (1886) 4 Atl. 558.
Massachusetts.— Grimes *v.* Briggs, 110 Mass. 446.
Minnesota.— Taylor *v.* Blake, 11 Minn. 255.
Missouri.— Holmes *v.* Hill, 19 Mo. 159.
New Jersey.—Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.
New York.— Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Shephard *v.* Watrous, 3 Cai. 166; Farmer *v.* Walter, 2 Edw. 601.
South Carolina.— Meek *v.* Atkinson, 1 Bailey 84, 19 Am. Dec. 653.
See 11 Cent. Dig. tit. "Contracts," § 438.

Contra, where the arrest or detention is illegal.— *Maine.*— Gibson *v.* Ethridge, 72 Me. 261; Kavanagh *v.* Saunders, 8 Me. 422.
Mississippi.— Stebbins *v.* Niles, 25 Miss. 267.
New Hampshire.— Breck *v.* Blanchard, 22 N. H. 303.
New York.— Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Winter *v.* Kinney, 1 N. Y. 365; Richards *v.* Vanderpoel, 1 Daly 71.
Vermont.— Brownell *v.* Talcott, 47 Vt. 243.
See 11 Cent. Dig. tit. "Contracts," § 438.

35. *California.*— Holt *v.* Thomas, 105 Cal. 273, 38 Pac. 891.
Colorado.— McClar *v.* Wilson, 18 Colo. 82, 31 Pac. 502.
Indiana.— Wilson Sewing Mach. Co. *v.* Curry, 126 Ind. 161, 25 N. E. 896; Buck *v.* Axt, 85 Ind. 512; Peckham *v.* Hendren, 76 Ind. 47; Cummins *v.* White, 4 Blackf. 356; Watson *v.* Cunningham, 1 Blackf. 321.
Iowa.— Dickerman *v.* Lord, 21 Iowa 338, 89 Am. Dec. 578.
Louisiana.— Bradford *v.* Brown, 11 Mart. 217.
Maine.— Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816, holding that it is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit, or if the wrong includes a violation of the criminal law to threaten him with a criminal prosecution.
Massachusetts.— Emmons *v.* Scudder, 115 Mass. 367; Benson *v.* Monson, 7 Cush. 125, 54 Am. Dec. 716.
Minnesota.— Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115.
Missouri.— Morgan *v.* Joy, 121 Mo. 677, 26 S. W. 670; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Claflin *v.* McDonough, 33 Mo. 412, 84 Am. Dec. 54.
New Hampshire.— Evans *v.* Gale, 18 N. H. 397.
New Jersey.— Tooker *v.* Sloan, 30 N. J. Eq. 394.
New York.— White *v.* Baxter, 41 N. Y. Super. Ct. 358; Scudder *v.* Burrows, 7 N. Y. St. 605.
North Carolina.— Hunt *v.* Rass, 17 N. C. 292, 24 Am. Dec. 274.
Pennsylvania.— Heysham *v.* Dettre, 89 Pa. St. 506.
Texas.— Wells *v.* Burnett, 7 Tex. 584.
West Virginia.— Whittaker *v.* Southwestern Virginia Imp. Co., 34 W. Va. 217, 12 S. E. 507.
United States.— Atkinson *v.* Allen, 71 Fed. 58, 17 C. C. A. 570; McKay *v.* Jackman, 17 Fed. 641.
See 11 Cent. Dig. tit. "Contracts," § 437.

Threat to levy an attachment or execution.— *Alabama.*—Lehman *v.* Shackleford, 50 Ala. 437.
Illinois.— Stover *v.* Mitchell, 45 Ill. 213.
Kentucky.— Waller *v.* Cralle, 8 B. Mon. 11.
Massachusetts.— Wilcox *v.* Howland, 23 Pick. 167.
Wyoming.— Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898.

36. Gabbey *v.* Forgeous, 38 Kan. 62, 15 Pac. 866; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Van Deventer *v.* Van Deventer, 46 N. J. L. 460.
37. Brower *v.* Callender, 105 Ill. 88.
38. Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Miller *v.* Coates, 4 Thomps. & C. (N. Y.) 429; French *v.* Shoemaker, 14 Wall. (U. S.) 314, 20 L. ed. 852. See Buford *v.* Louisville, etc., R. Co., 82 Ky. 286; Kenny *v.* Udall, 5 Johns. Ch. (N. Y.) 464.
39. *In re* Meyer, 106 Fed. 828.
40. Wallach *v.* Hoexter, 17 Abb. N. Cas. (N. Y.) 267. *Contra,* Tapley *v.* Tapley, 10 Minn. 448, 83 Am. Dec. 76.
41. Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180.
42. Jewelers' League *v.* De Forest, 80 Hun (N. Y.) 376, 30 N. Y. Suppl. 88, 61 N. Y. St. 827.

of the law legal duress existed only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant and courageous man of his free will and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage.[43]

b. Modification of Rule. Later there came a slight modification in the amount of resistance which a person was bound to make, it being changed from that of a constant and courageous man to that of a person of ordinary firmness.[44] But with this modification duress in the common-law courts was a matter of law and subject to the exact legal test just mentioned, and oppression or threats not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise of his free will, was remediless except by an appeal to a court of equity, where a remedy was obtainable on the ground of undue influence.[45] The later cases, however, do not apply the strict doctrine of the common law as to duress, but apply the equitable doctrine in actions at law.[46]

c. The Modern Doctrine. This modern doctrine holds that there is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential

43. Coke Litt. 253; Pollock Contr. 554. And see 1 Bl. Comm. 130, 131, where it is said: "Whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act: these, though accompanied by all the other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. . . . The constraint a man is under in these circumstances is called in law 'duress.' . . . A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life or limb."

44. 1 Chitty Contr. (11th ed.) 372; 2 Greenleaf Ev. 301; U. S. *v.* Huckabee, 16 Wall. (U. S.) 414, 21 L. ed. 457 (where it was said: "Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness"). And see the following cases:

Arkansas.—Bosley *v.* Shanner, 26 Ark. 280; Burr *v.* Burton, 18 Ark. 214.

Illinois.— Youngs *v.* Simm, 41 Ill. App. 28.

Indiana.— Hines *v.* Hamilton County, 93 Ind. 266.

Maine.— Thorne *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. St. Rep. 816; Higgins *v.* Brown, 78 Me. 473, 5 Atl. 269; Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

Minnesota.— Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359.

Missouri.— Wolfe *v.* Marshal, 52 Mo. 167.

Nebraska.— Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321.

West Virginia.— Simmons *v.* Trumbo, 9 W. Va. 358.

45. "The court of chancery besides a concurrent jurisdiction in cases of legal duress exercises an extended jurisdiction to grant relief in various cases of pressure which did not amount to duress at common law." Leake Contr. 354.

46. The expressions in some of the cases to the effect that the threat must be such as to overcome a person of "ordinary firmness of mind" or of "ordinary courage and constancy of mind" is hardly supported by any actual decision to that effect. Indeed the law as thus stated would seem to reverse the usual order of things and instead of protecting the weak against the strong, to throw its mantle around the strong and leave the weak and helpless beyond the pale of its protection. On the contrary the later cases "consider the quality of the contracting mind, and therefore hold the apparent, yet unreal, consent of a subject or timid person, or person of inferior intellect, as invalid as that of the strongest and most independent understanding, though the latter would not have been

to the making of a contract, and was the contract thereby obtained?[47] Duress then, according to this class of cases, includes that condition of mind produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.[48]

d. Threats of Bodily Harm. The early common-law rule, as we have seen, was that, while a threat against one's life or to do bodily injury was of such a nature as to render the act done under its influence an act done under duress, yet the threat of bodily injury must be of great bodily harm, the loss of a limb or mayhem, and that a threat of a mere battery was not legal duress, for the reason that it was not sufficient to overcome the mind and will of an ordinarily firm and courageous man.[49] But the later American rule holds contracts induced by threats and fear of a battery voidable on the ground of duress.[50]

e. Threats of Injury to Property — (i) *In General.* According to the modern doctrine threats of destruction of property or duress of goods under oppressive circumstances will avoid a contract on the ground of duress, because in such cases there is nothing but the form of agreement without its substance.[51]

(ii) *Parties Not at Arm's Length.* Where the parties are not at arm's length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to or withholding of property as made

enthralled where the former was." Bishop Contr. § 719.

47. Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134. And see Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651; Love *v.* State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234; Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 494, 47 L. R. A. 417; Wulff *v.* Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Dayton City Nat. Bank *v.* Kusworm, 91 Wis. 166, 64 N. W. 843; Kuelkamp *v.* Hidding, 31 Wis. 503; Radick *v.* Hutchins, 95 U. S. 210, 24 L. ed. 409.

48. See the cases in the preceding note.

49. Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134.

50. Love *v.* State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234; Foshay *v.* Ferguson, 5 Hill (N. Y.) 154; Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134.

51. *Florida.*— Fuller *v.* Roberts, 35 Fla. 110, 17 So. 359.

Georgia.— Crawford *v.* Cato, 22 Ga. 594.

Illinois.— Pemberton *v.* Williams, 87 Ill. 15; Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Thurman *v.* Burt, 53 Ill. 129.

Indiana.— Bennett *v.* Ford, 47 Ind. 264; Klussman *v.* Copeland, 18 Ind. 306.

Kansas.— McCormick *v.* Dalton, 53 Kan. 146, 35 Pac. 1113.

Maryland.— Williams *v.* Williams, 63 Md. 371; Frederick Centr. Bank *v.* Copeland, 18 Md. 317, 81 Am. Dec. 597.

Michigan.— Hackley *v.* Headley, 45 Mich. 567, 8 N. W. 511; Vyne *v.* Glenn, 41 Mich. 112, 1 N. W. 997.

Missouri.—Wilkerson *v.* Hood, 65 Mo. App. 491.

New York.— McPherson *v.* Cox, 86 N. Y. 472; Scholey *v.* Mumford, 60 N. Y. 498; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142 [*affirming* 1 Duer 209]; Foshay *v.* Ferguson, 5 Hill 154.

Pennsylvania.— Motz *v.* Mitchell, 91 Pa. St. 114; Miller *v.* Miller, 68 Pa. St. 486; White *v.* Heylman, 34 Pa. St. 142. See Heysham *v.* Dettre, 89 Pa. St. 506.

South Carolina.— Collins *v.* Westbury, 2 Bay 211, 1 Am. Dec. 643; Sasportas *v.* Jennings, 1 Bay 470.

Tennessee.— Waller *v.* Parker, 5 Coldw. 476.

Texas.— Oliphant *v.* Minkham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363.

Virginia.—Nelson *v.* Suddarth, 1 Hen. & M. 350.

United States.— Lonegan *v.* Buford, 148 U. S. 581, 13 S. Ct. 684, 37 L. ed. 569; U. S. *v.* Huckabee, 16 Wall. 414, 21 L. ed. 457; French *v.* Shoemaker, 14 Wall. 314, 20 L. ed. 852; Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134; Tutt *v.* Ide, 3 Blatchf. 249, 24 Fed. Cas. No. 14,275*a*.

See 11 Cent. Dig. tit. "Contracts," § 432 *et seq.*

Absence of right to property.— The fact of duress of goods depends upon the right of a party to demand them as his property. Where one has in fact no right to demand goods except upon performance of terms and conditions imposed by law, it is not duress for a treasury agent to refuse to deliver them except upon those conditions. A compliance with the conditions by the owner, although thus exacted, must be deemed voluntary. Block *v.* U. S., 8 Ct. Cl. 461.

Real property is not in duress unless there be an illegal demand made against the owner, coupled with a present power or authority in the person making such demand to sell or dispose of the same if payment is not made as demanded. Mariposa Co. *v.* Bowman, Deady 228, 16 Fed. Cas. No. 9,089.

under duress,[52] as for example where a common carrier refuses to deliver or transport freight already in his possession, unless the shipper will sign a special contract;[53] where illegal charges are exacted from a customs officer as a condition of the delivery of property;[54] where a banker refuses to honor a customer's check, unless he accedes to a false and fraudulent claim;[55] where one with the necessary power threatens to prevent the clearance of a vessel;[56] where a gas or water company refuses to furnish gas until a promise which it has no right to exact is made;[57] where a state institution refuses to admit a student unless a payment of an illegal fee is made by him;[58] and other like cases.[59] An order of a military commandant in time of war, after martial law has been declared, requiring an act to be performed by a citizen which is contrary to his inclination, constitutes duress, although no threats or demonstrations of violence are used at the time the act is performed.[60] And the position of a public officer is generally such that persons acceding to illegal exactions on his part may be said to do so under duress.[61]

(III) *Lack of Consideration.* Where the detention of property is without legal right, the contract entered into to obtain possession is void on the ground of want of consideration.[62]

52. Love *v.* State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234; Secor *v.* Clark, 117 N. Y. 350, 22 N. E. 754, 1 N. Y. Suppl. 565, 27 N. Y. St. 169; Schoellhamer *v.* Rometsch, 26 Oreg. 394, 38 Pac. 344.

53. *Arkansas.*— Little Rock, etc., R. Co. *v.* Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527.

Kansas.— Atchison, etc., R. Co. *v.* Dill, 48 Kan. 210, 29 Pac. 148.

Kentucky.— Adams Express Co. *v.* Nock, 2 Duv. 562, 87 Am. Dec. 510.

Tennessee.— Louisville, etc., R. Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

Texas.— Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

Vermont.— Beckwith *v.* Frisbie, 32 Vt. 559.

54. Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373.

55. Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

56. Baldwin *v.* Sullivan Lumber Co., 20 N. Y. Suppl. 496, 48 N. Y. St. 296.

57. New Orleans Gas Light, etc., Co. *v.* Paulding, 12 Rob. (La.) 378; Westlake *v.* St. Louis, 77 Mo. 47, 46 Am. Rep. 4.

58. Niedermeyer *v.* State University, 61 Mo. App. 654.

59. Dwincl *v.* Barnard, 28 Me. 554, 48 Am. Dec. 507, where a person having a lawful right to float his logs over the land of another, without his consent, through an artificial channel made by the latter by diverting the natural course of a stream, and being resisted and obstructed in the use of it by the other, thereupon made a contract with him to pay a sum of money for the removal of such obstruction, and for the permission to float his logs, the agreement being held voidable as procured by duress.

Exercise of right not duress.— Where a baker, being deserted by his journeymen, applied to a bakers' union for other journeymen, and was refused aid unless he would execute his note to the union for a sum charged by it for its assistance, it was held, in an action on the note, that it was no duty of the union to supply defendant with journeymen, and that their refusal so to do, except upon an agreement for compensation, did not constitute duress. Grabosski *v.* Gewerz, 17 N. Y. Suppl. 528, 44 N. Y. St. 127.

60. Olivari *v.* Menger, 39 Tex. 76.

61. Jackson *v.* Siglin, 10 Oreg. 93; Wooters *v.* Smith, 56 Tex. 198; Lovejoy *v.* Lee, 35 Vt. 430; Silliman *v.* U. S., 101 U. S. 465, 25 L. ed. 987; Livingston *v.* U. S., 3 Ct. Cl. 131.

62. Brayden *v.* Goulman, 1 T. B. Mon. (Ky.) 115. See *supra*, IV, D, 11, 12.

Recovery of money paid under duress.— Where money is paid under duress, threats of imprisonment or of personal injury, or to release goods or property from duress, without any other consideration, it may be recovered back as a debt, as having been obtained by compulsion and without consideration.

Colorado.— Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

Massachusetts.— Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367; Joyner *v.* Egremont School Dist. No. 3, 3 Cush. 567.

Michigan.— Vyne *v.* Glenn, 41 Mich. 112, 1 N. W. 997.

New York.— Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Coady *v.* Curry, 8 Daly 58; Bates *v.* New York Ins. Co., 3 Johns. Cas. 238.

South Carolina.—Alston *v.* Durant, 2 Strobh. 257, 49 Am. Dec. 596.

England.— Atlee *v.* Backhouse, 1 H. & H. 135, 7 L. J. Exch. 234, 3 M. & W. 633, 650, where Parke, B., said: "There is no doubt . . . that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, . . . that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down . . .— but the ground is, that it is not a voluntary payment. If

5. Who Must Impose Duress. Duress, to avoid a contract, must be the act of the other party himself or his agent, or must be imposed with his knowledge, and taken advantage of by him for the purpose of obtaining the agreement. Duress by a third person will not avoid a contract made with a party who was not cognizant of it.[63]

6. Upon Whom Duress Must Be Imposed. As a rule an agreement cannot be avoided because the duress was imposed on a third person. In other words the law does not regard one person as under duress who enters into a contract to relieve another person and not himself.[64] Thus the duress of a principal will not excuse, and cannot be pleaded by a surety;[65] and a servant cannot avoid a deed made by duress to his master nor conversely.[66] Nor can a bill of sale be impeached by the seller's creditors, or by an officer attaching in their behalf, on the ground of duress of the seller.[67] An exception to the general rule is where the subject of the duress is the wife, husband, parent, child,[68] or other near

my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."

See Payment.

63. *Illinois.*— Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Schwartz *v.* Schwartz, 29 Ill. App. 516.

Kentucky.— Fightmaster *v.* Levi, 17 S. W. 195, 13 Ky. L. Rep. 412.

Massachusetts.— Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.

New York.—Sherman *v.* Sherman, 20 N. Y. Suppl. 414, 47 N. Y. St. 404.

Texas.— Dimmitt *v.* Robbins, 74 Tex. 441, 12 S. W. 94.

See Leake Contr. 425; 1 Rolle Abr. 688.

64. *Illinois.*— Plummer *v.* People, 16 Ill. 358.

Kentucky.— Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559; Jones *v.* Turner, 5 Litt. 147.

Massachusetts.— Robinson *v.* Gould, 11 Cush. 55.

New Jersey.— Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180.

Pennsylvania.— Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706; *In re* Buzzard, 13 Lanc. Bar 127.

Texas.— Spaulding *v.* Crawford, 27 Tex. 155.

Wyoming.— Barrett *v.* Mahnken, 6 Wyo. 451, 48 Pac. 202, 71 Am. St. Rep. 953.

England.—Huscombe *v.* Standing, Cro. Jac. 187.

See 11 Cent. Dig. tit. "Contracts," § 431 *et seq.*

65. *Illinois.*— Huggins *v.* People, 39 Ill. 241; Plummer *v.* People, 16 Ill. 358.

Maine.— Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

New York.— Solinger *v.* Earle, 82 N. Y. 393.

Texas.— Spaulding *v.* Crawford, 27 Tex. 155.

England.— Huscombe *v.* Standing, Cro. Jac. 187.

And see Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; Jones *v.* Turner, 5 Litt. (Ky.) 147; Bordentown Tp. *v.* Wallace, 60 N. J. L. 13, 11 Atl. 267; Strong *v.* Grannis, 26 Barb. (N. Y.) 122.

See Principal and Surety.

Contra as to statutory bonds.— State *v.* Brantley, 27 Ala. 44; Fisher *v.* Shattuck, 17 Pick. (Mass.) 252; Thompson *v.* Lockwood, 15 Johns. (N. Y.) 256.

66. Rolle Abr. 687; Bayly *v.* Clare, 2 Brownl. 275, 276, 9 Vin. Abr. 320, 16 Vin. Abr. 240. But see Cumming *v.* Ince, 11 Q. B. 112, 63 E. C. L. 112.

The mayor and commonalty may avoid a deed by reason of a duress of the mayor. Bayly *v.* Clare, 2 Brownl. 275, 276, 9 Vin. Abr. 320, 16 Vin. Abr. 240.

67. Lewis *v.* Bannister, 16 Gray (Mass.) 500.

68. *Alabama.*—Holt *v.* Agnew, 67 Ala. 360.

Georgia.— Southern Express Co. *v.* Duffey, 48 Ga. 358.

Illinois.— Plummer *v.* People, 16 Ill. 358; Bradley *v.* Irish, 42 Ill. App. 85; Mayer *v.* Oldham, 32 Ill. App. 233; Shenk *v.* Phelps, 6 Ill. App. 612. See also Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147.

Indiana.— Brooks *v.* Berryhill, 20 Ind. 97.

Iowa.— Nevada First Nat. Bank *v.* Bryan, 62 Iowa 42, 17 N. W. 165; Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447.

Kansas.— Heaton *v.* Norman County State Bank, 59 Kan. 281, 52 Pac. 876.

Kentucky.— See Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Massachusetts.— Bryant *v.* Peck, etc., Co., 154 Mass. 460, 28 N. E. 678; Harris *v.* Carmody, 131 Mass. 51, 41 Am. Rep. 188.

Michigan.— Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

Mississippi.—Allen *v.* Leflore County, 78 Miss. 671, 29 So. 161.

Missouri.— McCoy *v.* Green, 83 Mo. 626.

Nebraska.—Hargreaves *v.* Korcek, 44 Nebr. 660, 62 N. W. 1086.

New Hampshire.— Davis *v.* Smith, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584.

relative,[69] as in the case of an aunt or brother who enters into a contract under duress to protect a nephew or brother.

F. Undue Influence — 1. Definition. An exact definition of the term "undue influence" is not easy to frame, although frequently attempted by judges and text-writers.[70] Perhaps the best is that of Holland, who says: "Undue influence consists of acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another."[71]

2. Equity Jurisdiction. Equity has always a jurisdiction to set aside agreements which have been induced by undue pressure or influence on one of the parties. An abuse of confidence will not be permitted to work profit to one and injury to another. Contracts made between persons in certain relative positions are treated in equity as subject to the general presumption of weakness on the one side, and oppression or advantage taken of that weakness on the other, and the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption[72] by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.[73] So, as we have already seen, in case of any

New Jersey.— Lomerson *v.* Johnston, 44 N. J. Eq. 93, 99, 13 Atl. 8, where it was said: "It is happy for us that all persons, male or female, are blessed with these tender sensibilities which quickly respond when peril is threatened to friend, a child, a husband or a wife."

New York.— Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7, 27 N. Y. St. 733, 15 Am. St. Rep. 447, 6 L. R. A. 491; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741; Metropolitan L. Ins. Co. *v.* Meeker, 85 N. Y. 614; Solinger *v.* Earle, 82 N. Y. 393; Osborn *v.* Robbins, 36 N. Y. 365; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Strang *v.* Peterson, 56 Hun 418, 10 N. Y. Suppl. 139, 31 N. Y. St. 462; Haynes *v.* Rudd, 30 Hun 233; Smith *v.* Rowley, 66 Barb. 502; Jaeger *v.* Koenig, 30 Misc. 580, 62 N. Y. Suppl. 803.

North Carolina.— Simms *v.* Barefoot, 3 N. C. 606.

Pennsylvania.— Oxford Nat. Bank *v.* Kirk, 90 Pa. St. 49; McGrory *v.* Reilley, 14 Phila. 111, 37 Leg. Int. 4. But see Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

South Carolina.— Williams *v.* Walker, 18 S. C. 577.

Texas.— Kocourek *v.* Marak, 54 Tex. 201, 33 Am. Rep. 623.

Vermont.— Hinsdill *v.* White, 34 Vt. 558.

Wisconsin.— Dayton City Nat. Bank *v.* Kusworm, 88 Wis. 188, 59 N. W. 564, 43 Am. St. Rep. 880, 26 L. R. A. 48; Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946; McCormick Harvesting-Mach. Co. *v.* Hamilton, 73 Wis. 486, 41 N. W. 727; Lefebvre *v.* Dutruit, 51 Wis. 326, 8 N. W. 149, 37 Am. Rep. 833.

United States.— McClintick *v.* Cummins, 3 McLean 158, 15 Fed. Cas. No. 8,699.

England.— Williams *v.* Bayley, L. R. 1 H. L. 200, 12 Jur. N. S. 875, 35 L. J. Ch. 717, 14 L. T. Rep. N. S. 802; Wayne *v.* Sands, Freem. K. B. 351; Rolle Abr. 687.

See 11 Cent. Dig. tit. "Contracts," § 440.

69. Aunt and nephew.— Sharon *v.* Gager, 46 Conn. 189.

Brother.— Davis *v.* Luster, 64 Mo. 43.

70. Some writers on contracts do not attempt a definition. See Anson Contr. 165; Leake Contr. 354.

71. Holland Jurisp. 239. And see Pollock Contr. 523, where it is said: "Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to be such as to preclude the exercise of free and deliberate judgment."

See for definitions by judges Nelson's Will, 39 Minn. 204, 39 N. W. 143; Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95; Pressley *v.* Kemp, 16 S. C. 334, 42 Am. Rep. 635; Aylesford *v.* Morris, L. R. 8 Ch. 484, 42 L. J. Ch. 546, 28 L. T. Rep. N. S. 541, 21 Wkly. Rep. 424; Smith *v.* Kay, 7 H. L. Cas. 750, 779 (where it is said: "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed").

Unfair dealing.—It has been suggested that "unfair dealing" is a more accurate expression to describe the acts which equity condemns than the term "undue influence." Harriman Contr. 259. But the latter phrase is safely ensconced in the literature of the law — in the judicial opinions, digests and dictionaries, and is not easily dislodged.

72. Presumption of undue influence see *infra*, VI, F, 5.

73. *Illinois.*— Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 119; Sands *v.* Sands, 112 Ill. 225; Ward *v.* Armstrong, 84 Ill. 151; Zeigler *v.* Huyler, 55 Ill. 288; Jennings *v.* McConnel, 17 Ill. 148; Casey *v.* Casey, 14 Ill. 112.

Kentucky.— Underwood *v.* Blockman, 4 Dana 309, 29 Am. Dec. 407.

Maryland.—Frederick Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Massachusetts.— Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Taylor *v.* Weld, 5 Mass. 109.

Minnesota.— Nelson's Will, 39 Minn. 204, 39 N. W. 143.

relation of a confidential and fiduciary character which gives to one of the parties an undue advantage over the other the law requires the utmost degree of good faith in all transactions between them. Consequently any misrepresentation or concealment of a material fact, or just suspicion of artifice or undue influence, will induce the interposition of equity, and the vacation of any transaction between the parties under such circumstances.[74] It is not necessary that the undue influence shall have been due to extraneous circumstances, but it may have arisen in the course of the same transaction in which it was exerted.[75]

3. CLASSIFICATION. The cases in which undue influence may arise are conveniently classified under three heads, namely: (1) Where a family or confidential relationship exists between the parties; (2) where there is a mental weakness in one caused either by age or illness; and (3) where one of the parties is necessitous or in distress.[76]

4. DUE AND UNDUE INFLUENCE DISTINGUISHED. Solicitation, importunity, argument, and persuasion are not undue influence, and a contract is not to be set aside merely because the one party has used these means to obtain the consent of the other.[77] Influence obtained by persuasion and argument or by appeals to the affections is not prohibited either in law or morals and is not obnoxious even in courts of equity, and may be termed "due influence."[78] Nor is the case changed because the parties stand in confidential relations to each other.[79] The line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice.[80] But on the other hand influence attained by flattery, importunity, superiority of will, mind, or character, which gives dominion over the will of another to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse, is such influence as equity condemns as undue.[81]

New York.— Green *v.* Roworth, 113 N. Y. 462, 21 N. E. 165, 23 N. Y. St. 149; Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Mead *v.* Bunn, 32 N. Y. 275.

North Carolina.— Garrow *v.* Brown, 60 N. C. 46, 86 Am. Dec. 450.

Pennsylvania.— *In re* Greenfield, 14 Pa. St. 489; Duncan *v.* McCullough, 4 Serg. & R. 483.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Vermont.— Ludlow *v.* Gill, 1 D. Chipm. 49.

Wisconsin.— Dayton City Nat. Bank *v.* Kusworm, 91 Wis. 166, 64 N. W. 843.

United States.— Selden *v.* Myers, 20 How. 506, 15 L. ed. 976.

England.— Aylesford *v.* Morris, L. R. 8 Ch. 484, 42 L. J. Ch. 546, 28 L. T. Rep. N. S. 541, 21 Wkly. Rep. 424.

74. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Yeates *v.* Pryor, 11 Ark. 58; Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178. See *supra*, VI, D, 2, b, (III); VI, D, 2, i, (V), (A).

75. Birdsong *v.* Birdsong, 2 Head (Tenn.) 289.

76. See *infra*, VI, F, 6.

77. *Illinois.*— Sturtevant *v.* Sturtevant, 116 Ill. 340, 6 N. E. 428; Rogers *v.* Higgins, 57 Ill. 244.

Iowa.— Beith *v.* Beith, 76 Iowa 601, 41 N. W. 371.

Kentucky.— Wise *v.* Foote, 81 Ky. 10.

New Jersey.— Black *v.* Foljambe, 39 N. J. Eq. 234.

West Virginia.— Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516.

Wisconsin.— See Batavian Bank *v.* North, 114 Wis. 637, 90 N. W. 1016.

United States.— Bowdoin College *v.* Merritt, 75 Fed. 480.

78. Schofield *v.* Walker, 58 Mich. 96, 24 N. W. 624; Bowdoin College *v.* Merritt, 75 Fed. 480.

79. Latham *v.* Udell, 38 Mich. 238, 241 (where it is said: "We do not know of any rule of law or of morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit or for that of others, . . . A faithful wife ought to have very great influence over her husband, and it is one of the necessary results of proper marriage relations"); Millican *v.* Millican, 24 Tex. 426 (holding that the influence which a dutiful child may exercise over an aged parent by acts of filial duty, and which naturally flows from mutual confidence and affection, is not improper).

80. Wallace *v.* Harris, 32 Mich. 380.

81. *Maryland.*— Layman *v.* Conrey, 60 Md. 286.

5. Presumption of Undue Influence. Where a relationship of a certain character is shown, or the circumstances of weakness, necessity, or distress are proved, equity will hold the agreement as procured by undue influence, and will relieve the promisor unless the other party is able to show that everything was fair, just, and reasonable.[82] In some cases in order to raise the presumption of undue influence it is only necessary to show that the parties occupied a certain relation toward each other. The relation alone, being confidential, raises the presumption.[83] In others the confidential character of the relation must be shown.[84] Thus it is universally held that a gift or voluntary conveyance between parties standing in the confidential relation of child to parent is *prima facie* void, and will not be upheld except upon proof that it was the free, voluntary, and unbiased act of the person making it. This is so, because a child is presumed to be under the control of parental influence as long as the dominion of the parent lasts, and while that dominion exists it lies on the parent, maintaining the gift, to disprove the exercise of parental influence by proof that the child had independent advice or in some other way.[85] So as to the relationship of attorney and client where the transaction is called in question by the client.[86] In other cases the proof of the actual exercise of undue influence is required or it must be shown that the relations of the parties were actually such as to imply dominion or control of one over the other.[87] Where fiduciary relations, mental weakness, or other circumstances of like character are not shown, the burden is on the plaintiff who seeks to avoid the contract for fraud or undue influence.[88]

6. Particular Relations — a. Family Relations. A large class of cases where agreements and other transactions have been set aside on the ground of undue influence are those where the party benefited stood in such a family relationship to the other as to render the latter peculiarly subject to influence. The relationship of husband and wife[89] and parent and child[90] are two of the most important of these. But the rule is by no means limited to persons in these relations. It extends to any case in which one member of a family exercises a preponderating influence in the family counsels, either from age, from character, or from other circumstances.[91]

b. Confidential Relations — (I) *Guardian and Ward.* Agreements made

Michigan.— Schofield *v.* Walker, 58 Mich. 96, 24 N. W. 624.

New Jersey.— Haydock *v.* Haydock, 33 N. J. Eq. 494.

New York.—Ingersoll *v.* Roe, 65 Barb. 346.

England.— Boyse *v.* Rossborough, 6 H. L. Cas. 2, 3 Jur. N. S. 373, 26 L. J. Ch. 256, 5 Wkly. Rep. 414.

And see the cases cited *infra*, VI, F, 6.

82. See the cases cited *infra*, VI, F, 6.

83. Cumberland Coal, etc., Co. *v.* Parish, 42 Md. 598; Adee *v.* Hallett, 3 N. Y. App. Div. 308, 38 N. Y. Suppl. 273, 73 N. Y. St. 754. See *infra*, VI, F, 6, a, b.

84. See *infra*, VI, F, 6, a, b.

85. See *infra*, VI, F, 6, a.

86. Vanasse *v.* Reid, 11 Wis. 303, 87 N. W. 192. See *infra*, VI, F, 6, b, (III).

87. Ross *v.* Ross, 6 Hun (N. Y.) 80; Keck *v.* Sayre, 4 Ohio S. & C. Pl. Dec. 195.

A gift or conveyance by parent to child is not presumed invalid, yet if it is shown that the relations were confidential and that the child exercised great influence over the parent, then the burden is thrown on the donee or grantee to show that the transaction was a just and fair one. Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643. See *infra*, VI, F, 6, a.

88. Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

89. Greene *v.* Greene, 42 Nebr. 634, 60 N. W. 937, 47 Am. St. Rep. 724; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289. See Husband and Wife.

90. *Alabama.*— Noble *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175.

California.— Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940.

Maryland.— Highberger *v.* Stiffler, 21 Md. 338, 83 Am. Dec. 593.

Ohio.— Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

Pennsylvania.— Miskey's Appeal, 107 Pa. St. 611.

United States.— Taylor *v.* Taylor, 8 How. 183, 12 L. ed. 1040.

England.— Archer *v.* Hudson, 7 Beav. 551, 8 Jur. 761, 29 Eng. Ch. 551.

See Parent and Child.

91. *Arkansas.*— Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1.

California.— Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940.

Maryland.— Highberger *v.* Stiffler, 21 Md. 338, 83 Am. Dec. 593 [*citing* Brooke *v.* Berry, 2 Gill (Md.) 83].

between a ward and his guardian are not recognized and enforced in equity, unless the circumstances show the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian.[92]

(II) *Trustee and Cestui Que Trust.* The principle also applies to contracts between trustee and *cestui que trust.*[93]

(III) *Attorney and Client.* And it applies to the relationship of attorney and client.[94]

(IV) *Spiritual Advisers and Spirit Mediums.* The power which a spiritual adviser may acquire over persons subject to his influence raises the presumption

Michigan.— Bowe *v.* Bowe, 42 Mich. 195, 3 N. W. 843.

New Jersey.— Hopper *v.* Hopper, (1896) 35 Atl. 400.

Ohio.— Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

England.— Archer *v.* Hudson, 7 Beav. 551, 8 Jur. 761, 29 Eng. Ch. 551.

Brother and sister.— *Alabama.*— Boney *v.* Hollingsworth, 23 Ala. 690.

Arkansas.— Gillespie *v.* Holland, 40 Ark. 28, 48 Am. Rep. 1; Million *v.* Taylor, 38 Ark. 428.

New Jersey.— Thornton *v.* Ogden, 32 N. J. Eq. 723.

New York.— Sears *v.* Shafer, 6 N. Y. 268.

England.— Sharp *v.* Leach, 31 Beav. 491, 8 Jur. N. S. 1026, 7 L. T. Rep. N. S. 146, 10 Wkly. Rep. 878.

Brother and brother.— Todd *v.* Grove, 33 Md. 188.

Sister and sister.— Watkins *v.* Brant, 46 Wis. 419, 1 N. W. 82; Harvey *v.* Mount, 8 Beav. 439, 9 Jur. 741, 14 L. J. Ch. 233.

Brother-in-law and sister-in-law.— Griffin *v.* Deveuille, 3 P. Wms. 131, note 2, 24 Eng. Reprint 998.

Stepfather and stepchild.— Tucke *v.* Buchholz, 43 Iowa 415; Bradshaw *v.* Yates, 67 Mo. 221; Berkmeyer *v.* Kellerman, 32 Ohio St. 239; Kempson *v.* Ashbee, L. R. 10 Ch. 15, 44 L. J. Ch. 195, 31 L. T. Rep. N. S. 525, 23 Wkly. Rep. 38; Espey *v.* Lake, 10 Hare 260, 16 Jur. 1106, 22 L. J. Ch. 336, 1 Wkly. Rep. 59, 44 Eng. Ch. 252.

Grandparent and grandchild.— Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940; Chambers *v.* Chambers, 139 Ind. 111, 38 N. E. 334. But see Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015.

Uncle and niece.—Archer *v.* Hudson, 7 Beav. 551, 8 Jur. 761, 29 Eng. Ch. 551; Maitland *v.* Irving, 15 Sim. 437, 38 Eng. Ch. 437.

Uncle and nephew.—Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149; Hall *v.* Perkins, 3 Wend. (N. Y.) 626; Graham *v.* Little, 56 N. C. 152. But a contract cannot be said to have been obtained by undue influence, plaintiff being a mature man, in the possession of all his faculties, who for several years had been manager of the corporation in which were the shares, although defendant, who was the owner of the majority of the corporation's stock and plaintiff's uncle, had been accustomed in a great measure to direct plaintiff's action, and was a tyrannical and overbearing man. Bancroft *v.* Bancroft, 110 Cal. 374, 40 Pac. 488, 42 Pac. 896.

Distant relationship by marriage.— Steed *v.* Calley, 1 Keen 620, 15 Eng. Ch. 620, 2 Myl. & K. 52, 7 Eng. Ch. 52.

Husband and wife and wife's aged aunt.— Griffiths *v.* Robins, 3 Madd. 191. And see McClure *v.* Lewis, 72 Mo. 314; Graves *v.* White, 4 Baxt. (Tenn.) 38.

Husband and uncle of his wife.— Green *v.* Thompson, 37 N. C. 365, where, however, the contract was sustained.

92. *Illinois.*— Wickiser *v.* Cook, 85 Ill. 68.

Michigan.— Hemphill *v.* Holford, 88 Mich. 293, 50 N. W. 300; Bowe *v.* Bowe, 42 Mich. 195, 3 N. W. 843.

Minnesota.—Ashton *v.* Thompson, 32 Minn. 25, 18 N. W. 918.

Missouri.— Garvin *v.* Williams, 44 Mo. 465, 10 Am. Dec. 314.

Vermont.— Wade *v.* Pulsifer, 54 Vt. 45.

See Guardian and Ward.

93. Nichols *v.* McCarthy, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 119; Ward *v.* Armstrong, 84 Ill. 151; Spencer's Appeal, 80 Pa. St. 317; McCants *v.* Bee, 1 McCord Eq. (S. C.) 383, 16 Am. Dec. 610. See Trusts.

94. *Connecticut.*— St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735.

Illinois.— Zeigler *v.* Hughes, 55 Ill. 288; Jennings *v.* McConnel, 17 Ill. 148.

Iowa.— Ryan *v.* Ashton, 42 Iowa 365.

Kentucky.— Carter *v.* West, 93 Ky. 211, 19 S. W. 592, 14 Ky. L. Rep. 191.

Michigan.—McGinn *v.* Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848.

See Attorney and Client.

Qualification.— The principle as to the necessity of persons seeking independent advice before making disposition of property to attorneys, agents, or trustees, arises only in cases where these parties are seeking to obtain some benefit or advantage for themselves. If they are not seeking such advantage, and the conveyance is not for their benefit or at their solicitation, but is made to them in trust for a benevolent or charitable use, it will be sufficient that the grantor had an opportunity to obtain independent advice, that she was not prevented from doing so, that she fully comprehended what she was doing, and that it was her own voluntary act. Bowdoin College *v.* Merritt, 75 Fed. 480.

of undue influence.[95] So the burden rests upon one claiming to be a spiritualistic medium to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence.[96]

(v) *Physician and Patient.* The relation of physician and patient is a confidential one of the same character as those just described.[97]

(vi) *Persons Engaged to Marry.* The principle also extends to parties about to marry, in the making of antenuptial contracts. As to persons engaged to marry, it is said that owing to the confidential relations which exist between them, an antenuptial contract which appears to have been unfairly procured will be set aside.[98] Although in most of the cases relief was sought at the suit of the woman,[99] the same doctrine has been evoked for the protection of the man against the woman.[1]

(vii) *Other Confidential Relations.* Other confidential relations may arise which do not fall under the special titles already enumerated, but as to which the same principle will be applied.[2] This principle, as was said in an

95. *California.*— Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

Michigan.— Finegan *v.* Theisen, 92 Mich. 173, 52 N. W. 619.

Missouri.— Ford *v.* Hennessy, 70 Mo. 580; Caspari *v.* New Jerusalem First German Church, 12 Mo. App. 293.

New Jersey.— Corrigan *v.* Pironi, 48 N. J. Eq. 607, 23 Atl. 355.

New York.— Marx *v.* McGlynn, 88 N. Y. 357.

Pennsylvania.— Greenfield Estate, 24 Pa. St. 232.

United States.— Jackson *v.* Ashton, 11 Pet. 229, 9 L. ed. 698; Machtribe *v.* Harmony Settlement, 3 Wall. Jr. 66, 17 Fed. Cas. No. 10,003.

England.— Allcard *v.* Skinner, 36 Ch. D. 145, 56 L. J. Ch. 1052, 57 L. T. Rep. N. S. 61, 36 Wkly. Rep. 251; Norton *v.* Relly, 2 Eden 286, 28 Eng. Reprint 908; Dent *v.* Bennett, 3 Jur. 99, 5 L. J. Ch. 58, 8 L. J. Ch. 125, 4 Myl. & C. 269, 18 Eng. Ch. 269, 7 Sim. 539, 8 Eng. Ch. 539; Huguenin *v.* Baseley, 14 Ves. Jr. 273, 9 Rev. Rep. 148, 276.

96. Connor *v.* Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Thompson *v.* Hawks, 11 Biss. (U. S.) 440, 14 Fed. 902; Lyon *v.* Home, L. R. 6 Eq. 655, 37 L. J. Ch. 674, 18 L. T. Rep. N. S. 451, 16 Wkly. Rep. 824; Nottidge *v.* Prince, 2 Giff. 246, 6 Jur. N. S. 1066, 29 L. J. Ch. 857, 8 Wkly. Rep. 742.

97. *Indiana.*— Watson *v.* Makan, 20 Ind. 223.

Massachusetts.— Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

Missouri.— Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; Cadwallader *v.* West, 48 Mo. 483; Doggett *v.* Lane, 12 Mo. 215.

New York.— Crispell *v.* Dubois, 4 Barb. 393.

Pennsylvania.— Unruh *v.* Lukens, 166 Pa. St. 324, 31 Atl. 110; Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731.

England.— Mitchell *v.* Homfray, 8 Q. B. D. 587, 50 L. J. Q. B. 460, 45 L. T. Rep. N. S. 694, 29 Wkly. Rep. 558; Ashwell *v.* Lomi, L. R. 2 P. & D. 477; Blackie *v.* Clark, 15 Beav. 595, 22 L. J. Ch. 377; Ahearne *v.* Hogan, 1 Drury 310; Pratt *v.* Barker, 1 Sim. 1, 2 Eng. Ch. 1, 4 Russ. 507, 4 Eng. Ch. 507; Billage *v.* Southee, 9 Hare 534, 41 Eng. Ch. 534; Gibson *v.* Russell, 7 Jur. 875, 2 Y. & C. 104, 21 Eng. Ch. 104; Dent *v.* Bennett, 3 Jur. 99, 5 L. J. Ch. 58, 8 L. J. Ch. 125, 4 Myl. & C. 269, 18 Eng. Ch. 269, 7 Sim. 539, 8 Eng. Ch. 539; Popham *v.* Brooke, 5 Russ. 8, 5 Eng. Ch. 8.

Dentist.— Allen *v.* Davis, 4 De G. & Sm. 133, 20 L. J. Ch. 44.

98. Schouler Dom. Rel. § 183. And see Lamb *v.* Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227; Douthitt *v.* Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533, 20 Centr. L. J. 388; Bierer's Appeal, 92 Pa. St. 265; Tiernan *v.* Binns, 92 Pa. St. 248; Kline's Estate, 64 Pa. St. 122; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206.

99. Lamb *v.* Lamb, 130 Ind. 273, 30 N. E. 36, 30 Am. St. Rep. 227; Russell's Appeal, 75 Pa. St. 269; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206; Wollaston *v.* Tribe, L. R. 9 Eq. 44, 21 L. T. Rep. N. S. 449, 18 Wkly. Rep. 83; Cobbett *v.* Brock, 20 Beav. 524; Page *v.* Horne, 11 Beav. 227, 12 Jur. 340, 17 L. J. Ch. 200.

Woman acting independently.— Where the woman, it appears, was quite independent of the man, and wholly disregarded his advice and wishes, a contract will not be set aside merely on account of the confidential relation. Falk *v.* Turner, 101 Mass. 494.

1. Taylor *v.* Rickman, 1 N. C. 278. And see Rockafellow *v.* Newcomb, 57 Ill. 186, 192, 194, where an intended husband, at the woman's solicitation, deeded her a piece of land worth seven thousand dollars for one worth seven hundred dollars, and she afterward declined to marry him. The court said: "A woman can always exercise an undue influence over the man she professes to love. . . . She had an undue influence over him and took advantage of the relation between them;" and set aside the conveyance.

2. Executor and testator's daughter.— Grosvenor *v.* Sherratt, 28 Beav. 659; Whit-

English case, applies to every case where influence is acquired and abused; where confidence is reposed and betrayed.[3] In brief where parties occupy a relation from which an unusual degree of confidence or affection arises, the party in whom such confidence is reposed is held to the utmost good faith.[4] Thus a confidential adviser, although not an attorney or solicitor, may be subject to the same rule.[5] So of persons associated together in business.[6] Where a young man who had just attained his majority incurred liabilities by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation, it was held that influence of this nature, although it could not be called parental, spiritual, or fiduciary, entitled the young man to the protection of the court.[7] And where conveyances were made by a man to his mistress, it was held that the onus of showing absence of undue influence was upon her.[8] The mere fact that the parties were friends is not enough to raise a presumption of undue influence.[9] So it has been held that there is no such relation of trust and confidence between a man and his mother-in-law as to raise the presumption of undue influence.[10] And the relation between the purchaser of lands sold under a decree and the former owner of the land will not interfere with their freely contracting with each other in regard to extension of time of redemption.[11]

c. Mental Weakness. At law mere weakness of mind is not a ground for releasing a person from his engagement, but there must have been an incapacity on his part to understand the nature and effect of the agreement. Hence mere weakness of mind or partial insanity or monomania, in connection with the subject of the agreement, would not affect its binding force.[12] So equity looks only to the competency of the understanding, and neither age, sickness, extreme distress, nor debility of body will affect the capacity to make a contract or convey-

ted *v.* Nash, 66 N. C. 590. See Williams *v.* Powell, 66 Ala. 20, 41 Am. Rep. 742; Hunt *v.* Moore, 2 Pa. St. 105.

3. Smith *v.* Kay, 7 H. L. Cas. 750, 779, where it was said: "The relations with which the Court of Equity most ordinarily deals, are those of trustee and *cestui que trust* and such like. It applies especially to those cases, for this reason and this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as in the other." And see Webber *v.* Sullivan, 58 Iowa 260, 12 N. W. 319; O'Neil *v.* O'Neil, 30 Minn. 33, 14 N. W. 59; Mullins *v.* McCandless, 57 N. C. 425.

4. Boney *v.* Hollingsworth, 23 Ala. 690; Kennedy *v.* Kennedy, 2 Ala. 571.

Keeper of asylum and recovered patient.— Wright *v.* Proud, 13 Ves. Jr. 136.

Master and servant.— Bridgman *v.* Green, 2 Ves. 627, 28 Eng. Reprint 399.

Pauper and county.—Scalf *v.* Collins County, 80 Tex. 514, 16 S. W. 314.

Teacher and pupil.— Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668.

The influence of an officer over his junior in the same regiment was taken into consideration in an English case. Lloyd *v.* Clark, 6 Beav. 309.

5. Poillon *v.* Martin, 1 Sandf. Ch. (N. Y.) 569; Buffalow *v.* Buffalow, 22 N. C. 241; Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440; Moxon *v.* Payne, L. R. 8 Ch. 881, 43 L. J. Ch. 240; Tate *v.* Williamson, L. R. 2 Ch. 55, 15 L. T. Rep. N. S. 549, 15 Wkly. Rep. 321; Rhodes *v.* Bates, L. R. 1 Ch. 252, 12 Jur. N. S. 178, 35 L. J. Ch. 267, 13 L. T. Rep. N. S. 778, 14 Wkly. Rep. 292; Broun *v.* Kennedy, 33 Beav. 133; Hunter *v.* Atkins, 3 Myl. & K. 113, 10 Eng. Ch. 113; Huguenin *v.* Baseley, 14 Ves. Jr. 273, 9 Rev. Rep. 148, 276.

6. Colton *v.* Standford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

7. Smith *v.* Kay, 7 H. L. Cas. 750. And see Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Hall *v.* Perkins, 3 Wend. (N. Y.) 626.

8. Leighton *v.* Orr, 44 Iowa 679. See to the same effect Hanna *v.* Wilcox, 53 Iowa 547, 5 N. W. 717; Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528.

9. "Although friends in fact, in law and equity they were strangers and stood at arm's length in the matter of contract; for friendship is unknown to law or equity; in it neither finds any relation involving special confidence." Hemingway *v.* Coleman, 49 Conn. 390, 44 Am. Rep. 243. And see Smith *v.* Curtis, 19 Fla. 786. See also Kennedy *v.* Kennedy, 2 Ala. 571.

10. Fish *v.* Cleland, 33 Ill. 238, 43 Ill. 282.

11. Ross *v.* Sutherland, 81 Ill. 275.

12. See INSANE PERSONS.

ance, if sufficient intelligence remains to understand the transaction.[13] In equity, however, where the mind is enfeebled by old age, sickness, great distress, or other like cause, whereby it is rendered incapable of resisting undue pressure, a contract made under such circumstances is made under undue influence. In such cases the view of equity is that the party has not exercised a deliberate judgment, but has been imposed upon by the stronger will and the latter is called upon to show the fairness of the agreement.[14] And while both at law and in equity intoxica-

13. *Illinois.*— Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636; Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589; Pickerell *v.* Morss, 97 Ill. 220; Willemin *v.* Dunn, 93 Ill. 511; Rogers *v.* Higgins, 57 Ill. 244; Lindsey *v.* Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Baldwin *v.* Dunton, 40 Ill. 188; Miller *v.* Craig, 36 Ill. 109.

Indiana.— Graham *v.* Castor, 55 Ind. 559.

Iowa.— Harris *v.* Wamsley, 41 Iowa 671.

Maryland.— Cain *v.* Warford, 33 Md. 23.

New Jersey.— Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015.

New York.— Tuite *v.* Hart, 71 N. Y. App. Div. 619, 75 N. Y. Suppl. 1098.

North Carolina.— Rippy *v.* Gant, 39 N. C. 443.

Pennsylvania.— Aiman *v.* Stout, 42 Pa. St. 114; Nance *v.* Boyer, 30 Pa. St. 99.

Rhode Island.— Cooney *v.* Lincoln, 21 R. I. 246, 42 Atl. 867, 79 Am. St. Rep. 799.

South Carolina.— Devall *v.* Devall, 4 Desauss. 79.

Wisconsin.— Henderson *v.* McGregor, 30 Wis. 78.

United States.— Bowdoin College *v.* Merritt, 75 Fed. 480.

Difference in the mental capacity of the parties to a contract is not ground for rescission, unless one overreached the other through his superior capacity. Moore *v.* Cross, 87 Tex. 557, 29 S. W. 1051. And see Thomas *v.* Sheppard, 2 McCord Eq. (S. C.) 36, 16 Am. Dec. 632.

14. *Alabama.*— Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595; Juzan *v.* Toulmin, 9 Ala. 622, 44 Am. Dec. 448.

Arkansas.— Beller *v.* Jones, 22 Ark. 92.

California.— Moore *v.* Moore, 56 Cal. 89.

Connecticut.— Taylor *v.* Atwood, 47 Conn. 498; Lavette *v.* Sage, 29 Conn. 577; Whipple *v.* McClure, 2 Root 216.

Georgia.— Maddox *v.* Simmons, 31 Ga. 512; Causey *v.* Wiley, 27 Ga. 444.

Idaho.— Kelly *v.* Perrault, (1897) 48 Pac. 45.

Illinois.— Reed *v.* Peterson, 91 Ill. 288; Oard *v.* Oard, 59 Ill. 46.

Indiana.— Ashmead *v.* Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; Wray *v.* Wray, 32 Ind. 126; Marshall *v.* Billingsly, 7 Ind. 250; McCormick *v.* Malin, 5 Blackf. 509.

Iowa.— Lillibridge *v.* Allen, 100 Iowa 582, 69 N. W. 1031; Norton *v.* Norton, 74 Iowa 161, 37 N. W. 129; Oakey *v.* Ritchie, 69 Iowa 69, 28 N. W. 448; Harris *v.* Wamsley, 41 Iowa 671; Perkins *v.* Scott, 23 Iowa 237; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas.— Bainter *v.* Fultz, 15 Kan. 323.

Kentucky.— Stewart *v.* Stewart, 7 J. J. Marsh. 183, 23 Am. Dec. 396; Stevens *v.* Snowden, 7 Ky. L. Rep. 743; Riley *v.* Albertson, 3 Ky. L. Rep. 391.

Louisiana.— Chevalier *v.* Whatley, 12 La. Ann. 651.

Maryland.— Owings Case, 1 Bland 370, 17 Am. Dec. 311.

Massachusetts.— Rau *v.* Von Zedlitz, 132 Mass. 164.

Michigan.— McDaniel *v.* McCoy, 68 Mich. 332, 36 N. W. 84; Churchill *v.* Scott, 65 Mich. 485, 32 N. W. 737.

Mississippi.— Simonton *v.* Bacon, 49 Miss. 582; Burch *v.* Shannon, 46 Miss. 525.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 361; Hamilton *v.* Armstrong, 120 Mo. 527, 25 S. W. 545; Armstrong *v.* Logan, 115 Mo. 465, 22 S. W. 384; Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Dickson *v.* Kempinsky, 96 Mo. 252, 9 S. W. 618; Holliway *v.* Holliway, 77 Mo. 393; Cadwallader *v.* West, 48 Mo. 483.

New Hampshire.— Roberts *v.* Barker, 63 N. H. 332.

New Jersey.— Morton *v.* Morton, (1887) 8 Atl. 807; Cole *v.* Cook, 6 N. J. Eq. 627.

New York.— Rider *v.* Miller, 86 N. Y. 507; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Bishop *v.* Hendick, 17 N. Y. Suppl. 241, 42 N. Y. St. 296; Derrich *v.* Emmens, 14 N. Y. Suppl. 360, 38 N. Y. St. 481; Matter of Morgan, 7 Paige 236.

North Carolina.— Garrow *v.* Brown, 60 N. C. 595, 86 Am. Dec. 450; Rippy *v.* Gant, 39 N. C. 443; Buffalow *v.* Buffalow, 22 N. C. 241.

Ohio.— Tracey *v.* Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Baugh *v.* Buckles, 2 Ohio Cir. Ct. 498; Corbit *v.* Corbit, 7 Ohio Dec. (Reprint) 692, 4 Cinc. L. Bul. 1006.

Oregon.— Scovill *v.* Barney, 4 Oreg. 288.

Pennsylvania.—Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177.

South Carolina.— Bunch *v.* Hurst, 3 Desauss. 373, 5 Am. Dec. 551.

Tennessee.— Tally *v.* Smith, 1 Coldw. 290; Craddock *v.* Cabiness, 1 Swan 474; Sparks *v.* White, 7 Humphr. 86.

Texas.— Varner *v.* Carson, 59 Tex. 303; Edwards *v.* Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080 (holding that a court of equity has jurisdiction to entertain an action brought by next friends, in the name and behalf of a person of weak mind, who is mentally incapacitated by disease, decrepitude, or other infirmity, although not in such a condition as to be adjudged a lunatic by law, to

tion or habits of drunkenness are no ground for setting aside an agreement, unless the party did not at the time understand the nature of his act or the intoxication was procured by the act or connivance of the one against whom relief is sought,[15] yet where it appears that undue advantage was taken of the person's condition to obtain an unconscionable bargain from him equity will interfere.[16]

d. Persons Unable to Read or Write. It is incumbent on one dealing with an unlettered man, who can neither read nor write, to show that such person fully understood the object and import of the writings upon which he is proceeding to charge him.[17] But mere inability to read or write does not raise a presumption of undue influence.[18]

e. Necessity and Distress. Where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, and the latter owing to his condition has encumbered himself with a heavy liability or an onerous obligation for the sake of a small or inadequate present gain, equity will relieve him.[19] Whenever, it is laid down by a leading authority, a person is in

set aside conveyances, and to protect such person from the undue influence and fraud of others, although the nominal plaintiff denies the incapacity and repudiates the acts of those bringing the suit); Faver *v.* Bowers, (Tex. Civ. App. 1895) 33 S. W. 131.

Vermont.— King *v.* Cummings, 60 Vt. 502, 11 Atl. 727; Mann *v.* Betterly, 21 Vt. 326; Conant *v.* Jackson, 16 Vt. 355.

Virginia.—Furlong *v.* Stanford, 87 Va. 506, 12 S. E. 1048; Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

West Virginia.—Deem *v.* Phillips, 5 W. Va. 168.

United States.—Griffith *v.* Godey, 113 U. S. 89, 5 S. Ct. 383, 28 L. ed. 934; Allore *v.* Jewell, 94 U. S. 506, 24 L. ed. 260; Kilgore *v.* Cross, 1 McCrary 144, 1 Fed. 578.

15. See DRUNKARDS.

16. *Indiana.*—Marshall *v.* Billingsly, 7 Ind. 250; McCormack *v.* Malin, 5 Blackf. 509.

Iowa.— Mansfield *v.* Watson, 2 Iowa 111.

New Jersey.— Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

North Carolina.— Freeman *v.* Dwiggins, 55 N. C. 162; Calloway *v.* Witherspoon, 40 N. C. 128; Morrison *v.* McLeod, 22 N. C. 221.

South Carolina.— Rutherford *v.* Ruff, 4 Desauss. 350.

Tennessee.— Birdsong *v.* Birdsong, 2 Head 289; Hotchkiss *v.* Fortson, 7 Yerg. 67; White *v.* Cox, 3 Hayw. 79.

Vermont.— Conant *v.* Jackson, 16 Vt. 335.

See DRUNKARDS.

Proceedings in habitual drunkenness are evidence of mental weakness which may be relied upon to avoid the obligation of a contract entered into. Stirling *v.* Hinckley, (Pa. 1886) 4 Atl. 358. See DRUNKARDS.

17. Jones *v.* Austin, 17 Ark. 498; Selden *v.* Myers, 20 How. (U. S.) 506, 15 L. ed. 976; Cooke *v.* Lamotte, 15 Beav. 234, 21 L. J. Ch. 371; Evans *v.* Llewellyn, 2 Bro. Ch. 150, 29 Eng. Reprint 86, 1 Cox Ch. 333, 29 Eng. Reprint 1190, 1 Rev. Rep. 49; Fry *v.* Lane, 40 Ch. D. 312, 58 L. J. Ch. 113, 60 L. T. Rep. N. S. 12, 37 Wkly. Rep. 135; Stilwell *v.* Wilkins, Jac. 280, 23 Rev. Rep. 56, 4 Eng. Ch. 280; Stanley *v.* Robinson, 1 Russ. & M. 527, 5 Eng. Ch. 527.

18. In Willard *v.* Pinard, 65 Vt. 160, 163, 26 Atl. 67, it was contended that the relations of the parties were such that the onus was on the plaintiff to show the fairness of the transaction. But the court said: "To establish this relation they rely upon the facts found; that the defendant and his wife were unable to read or write, much more than to write their names. It is not found that they were not possessed of ordinary faculties of mind, and ordinary memory and judgment in regard to property and its value. It is also found that the intestate was a business man and a lawyer; that he professed friendship for the defendants, agreed to treat them fairly, and to keep accurate accounts of their transactions. These agreements are no more than the law always implies in dealings between the ordinary debtor and creditor. It is not shown or claimed that the intestate ever was the trustee of the defendants in regard to any of their transactions. So far as is found the parties sustained to each other the ordinary relation existing between an educated, honest business man, and an ordinarily bright and capable man possessed of memory and judgment, but uneducated in knowledge of books and of the art of reading and writing except to a limited extent. The facts reported fail to bring the case within the principles governing the decisions cited for the defendants."

19. *Alabama.*— Lester *v.* Mahan, 25 Ala. 445, 60 Am. Dec. 530.

Illinois.— Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10.

Indiana.— McCormick *v.* Malin, 5 Blackf. 509.

Kansas.— Kelley *v.* Caplice, 23 Kan. 474, 33 Am. Rep. 179.

Kentucky.— Esham *v.* Lamoar, 10 B. Mon. 43.

Michigan.— Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711.

pecuniary necessity or distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such a condition to obtain from him a conveyance

New York.—Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Van Dyke *v.* Wood, 60 N. Y. App. Div. 208, 70 N. Y. Suppl. 324; Neilson *v.* McDonald, 6 Johns. Ch. 201.

Pennsylvania.— Motz *v.* Mitchell, 91 Pa. St. 114.

Rhode Island.—Brown *v.* Hall, 14 R. I. 249, 51 Am. Rep. 375.

Virginia.— McKinney *v.* Pinckard, 2 Leigh 149, 21 Am. Dec. 601.

United States.— Wheeler *v.* Smith, 9 How. 55, 13 L. ed. 44.

England.— James *v.* Kerr, 40 Ch. D. 449, 53 J. P. 628, 58 L. J. Ch. 355, 60 L. T. Rep. N. S. 212, 37 Wkly. Rep. 279; Wood *v.* Abney, 3 Madd. 417; Longmate *v.* Ledger, 2 Giff. 157, 6 Jur. N. S. 481, 8 Wkly. Rep. 386.

Illustrations.— In Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711, a dissolute and inexperienced spendthrift twenty-five years old mortgaged all the real estate to which he was entitled under his father's will for five thousand dollars, as collateral to his note for that amount, made up as follows: One thousand dollars in cash; a due-bill of forty-seven dollars surrendered; one hundred and ninety-nine dollars interest credited on a previous mortgage; one hundred and ten dollars and thirty-five cents premiums paid on a life-insurance policy assigned to the mortgagee; and five hundred and fifty-six dollars retained to pay subsequent annual premiums thereon; and three thousand two hundred dollars for a conveyance of land worth one thousand dollars. The mortgagee was familiar with the mortgagor's circumstances and required him to buy the land as a condition of lending the money, although the mortgagor knew nothing of the land and had no use for it. It was held that the transaction was unconscionable and that the land should be redeeded, but that the mortgage should stand for the actual loans, indebtedness, advances, and credits, if the insurance policy was reassigned. See also Brown *v.* Hall, 14 R. I. 249, 51 Am. Rep. 375. In Baxter *v.* Wales, 12 Mass. 365, an agreement by which a person hired a cow of another, agreeing to return the animal within a year and pay six dollars, and, if the animal was not delivered in that time, to pay six dollars a year until she was delivered, was held unconscionable and unenforceable as to the agreement to pay at the rate of six dollars after the end of the first year.

Conveyance from husband to wife.—Where a husband conveyed to his wife land worth more than her inchoate right of dower in all his lands in consideration of her agreement to release her dower rights in any lands of his when requested, without further consideration, and thereafter, judgment of foreclosure having been entered on a mortgage on certain of his lands, and he being unable to pay the mortgage and having sold said lands pending suit, she, with intention to oppress him, to take advantage of his necessities, and to extort from him an unconscionable consideration for releasing her apparent right of dower in such lands, refused to release the same unless he should in consideration convey her certain other lands; and he, compelled by his necessities, yielded, it was held that the latter deed to her would be set aside. Van Dyke *v.* Wood, 60 N. Y. App. Div. 208, 70 N. Y. Suppl. 324.

Payment to procure release from attachment.— Goods requiring special care, and of a perishable nature, were wrongfully taken and kept from the owner thereof by means of a writ of attachment fraudulently obtained, and were rapidly going to destruction, and the party in possession refused to surrender the goods on payment of the sum actually due, demanding more than twice that amount, and in addition thereto a release from all damages for his wrongful act, and the defendant in the attachment, to obtain possession of his property, paid the sum demanded and executed the release. In an action on the case for wrongfully suing out the attachment, it was held that the release could be avoided on the ground of oppression. Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10.

Reversionary interests and expectant heirs.— A contract with a person for the sale or charge of property in expectancy, whether as reversioner or remainder-man, or whether as expectant heir or as expectant devisee or legatee of another, raises a presumption against the purchaser, which he must be prepared to rebut in order to support the contract, and great inadequacy of consideration will be a circumstance of great weight against him. Chesterfield *v.* Janssen, 1 Atk. 299, 26 Eng. Reprint 191, 2 Ves. 125, 28 Eng. Reprint 82, 1 White & T. Lead. Cas. 483. The phrase "expectant heir" (with reference to the doctrine in question) "is used . . . as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen." Jessel, M. R., in Beynon *v.* Cook, L. R. 10 Ch. 389, 32 L. T. Rep. N. S. 353, 23 Wkly. Rep. 531. And see Hale *v.* Hallon, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75.

Mortgagor and mortgagee.— The sale by a mortgagor of his equity of redemption to the mortgagee will be rescinded if any undue ad-

or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual distress or threats, equity may relieve defensively or affirmatively.[20]

7. Inadequacy of Consideration. Inadequacy of consideration is neither in law nor in equity a ground for refusing the enforcement of an agreement.[21] Standing alone it is not evidence of fraud or undue influence; but where the party was under the influence of another and was not a free agent, the fact that the consideration was inadequate is a material element in determining a court of equity to set the contract aside.[22] And where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence.[23]

vantage was taken of the mortgagee's necessities. See Mortgages.

Lender and borrower.— Agreements between lender and borrower are closely scrutinized because they are not always at arm's length. Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; Dorrill *v.* Eaton, 35 Mich. 302; Hough *v.* Hunt, 2 Ohio 495, 15 Am. Dec. 569; Brown *v.* Hall, 14 R. I. 249, 51 Am. Rep. 375; Cockell *v.* Taylor, 15 Beav. 103, 31 L. J. Ch. 545. Even in the absence of usury laws both the English and American courts have disallowed excessive interest, although reserved by contract between the parties. Sime *v.* Norris, 8 Phila. (Pa.) 84; Brown *v.* Hall, 14 R. I. 249, 51 Am. Rep. 375; Aylesford *v.* Morris, L. R. 8 Ch. 484, 42 L. J. Ch. 546, 28 L. T. Rep. N. S. 541, 21 Wkly. Rep. 424; Tyler *v.* Yates, L. R. 6 Ch. 665, 40 L. J. Ch. 768, 25 L. T. Rep. N. S. 284, 19 Wkly. Rep. 909; Miller *v.* Cook, L. R. 10 Eq. 641, 40 L. J. Ch. 11, 22 L. T. Rep. N. S. 740, 18 Wkly. Rep. 1061. See Usury.

A provision in a note for attorney's fees, if the note is not paid at maturity, has been held void in some states, but not in others. See Commercial Paper, 7 Cyc. 584.

20. Pomeroy Eq. Jur. § 948.

Agreements held not unconscionable.— The following agreements have been held not unconscionable: An agreement by which a clerk in a mill was charged with overdeliveries from the mill to a drayman, and the drayman credited therewith, the drayman was charged with underdeliveries, and the amount of the same credited to the clerk, thus making overdeliveries from the mill a gain to the drayman and a loss to the clerk, and underdeliveries a loss to the drayman and a gain to the clerk, but intended as a check and to induce accuracy in deliveries (Maher *v.* Miller, 61 Ga. 556, 34 Am. Rep. 104); and an agreement between a street railway company and its conductor, requiring the conductor to register every passenger getting upon his car, forbidding him to receive a fare from a passenger, either directly or indirectly, and providing that for the violations of such rules a sum stated should be deducted from wages then or thereafter due him, which should belong to the company as liquidated damages (Gallagher *v.* Christopher, etc., R. Co., 14 Daly 366, 13 N. Y. St. 80; Birdsall *v.* Twenty-Third St. R. Co., 8 Daly (N. Y.) 419).

21. See *supra*, IV, E. And see Cancellation of Instruments, 6 Cyc. 286.

22. See *supra*, IV, E, 2, b.

Where to mental weakness, inadequacy of consideration is added, the presumption of undue influence becomes very strong.

Alabama.— Martin *v.* Martin, 35 Ala. 560.

Connecticut.— Lavette *v.* Sage, 29 Conn. 577.

Georgia.—Maddox *v.* Simmons, 31 Ga. 512.

Indiana.— Marshall *v.* Billingsly, 7 Ind. 250; McCormack *v.* Malin, 5 Blackf. 509.

Kansas.— Bainter *v.* Fultz, 15 Kan. 323.

Kentucky.— Wilson *v.* Oldham, 12 B. Mon. 55.

New Jersey.— Cole *v.* Cook, 6 N. J. Eq. 627; Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

Oregon.— Scovil *v.* Barney, 4 Oreg. 288.

Pennsylvania.— Springer's Appeal, 111 Pa. St. 228, 2 Atl. 855.

Vermont.— Mann *v.* Blitterly, 21 Vt. 326; Conant *v.* Jackson, 16 Vt. 335.

West Virginia.—Deem *v.* Phillips, 5 W. Va. 168.

23. *Alabama.*— Judge *v.* Wilkins, 19 Ala. 765.

Georgia.— Wormack *v.* Rogers, 9 Ga. 60.

Kansas.— Kelley *v.* Caplice, 23 Kan. 474, 33 Am. Rep. 179.

Michigan.— Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 761.

Pennsylvania.— Motz *v.* Mitchell, 91 Pa. St. 114.

Tennessee.— Birdsong *v.* Birdsong, 2 Head 603.

England.— Clark *v.* Mal, 4 De G. F. & J. 401, 65 Eng. Ch. 310.

Even in courts of law, while it is laid down in many cases that adequacy of consideration is not material (see *supra*, IV, E) yet, if the contract be unreasonable and unconscionable, a court of law will give to the party who sues for the breach, not what the other party promised to pay, but only such as he is honestly and equitably entitled to. Baxter *v.* Wales, 12 Mass. 365; Leland *v.* Stone, 10 Mass. 459; Cutler *v.* Johnson, 8 Mass. 266; Cutler *v.* How, 8 Mass. 257; Waterbury *v.* Lasedo, 68 Tex. 565, 5 S. W. 81; Hume *v.* U. S., 132 U. S. 406, 10 S. Ct. 134, 33 L. ed. 393; Scott *v.* U. S., 12 Wall. (U. S.) 443, 20 L. ed. 438. See Russell *v.* Ruckman, 3 E. D. Smith (N. Y.) 419; Greer *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 427.

8. Right to Rescind and Limitation — a. In General. The limitations as to the right to rescind for fraud[24] and for duress[25] apply also as a general rule to undue influence,[26] the agreement being simply voidable and capable of ratification by the party influenced.[27]

b. Delay or Laches. There is a distinction, however, with respect to the effect of delay in rescinding. In the case of fraud, as soon as the fraud is discovered, the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded or estops him after a time on account of delay or laches.[28] But in the case of undue influence it is not a particular statement, but a combination of circumstances, which constitutes the vitiating element in the contract, and unless it is clear that the will of the injured party was relieved from the dominant influence under which he acted, or that the imperfect knowledge with which he entered into the contract was supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him nor will time be allowed to run against him.[29] The presumption of undue influence from the parental or quasi-parental relation does not cease when the child becomes of age and is emancipated by law. The confidential relation and presumption of undue influence continues until the child is entirely released from any sort of influence.[30] And the same principle applies to other

Early cases at law.— The earliest case of this kind is James *v.* Morgan, 1 Lev. 111, reported as follows: "Assumpsit to pay for a Horse a Barley-Corn a Nail; doubling it every Nail; and avers that there were thirty-two Nails in the Shoes of the Horse, which, being doubled every Nail, came to five hundred Quarters of Barley: And on *Non Assumpsit* pleaded, the Cause being tried before Hyde at Hereford, he directed the Jury to give the Value of the Horse in Damages, being £8, and so they did: And it was afterwards moved in Arrest of Judgment for a small Fault in the Declaration, which was over-ruled, and Judgment given for the Plaintiff." In Thornborough *v.* Whitacre, 6 Mod. 305, 2 Ld. Raym. 1164, the plaintiff declared that the defendant, in consideration of two shillings and six pence paid down, and four pounds and seventeen shillings and six pence to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on a certain Monday, and to double it successively on every Monday for a year, and the defendant demurred to the declaration. Upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be five hundred and twenty-four million, two hundred and eighty-eight thousand quarters. The court recognized the case of James *v.* Morgan as good law, and said that although the contract was a foolish one, the defendant ought to pay something for his folly. The counsel for the defendant "perceiving the opinion of the Court to be against him [his client], offered the plaintiff his half-crown and costs, which was accepted of, and so no judgment was given in the case." In both of these cases, one party had evidently taken advantage of the other's ignorance of arithemetic to obtain the one-sided bargain. See also Jestons *v.* Brooke, Cowp. 793; Floyer *v.* Edwards, Cowp. 112.

In a New York case B agreed to furnish his biography to A for publication within a time fixed, and for every day beyond that time he agreed to pay one hundred and sixty-five dollars. The biography was never furnished at all, and A brought suit to recover for a delay of one hundred and sixty-one days. It was held that the agreement is so extortionate as to raise the presumption of fraud in its inception and would not be literally enforced, and that A could only recover his actual loss arising from B's failure to fulfil his agreement.

24. See *supra*, VI, D, 3, c.

25. See *supra*, VI, E, 2.

26. Dent *v.* Long, 90 Ala. 172, 7 So. 640; Burt *v.* Quisensberry, 132 Ill. 385, 24 N. E. 622; Dayton City Nat. Bank *v.* Kusworm, 91 Wis. 166, 64 N. W. 843; O'Callahan *v.* Lowndes, 66 Fed. 356, 13 C. C. A. 510.

27. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Moore *v.* Reed, 37 N. C. 580; Smith *v.* Williamson, 8 Utah 219, 30 Pac. 753.

28. See *supra*, VI, D, 3, c, (II).

29. *Alabama.*— Thompson *v.* Lee, 31 Ala. 292.

Indiana.— McCormick *v.* Malin, 5 Blackf. 509.

Maryland.— McConkey *v.* Cocke, 69 Md. 286, 14 Atl. 465, 27 Centr. L. J. 476.

Massachusetts.— Rau *v.* Von Zedlitz, 132 Mass. 164; Montgomery *v.* Pickering, 116 Mass. 227.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359; McClure *v.* Lewis, 72 Mo. 314.

North Carolina.— Boyd *v.* Hawkins, 17 N. C. 195.

South Carolina.— Butler *v.* Haskell, 4 Desauss. 651.

Vermont.— Wade *v.* Pulsifer, 54 Vt. 45.

England.—Moxon *v.* Payne, L. R. 8 Ch. 881, 43 L. J. Ch. 240.

30. Archer *v.* Hudson, 7 Beav. 551, 8 Jur. 761, 29 Eng. Ch. 551. See also Noble *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175; Ashton *v.* Thompson, 32 Minn. 25, 18

confidential relations, such as the relation of attorney and client, the relation of physician and patient, and the like.[31]

VII. ILLEGALITY.

A. In General. An illegal agreement will not be enforced, and hence is not a contract according to the definition of a contract.[32] The illegality may be found in the matter of the consideration or of the promise as expressed in the agreement, or it may be found in the purpose to which the agreement, although legal in expression, is applied. In either case the agreement is void.[33]

N. W. 918; Miller *v.* Simonds, 72 Mo. 669. See PARENT AND CHILD.

31. Mason *v.* Ring, 3 Abb. Dec. (N. Y.) 210, 2 Abb. Pr. N. S. (N. Y.) 322; Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703; Mitchell *v.* Homfray, 8 Q. B. D. 587, 50 L. J. Q. B. 460, 45 L. T. Rep. N. S. 694, 29 Wkly. Rep. 558; Rhodes *v.* Bate, L. R. 1 Ch. 252, 12 Jur. N. S. 178, 35 L. J. Ch. 267, 13 L. T. Rep. N. S. 778, 14 Wkly. Rep. 292.

32. See *supra*, I, A. Such agreements, however, are often inaccurately spoken of by courts and text-writers as "illegal contracts."

33. *Alabama.*— State *v.* Metcalfe, 75 Ala. 42; James *v.* Hendree, 34 Ala. 488; Stanley *v.* Nelson, 28 Ala. 514.

Arkansas.— Cox *v.* Donnelly, 34 Ark. 762; McMurtry *v.* Ramsey, 25 Ark. 349; Ruddell *v.* Landers, 25 Ark. 238, 94 Am. Dec. 719.

California.— Jones *v.* Hanna, 81 Cal. 507, 22 Pac. 885; Danielwitz *v.* Sheppard, 62 Cal. 339; Morgan *v.* Menzies, 60 Cal. 341.

Colorado.— Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823; Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Connecticut.— Seeley's Appeal, 56 Conn. 202, 14 Atl. 291; Treat *v.* Jones, 28 Conn. 334; Goodwin *v.* Goodwin, 4 Day 343.

Dakota.— Peck *v.* Levinger, 6 Dak. 54, 50 N. W. 481.

Delaware.— Stroud *v.* Smith, 4 Houst. 448; Walraven *v.* Jones, 1 Houst. 355.

District of Columbia.— Sunderland *v.* Kilbourn, 3 Mackey 506; Meguire *v.* Corwine, 3 MacArthur 81.

Florida.— Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

Georgia.— Mercier *v.* Mercier, 50 Ga. 546, 15 Am. Rep. 694; Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Idaho.— Settle *v.* Sterling, 1 Ida. 259.

Illinois.— Foss *v.* Cummings, 149 Ill. 353, 36 N. E. 553; Penn *v.* Bornman, 102 Ill. 523; Wells *v.* People, 71 Ill. 532.

Indiana.— Maguire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353; Skelton *v.* Bliss, 7 Ind. 77; State Bank *v.* Coquillard, 6 Ind. 232.

Iowa.— Miller *v.* Miller, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431; Pike *v.* King, 16 Iowa 49; Reynolds *v.* Nichols, 12 Iowa 398; Guenther *v.* Dewien, 11 Iowa 133.

Kansas.— State *v.* Cross, 38 Kan. 696, 17 Pac. 190; McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213.

Kentucky.— Davis *v.* Jones, 94 Ky. 320, 22 S. W. 331, 15 Ky. L. Rep. 89, 42 Am. St. Rep. 360; Kentucky Flour Co. *v.* Smith, 14 Ky. L. Rep. 237.

Louisiana.— Norton *v.* Dawson, 19 La. Ann. 464, 92 Am. Dec. 548; Bowman *v.* Gonegal, 19 La. Ann. 328, 92 Am. Dec. 537; Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527; Davis *v.* Holbrook, 1 La. Ann. 176.

Maine.— Harding *v.* Hagar, 60 Me. 340; Tillock *v.* Webb, 56 Me. 100.

Maryland.— Howard *v.* First Independent Church, 18 Md. 451; Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346; Hall *v.* Mullin, 5 Harr. & J. 190.

Massachusetts.— Holcomb *v.* Weaver, 136 Mass. 265; Blasdel *v.* Fowle, 120 Mass. 447, 21 Am. Rep. 533; Adams *v.* Coulliard, 102 Mass. 167; Russell *v.* De Grand, 15 Mass. 35.

Michigan.— Case *v.* Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341, 31 L. R. A. 282; O'Hare *v.* Carpenter, 23 Mich. 410, 9 Am. Rep. 89.

Minnesota.—Adams *v.* Adams, 25 Minn. 72; Belden *v.* Munger, 5 Minn. 211, 80 Am. Dec. 407.

Mississippi.— Odineal *v.* Barry, 24 Miss. 9; Adams *v.* Rowan, 8 Sm. & M. 624; Wooten *v.* Miller, 7 Sm. & M. 380.

Missouri.— Blank *v.* Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; St. Louis *v.* Meier, 77 Mo. 13; Ashbrook *v.* Dale, 27 Mo. App. 649.

Montana.— Ford *v.* Gregson, 7 Mont. 89, 14 Pac. 659.

Nebraska.— Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724; Gould *v.* Kendall, 15 Nebr. 549, 19 N. W. 483; Platte County *v.* Gerrard, 12 Nebr. 244, 11 N. W. 298.

Nevada.— Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548.

New Hampshire.—Cross *v.* Cross, 58 N. H. 373; Plumer *v.* Smith, 5 N. H. 553, 22 Am. Dec. 478.

New Jersey.— Swayze *v.* Hull, 8 N. J. L. 54, 14 Am. Dec. 399; Mandeville *v.* Harman, 42 N. J. Eq. 185, 7 Atl. 37.

New York.— New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; De Groat *v.* Van Duzer, 20 Wend. 390 [*reversing* 17 Wend. 170].

North Carolina.— Covington *v.* Threadgill, 88 N. C. 186; Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

Ohio.— Cumpston *v.* Lambert, 18 Ohio 81, 51 Am. Dec. 442.

Oregon.— Sweeney *v.* McLeod, 15 Oreg. 330, 15 Pac. 275.

Pennsylvania.— Ham *v.* Smith, 87 Pa. St.

B. What Agreements Are Illegal — 1. In General. Unlawful agreements, that is, those whose objects are illegal, may be placed in two classes, viz.: (1) Agreements in violation of positive law, and (2) agreements contrary to public policy. In the first of these classes the object of the agreement is expressly or impliedly prohibited by some rule of the common law or by express statute.[34] In the second the prohibition rests on what is called "the policy of the law" or public policy.[35] Sometimes the public policy is also expressed in some rule of the common law and sometimes it is expressed in some statute; and hence a classification of this kind is not entirely accurate.

2. Agreements in Violation of Positive Law — a. In General. Agreements in violation of positive law are those which are expressly or impliedly prohibited either (1) by some rule of the common law, or (2) by some express statutory provision. The common law prohibits generally what is contrary to public policy and morality as defined by the decisions of the courts.[36] The cases, however, are likely to lap over and to stand sometimes on one, sometimes on another, and sometimes on both sides of this imaginary line.[37] It is immaterial, so far as the effect of the illegality is concerned, whether the object of the agreement is forbidden by the common law or by statute,[38] or whether the thing forbidden is *malum in se* or merely *malum prohibitum*.[39]

b. Agreements in Violation of Rules of Common Law — (1) *Agreements Involving Commission of Crime.* An agreement which involves the doing of anything which is a crime or indictable offense at common law is illegal and void.[40] This is true for example of an agreement to commit murder, larceny,

63; Hunter *v.* Nolf, 71 Pa. St. 282; Weeks *v.* Lippencott, 42 Pa. St. 474.

Rhode Island.— Birkett *v.* Chatterton, 13 R. I. 299, 43 Am. Rep. 30; Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541.

South Carolina.— McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Alwyn *v.* Perkins, 3 Desauss. 297.

Tennessee.— Kirk *v.* Morrow, 6 Heisk. 445; Bledsoe *v.* Jackson, 4 Sneed 429; Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

Texas.— Specht *v.* Collins, 81 Tex. 213, 16 S. W. 934; McGreal *v.* Wilson, 9 Tex. 426; Roby *v.* Carter, 6 Tex. Civ. App. 295, 25 S. W. 725.

Vermont.— Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260; Meacham *v.* Dow, 32 Vt. 721; Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

Virginia.— Tardy *v.* Creasy, 81 Va. 553, 59 Am. Rep. 676; O'Rear *v.* Kiger, 10 Leigh 622; Kemper *v.* Kemper, 3 Rand. 8.

Washington.— Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Terr. 283, 34 Am. Rep. 803.

West Virginia.—Morgan *v.* Hale, 12 W. Va. 713; Capehart *v.* Rankin, 3 W. Va. 571, 100 Am. Dec. 779.

Wisconsin.— De Wit *v.* Lander, 72 Wis. 120, 39 N. W. 349; Pickett *v.* School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55.

United States.— U. S. Bank *v.* Owens, 2 Pet. 527, 7 L. ed. 508; Scudder *v.* Andrews, 2 McLean 464, 21 Fed. Cas. No. 12,564; Piatt *v.* Oliver, 1 McLean 295, 19 Fed. Cas. No. 11,114.

England.— Booth *v.* Bank of England, 6 Bing. N. Cas. 415, 7 Cl. & F. 509, 4 Jur. 762, 2 Scott N. R. 701, 7 Eng. Reprint 1163, 37 E. C. L. 694.

See 11 Cent. Dig. tit. "Contracts," § 468 *et seq.*

34. See *supra*, VII, 2

35. See *supra*, VII, 3.

36. See *infra*, VII, B, 2, b.

37. As has often been pointed out "many acts are prohibited by statute which were formerly prohibited by the common law, and which, but for the statute, would still be so prohibited. Again, many acts which are prohibited by the common law in one state are prohibited by statute in another, and in some states there are no common-law crimes at all. For this reason, in treating of agreements in breach of express rules of the common law we must include agreements in breach of statutes which are merely declaratory of the common law." Clark Contr. 377.

38. Byrd *v.* Hughes, 84 Ill. 174, 25 Am. Rep. 442; Wells *v.* People, 71 Ill. 532; Nash *v.* Monheimer, 20 Ill. 215; Munsell *v.* Temple, 8 Ill. 93; Wheeler *v.* Russell, 17 Mass. 258.

39. *Georgia.*— Penitentiary Co. No. 2 *v.* Roundtree, 113 Ga. 799, 39 S. E. 508.

Illinois.— Penn *v.* Bornman, 102 Ill. 523.

Massachusetts.— White *v.* Buss, 3 Cush. 448.

New Hampshire.—Lewis *v.* Welch, 14 N. H. 294.

North Carolina.— Puckett *v.* Alexander, 102 N. C. 75, 8 S. E. 767, 3 L. R. A. 43.

United States.— U. S. Bank *v.* Owens, 2 Pet. 527, 7 L. ed. 508.

England.— Bensley *v.* Bignold, 5 B. & Ald. 335, 7 E. C. L. 188; Cannan *v.* Bryce, 3 B. & Ald. 179, 22 Rev. Rep. 342; Aubert *v.* Maze, 2 B. & P. 371, 5 Rev. Rep. 624.

See *infra*, VII, B, 2, c.

40. *Alabama.*— James *v.* Hendree, 34 Ala. 488.

arson, or an assault;[41] to abduct another;[42] to print, publish, or sell a libelous work;[43] to write an immoral book;[44] to indemnify one for publishing a libel,[45] for committing a wilful and malicious trespass,[46] or for any other illegal act;[47] to marry where the parties are already married to the knowledge of each other;[48] or of a note given in consideration of counterfeit bank-notes sold by the payee to the maker.[49] If the act to be done does not amount to a crime at common law, the contract is not illegal, unless the act is a civil wrong, is prohibited by statute, or is contrary to public policy.[50]

Arkansas.— Barker *v.* Parker, 23 Ark. 390.

Georgia.— Cook *v.* Western, etc., R. Co., 72 Ga. 48. And see Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264.

Louisiana.—Merchants' Ins. Co. *v.* Addison, 9 Rob. 486.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59.

Michigan.—Smith *v.* Barstow, 2 Dougl. 155.

New Hampshire.— Hinds *v.* Chamberlin, 6 N. H. 225.

New Jersey.— Cannon *v.* Cannon, 26 N. J. Eq. 316.

Ohio.— Forsythe *v.* State, 6 Ohio 19.

Pennsylvania.— Weeks *v.* Lippencott, 42 Pa. St. 474.

Tennessee.— Kirk *v.* Morrow, 6 Heisk. 445

Virginia.— Bier *v.* Dozier, 24 Gratt. 1.

England.— Griffiths *v.* Dudley, 9 Q. B. D. 357, 46 J. P. 711, 51 L. J. Q. B. 543, 47 L. T. Rep. N. S. 10, 30 Wkly. Rep. 797; Printing, etc., Registering Co. *v.* Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463; Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86.

See 11 Cent. Dig. tit. "Contracts," §§ 470, 471, 475, 476.

A lease of a mining shaft sunk in a street of a city is illegal and void. Friend *v.* Porter, 50 Mo. App. 89.

41. *Illinois.*— Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117.

Louisiana.—Merchants' Ins. Co. *v.* Addison, 9 Rob. 486.

New York.— Pierson *v.* Thompson, 1 Edw. 212.

Tennessee.— Kirk *v.* Morrow, 6 Heisk. 445.

England.— Allen *v.* Rescons, 2 Lev. 174; Collins *v.* Blantern, 2 Wils. C. P. 347.

See Sheppard Touch. 370.

42. Barker *v.* Parker, 23 Ark. 390.

43. Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 5 L. J. C. P. 193, 3 Scott 59, 29 E. C. L. 695; Poplett *v.* Stockdale, 2 C. & P. 198, R. & M. 337, 31 Rev. Rep. 662, 12 E. C. L. 526; Clay *v.* Yates, 1 H. & N. 73, 2 Jur. N. S. 908, 25 L. J. Exch. 237, 4 Wkly. Rep. 557.

44. Gale *v.* Leckie, 2 Stark. 107, 19 Rev. Rep. 692, 3 E. C. L. 337.

45. Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260; Arnold *v.* Clifford, 2 Sumn. (U. S.) 238, 1 Fed. Cas. No. 555; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 5 L. J. C. P. 193, 3 Scott 59, 29 E. C. L. 695. See also Hayes *v.* Hayes, 8 La. Ann. 468; Jewett Pub. Co. *v.* Butler, 159 Mass. 517, 34 N. E. 1087; Lea *v.* Collins, 4 Sneed (Tenn.) 393. And see INDEMNITY.

46. Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264; Stanton *v.* McMullen, 7 Ill. App. 326; Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421; McGreal *v.* Wilson 9 Tex. 426. See INDEMNITY.

47. *Alabama.*— James *v.* Hendree, 34 Ala. 488.

Georgia.— Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264; White *v.* Ault, 19 Ga. 551.

New Hampshire.— Hinds *v.* Chamberlin, 6 N. H. 225.

New York.— Griffiths *v.* Hardenbergh, 41 N. Y. 464.

Ohio.— Cumpston *v.* Lambert, 18 Ohio 81, 51 Am. Dec. 442 [*affirming* 1 Ohio Dec. (Reprint) 248, 5 West. L. J. 459].

Pennsylvania.—Weckerly *v.* German Church, 3 Rawle 172.

Tennessee.— Hunter *v.* Agee, 5 Humphr. 57.

United States.— Arnold *v.* Clifford, 2 Sumn. 238, 1 Fed. Cas. No. 555.

See 11 Cent. Dig. tit. "Contracts," § 471 *et seq.* And generally INDEMNITY.

Where illegal acts are already done, agreements to indemnify against their consequences are sustained. Griffiths *v.* Hardenbergh, 41 N. Y. 464; Kneeland *v.* Rogers, 2 Hall 579; Doty *v.* Wilson, 14 Johns. (N. Y.) 378; Given *v.* Driggs, 1 Cai. (N. Y.) 450; Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421; Hunter *v.* Agee, 5 Humphr. (Tenn.) 57; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332.

48. Paddock *v.* Robinson, 63 Ill. 99, 14 Am. Rep. 112. And see BREACH OF PROMISE TO MARRY, 5 Cyc. 1000.

49. Blont *v.* Proctor, 5 Blackf. (Ind.) 265.

50. Agreements not illegal.— There is no illegality in an agreement that one party thereto may if necessary use force in taking possession of certain property, in case the other party fails to comply with its conditions (Ambrose *v.* Root, 11 Ill. 497, 52 Am. Dec. 456); in an agreement to do work on another's land, when the owner does not object (Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204); in an agreement to indemnify another for entering on or seizing property under a claim of right (Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158; Avery *v.* Halsey, 14 Pick. (Mass.) 174. And see INDEMNITY); or where there is no intention of committing a trespass or other illegal act (Smith *v.* Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; Stanton *v.* McMullen, 7 Ill. App.

(II) *Agreements With Alien Enemies.* An agreement with an alien enemy is illegal and void, not because of any want of power to contract merely because of public policy, but because "it was a principle of the common law that trading with the enemy without the King's license was illegal in British subjects." [51]

(III) *Agreements Involving Civil Wrong.* An agreement is illegal and void where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime either at common law or under the statutes.[52] This is true for example of an agreement to commit a mere civil trespass upon land or goods,[53] if it is known that it will be a trespass;[54] of an agreement to perpetrate a fraud upon a third person;[55] of a contract to infringe another's copyright, patent, or trade-mark;[56] and of an agreement to slander another[57] or publish a libel.[58]

(IV) *Agreements to Defraud Individuals.* As just stated, an agreement to perpetrate a fraud upon a third person is illegal and void.[59] Among the agreements which have been declared illegal and void as tending to defraud or otherwise interfere with the rights of third persons are an agreement whereby a physician was to explain to a railroad company the injuries received by a person at the hands of the company, and his compensation was to vary according to the sum which the company should pay;[60] an agreement between the father and grandfather of an infant legatee on one side, and an heir at law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should be set aside the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee;[61] an agreement to renounce an executorship;[62] a secret agreement between partners tending to defraud third persons;[63] an agreement to make a stranger one's heir;[64] an agreement to reprint any literary work in violation of a right of copyright secured to another;[65] an agreement whereby one party, for certain commissions, was to attend meetings of persons solicited to buy real estate from the other party and

326; Stone *v.* Hooker, 9 Cow. (N. Y.) 154; Jamieson *v.* Calhoun, 2 Speers (S. C.) 19; Davis *v.* Arledge, 3 Hill (S. C.) 170, 30 Am. Dec. 360; Hunter *v.* Agee, 5 Humphr. (Tenn.) 57).

51. Potts *v.* Bell, 8 T. R. 548. See also Patton *v.* Nicholson, 3 Wheat. (U. S.) 204, 4 L. ed. 371. And see War.

52. Randall *v.* Howard, 2 Black (U. S.) 585, 17 L. ed. 269; and cases cited in the notes following.

53. *Georgia.*—Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264.

Illinois.— Stanton *v.* McMullen, 7 Ill. App. 326.

Michigan.— Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204.

North Carolina.— Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

South Carolina.— Davis *v.* Arledge, 3 Hill 170, 30 Am. Dec. 360.

Texas.— McGreal *v.* Wilson, 9 Tex. 426.

Acts not trespasses.— A contract to perform work on the land of a third person is not a contract to commit a trespass, and is not illegal if the owner of the land does not object. Fuller *v.* Rice, 52 Mich. 435, 18 N. W. 204. See also Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158.

54. Avery *v.* Halsey, 14 Pick. (Mass.) 174; Stone *v.* Hooker, 9 Cow. (N. Y.) 154; Davis *v.* Arledge, 3 Hill (S. C.) 170, 30 Am. Dec. 360. See *infra*, VII, C, 12.

55. See *infra*, VII, B, 2, b, (IV) *et seq.*

56. Nichols *v.* Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262.

57. See Hayes *v.* Hayes, 8 La. Ann. 468.

58. An agreement to libel another is illegal, not only because it is an agreement to commit a civil wrong, but also because it is an agreement to commit a crime. See *supra*, VII, B, 2, b, 1.

59. *Kentucky.*—Morgan *v.* Ballard, 1 A. K. Marsh. 558.

Maine.— Smith *v.* Humphreys, 88 Me. 345, 34 Atl. 166.

Michigan.— Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369.

Mississippi.—Spinks *v.* Davis, 32 Miss. 152.

New York.— Kelly *v.* Scott, 49 N. Y. 595.

Rhode Island.— Walling *v.* Angell, 6 R. I. 499.

See 11 Cent. Dig. tit. "Contracts," § 521.

60. Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369.

61. Gray *v.* McReynolds, 65 Iowa 461, 21 N. W. 777, 54 Am. Rep. 16.

62. Ellicott *v.* Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327.

63. Kelly *v.* Scott, 49 N. Y. 595.

64. Davis *v.* Jones, 94 Ky. 320, 22 S. W. 331, 15 Ky. L. Rep. 89, 42 Am. St. Rep. 360. And see Brewer *v.* Hieronymous, 41 S. W. 310, 19 Ky. L. Rep. 645.

65. Nichols *v.* Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262.

persuade them to become purchasers, representing himself to them as a purchaser by subscribing for lots, which the owner was to take off his hands if he should not wish to retain them, concealing from the intending buyers his arrangement with such owner;[66] an agreement with a tenant whereby he was induced to attorn to a third person;[67] an agreement to pay money procured by one from those preferred in a will, by concealing, after the death of the testator and before probate, the place of its deposit and by threatening to destroy it;[68] an agreement to advance the selling price of stocks by means of fictitious sales;[69] an agreement to aid another in obtaining title to land sold by an administrator at a price much less than its real value;[70] and an agreement to cancel a claim against another in consideration of his withholding exceptions to a claim asserted by him against an estate.[71]

(v) *Agreements to Defraud the Public Generally.* Any agreement which is intended or directly tends to defraud the public generally, even though it may not amount to a criminal conspiracy, is illegal and void. It has been so held for example of an agreement for the sale of domestic sardines, to be packed in boxes with labels representing them as foreign sardines;[72] an agreement by which a tradesman having a reputation as a seedsman sold his empty bags and his labels to another to be filled and sold by him as seeds grown by the former;[73] an agreement to sell one's reputation or skill in a profession, as an agreement by a physician to permit another to take his office and practise in his name;[74] an agreement by an author to assign the privilege of publishing books with his name on the title page, or by a painter to sell to another the right to place his signature on pictures painted by the latter;[75] or of a musical director to allow another to use his name as the name of the latter's band;[76] and agreements for the sale of grain for seed at a price far above its actual value, in which the seller agrees to sell the crop raised therefrom or a part of it for the buyer at an extravagant price, and which therefore cannot be performed without defrauding someone.[77]

66. McDonnell *v.* Rigney, 108 Mich. 276, 66 N. W. 52. And see Zabel *v.* New State Telephone Co., 127 Mich. 402, 86 N. W. 949.

67. Morgan *v.* Ballard, 1 A. K. Marsh. (Ky.) 558.

68. Walling *v.* Angell, 6 R. I. 499.

69. Livermore *v.* Bushnell, 5 Hun (N. Y.) 285.

70. Smith *v.* Humphreys, 88 Me. 345, 34 Atl. 166.

71. Young *v.* Evans, 8 Ky. L. Rep. 353.

72. Materne *v.* Horwitz, 101 N. Y. 469, 5 N. E. 331. See also Church *v.* Proctor, 66 Fed. 420, 13 C. C. A. 426.

73. Bloss *v.* Bloomer, 23 Barb. (N. Y.) 604. See Hoxie *v.* Chaney, 143 Mass. 592, 593, 10 N. E. 713, 58 Am. Rep. 149, where it was said: "There may no doubt be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and, in such cases, it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is in any case a question whether the use of the trade-mark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which should contain a misrepresentation to the public." See Trade-Marks and Trade-Names.

74. Jerome *v.* Bigelow, 66 Ill. 452, 16 Am. Rep. 597. This does not apply where the agreement is that the seller is to recommend the purchaser to his patients. Hoyt *v.* Holly, 39 Conn. 326, 12 Am. Rep. 390.

An agreement to admit a person into a medical institute and to assist in obtaining for him a diploma, in consideration of his abandoning a fictitious name similar to that of the other party, who is a member of the faculty, is void. Olin *v.* Bate, 98 Ill. 53, 38 Am. Rep. 78.

75. Skinner *v.* Oakes, 10 Mo. App. 45; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1.

76. Blakely *v.* Sousa, 52 Centr. L. J. 129. See also Messer *v.* The Fadettes, 168 Mass. 140, 46 N. E. 407, 60 Am. St. Rep. 371, 37 L. R. A. 721, where the leader of an orchestra attempted to sell all her right, title, and interest in and to a musical organization or orchestra, together with the name by which it was designated — the "Fadette Ladies' Orchestra" — and it was held that the name was unassignable, as the use of it by the assignee would mislead and defraud the public, and for that reason the claim to have the assignment enforced would not be sanctioned by the courts.

77. Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077; Merrill *v.* Packer, 80 Iowa

(VI) *FRAUDS ON SELLERS AND BIDDERS AT AUCTIONS.* Agreements which have for their object the fraudulent raising or lowering of prices at auction sales are illegal as frauds upon the owners of the property offered or upon the honest bidders at such sales.[78]

(VII) *FRAUDS ON CREDITORS.* Common instances of agreements void because of fraud upon third parties are assignments for the benefit of creditors with the intention of defrauding them,[79] secret agreements in compositions with creditors in fraud of some of them,[80] and conveyances of property to defraud creditors.[81]

(VIII) *AGREEMENTS BY AGENTS, TRUSTEES, AND OTHERS IN FIDUCIARY OR CONFIDENTIAL CAPACITIES.* Another class of agreements which are deemed to be illegal and void because of their constituting or tending to constitute a fraud upon third persons are those whose object or tendency is to constitute a fraud or breach of trust or breach of duty on the part of a person who stands in a fiduciary or confidential relation, as agents and employees,[82] attorneys,[83]

542, 45 N. W. 1076; Davis *v.* Seeley, 71 Mich. 209, 38 N. W. 901; McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Carter *v.* Lillie, 3 Ohio Cir. Ct. 364; Shirey *v.* Ulsh, 2 Ohio Cir. Ct. 401. *Compare*, however, Matson *v.* Blossom, 50 Hun (N. Y.) 600, 2 N. Y. Suppl. 551.

78. See AUCTIONS AND AUCTIONEERS, 4 Cyc. 1044, 1045.

79. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 196.

80. See COMPOSITIONS WITH CREDITORS.

81. See FRAUDULENT CONVEYANCES.

82. *District of Columbia.*— Sunderland *v.* Kilbourn, 3 Mackey 506.

Illinois.— Byrd *v.* Hughes, 84 Ill. 174, 25 Am. Rep. 442 (holding that a contract made by a confidential agent and adviser of his principals, by which the agent is to induce the principals to discharge their present attorney and employ another, the latter agreeing in consideration thereof to pay the agent one half of his fees, is illegal, and cannot be enforced by the agent at law or in equity); Barkley *v.* Williams, 26 Ill. App. 213 (holding that an agreement between a railroad official and another to divide the profits on a contract to be secured by the latter to furnish materials for a public improvement, the only service rendered by the former being to allow the latter lower freight rates than he demanded of others, is void as against public policy, and will not support an action to recover a share of the profits realized).

Kentucky.— Lucas *v.* Allen, 80 Ky. 681.

Missouri.— Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385, holding that a promise by a merchant to the employee of a third person, whose duty it was to examine material purchased for his employer and to certify as to the correctness of the bill, to pay such employee commissions on sales made to his employer through the employee's influence, was illegal and void.

New York.— Place *v.* Greenman, 6 Thomps. & C. 681 (holding that where a person was employed by a steamship company to examine a vessel which the company proposed to purchase, an agreement between him and the owner of the vessel that he should receive a certain sum in case of a sale to the company, was in conflict with his duty to the company and void); Davenport *v.* Hulme, 11 Misc. 521, 32 N. Y. Suppl. 803, 66 N. Y. St. 185 (holding that an agreement by the bookkeeper of a corporation to disclose its financial condition to another was void, and that it was immaterial that the other person was a stock-holder of the corporation); Holloway *v.* Stevens, 48 How. Pr. 129; Brewster *v.* Hatch, 1 N. Y. City Ct. 375.

Pennsylvania.— Everhart *v.* Searle, 71 Pa. St. 256, where a real-estate agent employed to sell land under a contract entitling him to receive all that he could get above a certain price made a contract, without the seller's knowledge, with the buyer, to negotiate a sale to him for a certain commission.

United States.— Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819, where an extension company which had a contract with a railroad company to locate and construct the latter's road "by the nearest, cheapest, and most suitable route" between two points for twenty thousand dollars per mile, agreed to locate the road through a certain town in consideration of being paid a bonus by a third person, and it appeared that in locating through such town it was necessary to deflect from the nearest, cheapest, and most natural route at an aditional cost of one hundred thousand dollars. It was held that the contract between the extension company and such third person was void, on the ground that it was an agreement by an employee to violate his obligation to his employer.

See 11 Cent. Dig. tit. "Contracts," § 527 *et seq.* And see, generally, PRINCIPAL AND AGENT.

83. Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267 (holding that an action would not lie on an agreement by an attorney to turn over to a third person accounts placed in his hands for collection); Cleveland *v.* Miller, 94 Mich. 97, 53 N. W. 961 (holding void a contract whereby an attorney for a mortgagee procured a discount on the mortgage for the mortgagor). See ATTORNEY AND CLIENT, 4 Cyc. 956 *et seq.*

auctioneers,[84] trustees,[85] executors or administrators,[86] guardians,[87] promoters, officers, and majority stock-holders of corporations,[88] partners and others

84. Hinnen *v.* Newman, 35 Kan. 709, 12 Pac. 144, holding illegal and void a secret agreement between a person employed by the executors of an estate to sell the property of the estate at auction and a third person, by which the latter was to and did attend the sale and buy property for the former. See AUCTIONS AND AUCTIONEERS, 4 Cyc. 1053 *et seq.*

85. Moss *v.* Cohen, 15 Misc. (N. Y.) 108, 36 N. Y. Suppl. 265, 71 N. Y. St. 5 (holding that a bond of indemnity to a testamentary trustee to induce a misappropriation of the trust was incapable of supporting an action); Withers *v.* Ewing, 40 Ohio St. 400 (holding that where a trustee had given his note and mortgage for the benefit of the beneficiaries, a promise by the beneficiaries that if he would resign they would cancel the note and mortgage was void). See TRUSTS.

86. *Maryland.*— Owings *v.* Owings, 1 Harr. & G. 484, holding illegal and void a contract by which the right to administer on an estate was declined in favor of one who contracted to pay the party relinquishing his right all the commissions allowed for the settlement of the estate. And see Brown *v.* Stewart, 4 Md. Ch. 368. *Compare*, however, Bassett *v.* Miller, 8 Md. 548.

Mississippi.— Whatley *v.* Hughes, 53 Miss. 268; Spinks *v.* Davis, 32 Miss. 152.

Missouri.— Porter *v.* Jones, 52 Mo. 399; Tyler *v.* Larimore, 19 Mo. App. 445 (holding that a contract entered into between the heirs and the administrators of an estate to prevent the due course of administration, and to circumvent the claims of creditors, was illegal and void). *Compare* Greer *v.* Nutt, 54 Mo. App. 4.

New Jersey.— Ellicott *v.* Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327.

New York.— Deobold *v.* Oppermann, 111 N. Y. 531, 684, 19 N. E. 94, 20 N. Y. St. 81, 7 Am. St. Rep. 760, 2 L. R. A. 644; Staunton *v.* Parker, 19 Hun 55; Moss *v.* Cohen, 11 Misc. 184, 32 N. Y. Suppl. 1078, 66 N. Y. St. 332 (holding illegal and void a bond given to indemnify executors against a contemplated devastavit of the estate was void).

North Carolina.— Wilson *v.* Lineberger, 94 N. C. 641, 55 Am. Rep. 628; Norton *v.* Edwards, 66 N. C. 367.

Ohio.— Swiggert *v.* White, 8 Ohio Dec. (Reprint) 452, 8 Cinc. L. Bul. 22.

Pennsylvania.— Bowers *v.* Bowers, 26 Pa. St. 74, 67 Am. Dec. 398; Myers *v.* Hodges, 2 Watts 381, 27 Am. Dec. 319 (holding that a contract by an administrator to sell the real estate of his intestate for a certain sum and on certain terms of payment, and that he would make the title through the medium of the orphans' court, was illegal and void). And see *In re* Aston, 5 Whart. 228.

Texas.—Aycock *v.* Braun, 66 Tex. 201, 18 S. W. 500.

United States.—Forsyth *v.* Woods, 11 Wall. 484, 20 L. ed. 207; Wilson *v.* Jordan, 3 Woods 642, 30 Fed. Cas. No. 17,814.

See 11 Cent. Dig. tit. "Contracts," § 531 *et seq.* And see, generally, EXECUTORS AND ADMINISTRATORS.

Executor acting as attorney.— It is the duty of an attorney to whom a debt has been intrusted to collect to prosecute the claim according to law and to collect it, if it can be done by legal means; and it is also the duty of an administrator to scrutinize rigidly every claim presented against the estate and to protect the legal interests of the estate. Hence these are inconsistent obligations which cannot be united in the same person; and an agreement by which an attorney undertakes to assume the administration of a certain estate and collect a debt against the intestate is void as against public policy, and on his failure to collect the debt no action can be maintained against him. Spinks *v.* Davis, 32 Miss. 152. And see Whatley *v.* Hughes, 53 Miss. 268.

87. Zander *v.* Feely, 47 Ill. App. 659 (holding illegal and void a contract by a guardian to institute and carry through the court the proceedings necessary to effect an exchange of property owned in part by the guardian and in part by the ward for property owned by a third person); Cunningham *v.* Cunningham, 18 B. Mon. (Ky.) 19, 68 Am. Dec. 718 (holding illegal and void an agreement by which a guardian, for a consideration, agreed with another to resign his guardianship in order that the other might be appointed in his place); Poultney *v.* Randall, 9 Bosw. (N. Y.) 232 (holding illegal and void an agreement between a guardian and his surety that the surety should hold the property of which the guardian was the legal custodian for his own indemnity). *Compare* Rogers *v.* Hopkins, 70 Ga. 454. See, generally, GUARDIAN AND WARD.

88. *California.*— Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645, holding that a promissory note made by a corporation, payable to its acting trustees, was void. And see Forbes *v.* McDonald, 54 Cal. 98, holding that an agreement of a trustee of a corporation for a pecuniary recompense to resign his trust was illegal, and a contract based wholly or partly on such an agreement as a consideration was void.

Connecticut.— Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90, holding that a secret contract between an owner of patents and a promoter that the latter should form a company to buy said patents for a certain price and manufacture thereunder, the patentee to pay the promoter one half of the price received, was void.

Illinois.— Linder *v.* Carpenter, 62 Ill. 309, holding that a contract made with officers of

engaged in a joint enterprise or undertaking or jointly interested in a matter[89]

a railroad company, acting in their individual capacity, to induce them to establish the line of the road at a given point for the purpose of promoting the private advantage of the contracting parties, was illegal, and would not be enforced in equity.

Kansas.— Noel *v.* Drake, 28 Kan. 265, 42 Am. Rep. 162, holding that a contract with the president of a national bank to buy shares on condition that the purchaser be made cashier was illegal, and an action for breach could not be maintained against the president.

Kentucky.— Berryman *v.* Cincinnati Southern R. Co., 14 Bush 755, holding that a contract to pay an officer of the corporation for using his influence to locate a line of railroad in a particular locality is against public policy and void.

Massachusetts.— Woodruff *v.* Wentworth, 133 Mass. 309; Noyes *v.* Marsh, 123 Mass. 286; Guernsey *v.* Cook, 120 Mass. 501 (holding that a contract of sale of stock of a corporation, which necessarily implied that the seller intended to derive and the buyer to give him a private advantage not shared by the other stock-holders, in consideration of his election as treasurer, was illegal and void); Fuller *v.* Dame, 18 Pick. 472.

Michigan.— Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477.

Minnesota.— Lum *v.* McEwen, 56 Minn. 278, 57 N. W. 662, holding that an agreement by the superintendent and general manager of a mill company, in consideration of fifty-one thousand dollars, to use his influence and authority to secure the removal of the mill to another place and the extension of its logging road to that place was illegal and void.

Missouri.— Jackson *v.* McLean, 100 Mo. 130, 13 S. W. 393; Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485, 5 S. W. 16; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224. *Compare* Workman *v.* Campbell, 46 Mo. 305.

New Hampshire.— Harris *v.* Scott, 67 N. H. 437, 32 Atl. 770.

New York.— Ft. Edward, etc., Plank Road Co. *v.* Payne, 15 N. Y. 583; Munson *v.* Syracuse, etc., R. Co., 29 Hun 76; Bliss *v.* Matteson, 52 Barb. 335; Davison *v.* Seymour, 1 Bosw. 88.

North Carolina.— McDonald *v.* Haughton, 70 N. C. 393, holding that a contract by the president and directors of a railroad company for the purchase of claims against the company was illegal, and would not be enforced.

Ohio.— Mullen *v.* Gaffey, 6 Ohio Dec. (Reprint) 102, 8 Am. L. Rec. 101.

Oregon.— Holladay *v.* Patterson, 5 Oreg. 177, holding that a promise to pay money to the directors of a railroad company if they will locate it on a specified route and establish a station at a point named is void as against public policy, because of its tendency to unduly influence the action of the directors.

United States.— West *v.* Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. ed. 254 (holding that a contract made by a person, in contemplation of becoming an officer in a private corporation and controlling a majority of its stock, that he will use his influence to retain another in office at a fixed salary is void, being inconsistent with the duty that the promisor as an officer owes to the stockholders, although no direct private gain is to result therefrom to him); Wardell *v.* Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509 (holding that a contract between a company composed of the stock-holders of a corporation and the corporation, whereby the company profits at the expense of the corporation, is fraudulent and cannot be enforced against the corporation); Jackson *v.* McLean, 36 Fed. 213 [*distinguishing* Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732]; Western Union Tel. Co. *v.* Union Pac. R. Co., 1 McCrary 418, 3 Fed. 1 (holding that a provision in a contract between a telegraph company and a railroad company to the effect that the telegraph company will transmit the family, private, and social messages of the executive officers of the railroad company free is against public policy and immoral and taints the entire contract, so that a court of equity will not enforce it or grant any relief to a party claiming under it).

See 11 Cent. Dig. tit. "Contracts," § 538 *et seq.* And see, generally, CORPORATIONS.

89 *California.*— Tappan *v.* Albany Brewing Co., 80 Cal. 570, 22 Pac. 257, 13 Am. St. Rep. 174, 5 L. R. A. 428, holding that an agreement to pay one of the owners of land sold under a decree in a suit for partition a further sum for her interest therein provided she would not oppose the confirmation of such sale, which was made for an inadequate price, was illegal, as being a promise to pay a consideration for the concealment of a fact which it was the party's duty to make known to the court and her cotenants.

Illinois.—Wallace *v.* Carpenter, 85 Ill. 590, where four persons by a verbal agreement as between themselves bought a tract of land for speculation and had the contract of purchase taken in the name of one to enable him to sell when he could realize a profit, which he did, and he and two of the others by agreement concealed the fact from the fourth and informed him that the purchase had fallen through by reason of a defect in the title, and the two agreed with the party holding the contract to pay him one third of the profits for selling, it being held that owing to the fraud practised on the fourth party the one selling could claim no benefit growing out of the fraudulent agreement in which he participated, and the fourth party thus sought to be defrauded was entitled to one fourth of the profits arising from the sale.

Iowa.— Gleason *v.* Chicago, etc., R. Co.,

or jointly liable in an action,[90] public officers or employees,[91] and any other persons occupying a fiduciary or confidential position.[92] To bring an agreement within this rule it must appear both that there was in fact some relation of trust or confidence and that the agreement contemplated or tended to a

(1889) 43 N. W. 517, where plaintiff and H were equal partners in an option for the purchase of land, and defendant contracted with them for its purchase within a specified time and at a specified price, the negotiations being carried on mainly by plaintiff on behalf of himself and H, and defendant promising to pay him a certain amount, in addition to the purchase-price of the land, if he would secure and deliver to it a contract signed by himself and H, to which plaintiff agreed, on condition that the agreement should be concealed from H. It was held that this agreement was in fraud of H's rights as an equal partner with the plaintiff and void. On a rehearing the case was otherwise decided on the ground that the evidence was conflicting as to whether H had knowledge of the agreement. Gleason *v.* Chicago, etc., R. Co., 82 Iowa 745, 48 N. W. 88.

New York.— Adams *v.* Outhouse, 45 N. Y. 318, holding that a promise by several distributees of an intestate's estate to pay money to other distributees as an inducement to them to acquiesce in the settlement of the estate, and not to prosecute proceedings to compel him to account for property of the estate alleged to have been appropriated by him, was void, being within the rule which prohibits any one acting with others in a matter of common interest from securing to himself any advantage over his associates by any secret agreement or understanding.

Vermont.— McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661, holding that where an agreement was signed by plaintiff to induce others to sign it, but with a secret agreement between plaintiff and another party to the agreement whereby plaintiff was to receive benefits not accruing to the other parties, the secret agreement was invalid.

See 11 Cent. Dig. tit. "Contracts," §§ 529, 530. And see, generally, CORPORATIONS; TENANCY IN COMMON; PARTNERSHIP.

Principle not applicable to unconnected landowners.— In Howden *v.* Simpson, 10 A. & E. 793, 819, 9 Cl. & F. 61, 8 Eng. Reprint 338, 37 E. C. L. 416, in which the defendants were a railroad company, a bill had been introduced in parliament, according to which the line would pass through the plaintiff's estates and near his mansion, and he was opposing the passing of the bill. The defendants agreed that if he would withdraw his opposition and assent to the railway they would endeavor to deviate the proposed line and in case the then bill should pass they would pay the plaintiff five thousand pounds for the damage which his residence and estate would sustain from the railway's passing according to the deviated line. The plaintiff withdrew his opposition to the bill. In an action upon this agreement the defendants pleaded by their second plea that the projected railway was intended to pass through lands of divers individuals, and that the said agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the individuals through whose lands the said railway was intended to pass. This plea was on demurrer overruled. Lord Chief Justice Tindal said: "If such intention [that is, to keep the agreement a secret from the other landowners] had even existed, there would still be a difficulty in holding that the deed would be fraudulent, on the ground that the supposed goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any company of projectors, just in the same manner as if a private individual, for any purpose of his own, were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing, as there is in the case of a general composition with creditors, in which case there is sometimes an express, and generally an implied, agreement that all, or all who are not expressly excepted, shall share equally and derive equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another; and there seems no analogy between their situation and that of unconnected landowners." See also Montclair Military Academy *v.* North Jersey St. R. Co., 65 N. J. L. 328, 47 Atl. 890.

90. Selz *v.* Unna, 6 Wall. (U. S.) 327, 18 L. ed. 799, holding that a secret agreement between a plaintiff in an action of trespass and certain of the defendants, under which they made no further defense, the plaintiff promising to collect his judgment from the other defendants exclusively, was inequitable, as tending to promote injustice, both as between the plaintiff and the other defendants and as between those jointly liable.

91. Lucas *v.* Allen, 80 Ky. 681, holding that a contract whereby the clerk of the board of aldermen of a city was to receive a certain compensation in consideration of information to be given by him, and of his aiding in the preparation and prosecution of a suit by taxpayers against the city. See OFFICERS.

92. *California.*— Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645.

Connecticut.— Bollman *v.* Loomis, 41 Conn. 581, holding that a friend and confidential adviser of a purchaser of property should not at the same time be secretly receiving

violation of the same.[93] While it is often said that such agreements are against public policy, because it is the policy of the law to secure fidelity in the discharge of their duties by all persons holding such positions of trust and confidence, yet it is more accurate to say that such agreements, tending to cause unfaithful conduct by fiduciaries, are illegal because they are in effect agreements to wrong or defraud the persons whose interests the fiduciaries have in charge.[94]

(IX) *AGREEMENTS TO WAIVE FRAUD.* False and fraudulent representations made by one party to a contract, by which the other party is induced to enter into the contract, render it voidable at the election of the defrauded party;[95] and a stipulation in such a contract to the effect that the false and fraudulent representations by which the one party induced the other to enter into it shall not affect its validity is itself of no validity. The law will not give effect to a stipulation intended to grant immunity to iniquity and fraud.[96] And it has been held

compensation from the seller for effecting the sale and that the contract for such compensation is void.

Illinois.— Zander *v.* Feely, 47 Ill. App. 659.

Massachusetts.— Holcomb *v.* Weaver, 136 Mass. 265, holding that where a person on being asked by another to recommend to him a builder that he could indorse in every way, recommended a builder who promised to pay him "for his trouble," such promise was illegal and would not support an action.

New York.— Bliss *v.* Matteson, 52 Barb. 335.

United States.—Wilson *v.* Jordan, 3 Woods 642, 30 Fed. Cas. No. 17,814.

93. *California.*— Green *v.* Brooks, 81 Cal. 328, 22 Pac. 849, where it was held that a contract founded on plaintiff's promise to disclose information as to the place where a railroad company intended to locate its depot was not void, where there was nothing to show that plaintiff obtained his information by reason of any relation of trust or confidence that he bore to the railroad company, that it had any interest in the subject-matter of the contract, or that it attempted to keep the location of the depot a secret.

Connecticut.— Hoyt *v.* Holly, 39 Conn. 326, 12 Am. Rep. 390, holding that where a physician in a country village, being about to remove, sold out to another physician and agreed to recommend him to his patients and to use his influence in his favor, on the payment of a certain sum by the other physician, reserving, however, the right to practise in the village when called on to do so, the agreement was not illegal as a breach of the personal trust and confidence reposed in the first physician by his patients.

Minnesota.— Peterson *v.* Christensen, 26 Minn. 377, 4 N. W. 623, a case of agency.

New Jersey.— Hedden *v.* Shepherd, 29 N. J. L. 334, real-estate broker.

New York.— Goodman *v.* Cohen, 132 N. Y. 205, 30 N. E. 399, 43 N. Y. St. 680 [*affirming* 16 Daly 47, 8 N. Y. Suppl. 859, 29 N. Y. St. 716], holding that the facts that the purchaser of goods which had been damaged by fire was an arbitrator appointed to assess the value of the insured goods and that he agreed to pay a sum equal to the value of the goods before the fire did not render the contract illegal, no objection on this ground having been raised in the court below. And see Morgan *v.* Woodruff, 12 Daly 207, holding that where an attorney has authority from his client to discontinue an action without costs, he does nothing improper in discontinuing at the request of the other party's bail in consideration of a payment made to him by the bail.

North Carolina.— Norton *v.* Edwards, 66 N. C. 367.

Texas.— Marble Falls First Nat. Bank *v.* Border, 9 Tex. Civ. App. 670, 29 S. W. 659.

Vermont.— Shattuck *v.* Mellis, 44 Vt. 262, holding that where a merchant is about to dispose of his entire stock in trade to another party, the buyer may contract with such merchant's clerk to pay him for making an invoice of the stock, although the clerk while making the invoice still receives his salary from his first employer.

Consent of all parties.—Where persons who have contracted with another to erect a building for them employ the contractor to superintend such erection, they cannot afterward complain that the employment placed him in a position in which his duties conflicted, no bad conduct on his part being averred. Shaw *v.* Andrews, 9 Cal. 73.

94. Harriman Contr. 105.

95. See *supra*, VI, D.

96. Bridger *v.* Goldsmith, 143 N. Y. 424, 428, 38 N. E. 458, 62 N. Y. St. 435 (where it was said: "A mere device of the guilty party to a contract intended to shield himself from the results of his own fraud, practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on part of the plaintiff, that however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. . . . Public policy and morality are both ignored if such

that a provision in a written contract signed by the purchaser of a stock of goods, stating that he had fully examined the goods (which was untrue), and that he accepted the same, "waiving all claim for damaged goods, shortages and prices," etc., could not avail the seller as an estoppel of the purchaser to claim damages for fraudulent representations made in the sale, where the contract itself was procured by fraud and for the purpose of protecting the seller against such an action.[97]

c. Agreements in Violation of Statutes — (I) *In General.* Where a statute expressly declares that certain kinds of contracts shall be void, there is then no doubt of the legislative intention, and an agreement of the kind voided by statute is unlawful. The same is true where the contract is in violation of a statute, although not therein expressly declared to be void.[98] It is immaterial whether

an agreement can he given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer he the rule but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time hreak down every harrier which the law has erected against fraudulent dealing"); Universal Fashion Co. *v.* Skinner, 64 Hun (N. Y.) 293, 19 N. Y. Suppl. 62, 46 N. Y. St. 633; Hofflin *v.* Moss, 67 Fed. 440, 14 C. C. A. 459.

97. Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

98. *Alabama.*— Brooklyn L. Ins. Co. *v.* Bladsoe, 52 Ala. 538; Patten *v.* Gilmer, 42 Ala. 548, 94 Am. Dec. 665; Montgomery Branch Bank *v.* Crocheron, 5 Ala. 250.

Arkansas.— Lindsay *v.* Rottaken, 32 Ark. 619.

California.— Chateau *v.* Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750; Morgan *v.* Menzies, 60 Cal. 341.

Georgia.— Raleigh, etc., R. Co. *v.* Swanson, 102 Ga. 754, 28 S. E. 601, 39 L. R. A. 275; Hill *v.* Mitchell, 25 Ga. 704; Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476.

Illinois.— Foss *v.* Cummings, 149 Ill. 353, 36 N. E. 553; Penn *v.* Bornman, 102 Ill. 523; Linn *v.* State Bank, 2 Ill. 87, 25 Am. Dec. 71.

Indiana.— Daniels *v.* Barney, 22 Ind. 207; Siter *v.* Sheets, 7 Ind. 132; Skelton *v.* Bliss, 7 Ind. 77; State Bank *v.* Coquillard, 6 Ind. 232; Naglebaugh *v.* Harder, etc., Coal Min. Co., 21 Ind. App. 551, 51 N. E. 427.

Iowa.— Watrous *v.* Blair, 32 Iowa 58; Pike *v.* King, 16 Iowa 49.

Kansas.— Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548; Jones *v.* Blacklidge, 9 Kan. 562, 12 Am. Rep. 503; Bemis *v.* Becker, 1 Kan. 226.

Kentucky.— Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, 17 Ky. L. Rep. 1345; Bull *v.* Harragan, 17 B. Mon. 349; Gray *v.* Roberts, 2 A. K. Marsh. 208, 12 Am. Dec. 383; Morton *v.* Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366.

Louisiana.— Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294; Cotton *v.* Brien, 6 Rob. 115.

Maine.— Buxton *v.* Hamblen, 32 Me. 448.

Massachusetts.— Levy *v.* Gowdy, 2 Allen 320; Miller *v.* Post, 1 Allen 434.

Michigan.— Cobbs *v.* Hixson, 75 Mich. 260, 42 N. W. 818, 4 L. R. A. 682.

Minnesota.—Buckley *v.* Humason, 50 Minn. 195, 52 N. W. 385, 36 Am. St. Rep. 637, 16 L. R. A. 423.

Mississippi.— Bowdre *v.* Carter, 64 Miss. 221, 1 So. 162.

Missouri.— Downing *v.* Ringer, 7 Mo. 585.

Nebraska.— Storz *v.* Finklestein, 46 Nebr. 577, 65 N. W. 195, 30 L. R. A. 644.

New Hampshire.— Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376.

New Jersey.— Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617.

New York.— Foley *v.* Speir, 100 N. Y. 552, 3 N. E. 477; Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Smith *v.* Albany, 7 Lans. 14; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barh. 397; Beman *v.* Tugnot, 5 Sandf. 153; Bell *v.* Quin, 2 Sandf. 146; Best *v.* Bauder, 29 How. Pr. 489; Walker *v.* Jackson, 7 Hill 387.

North Carolina.— Covington *v.* Threadgill, 88 N. C. 186; Fleming *v.* Burgin, 37 N. C. 584.

Ohio.— State *v.* Buttles, 1 Ohio Dec. (Reprint) 520, 10 West. L. J. 309.

Pennsylvania.—Fowler *v.* Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Seidenbender *v.* Charles, 4 Serg. & R. 151, 8 Am. Dec. 682; Biddis *v.* James, 6 Binn. 321, 6 Am. Dec. 456; Mitchell *v.* Smith, 1 Binn. 110, 2 Am. Dec. 417; Maybin *v.* Coulon, 4 Dall. 298, 1 L. ed. 841.

South Carolina.— McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

Tennessee.— Harris *v.* Parker, 108 Tenn. 29, 64 S. W. 1087; Johnson *v.* Cooper, 2 Yerg. 524, 24 Am. Dec. 502.

Texas.— Roby *v.* Carter, 6 Tex. Civ. App. 295, 25 S. W. 725.

Vermont.— Rutland Bank *v.* Parsons, 21 Vt. 199; Territt *v.* Bartlett, 21 Vt. 184.

West Virginia.— Capehart *v.* Rankin, 3 W. Va. 571, 100 Am. Dec. 779.

United States.— U. S. Bank *v.* Owens, 2 Pet. 527, 7 L. ed. 508; The Pioneer, Deady 72, 19 Fed. Cas. No. 11,177.

England.— Smith *v.* Lindo, 4 C. B. N. S. 395, 27 L. J. C. P. 196, 93 E. C. L. 395; Taylor *v.* Crowland Gas, etc., Co., 2 C. L. R. 1247, 10 Exch. 293, 18 Jur. 913, 23 L. J. Exch. 254, 2 Wkly. Rep. 563.

the thing forbidden is *malum in se* or merely *malum prohibitum*.[99] A statute prohibiting the making of contracts, except in a certain manner *ipso facto* makes them void if made in any other way.[1]

(II) *Statutes Merely Imposing a Penalty.* Frequently a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. By some courts it is held that an agreement founded on or for the doing of such penalized act is void;[2] in accordance with the view of Lord Holt in an

See 11 Cent. Dig. tit. "Contracts," § 477 *et seq.*

An agreement in violation of the constitution of the United States, whether made by the United States, a state, or an individual, is invalid. Patton *v.* Gilmer, 42 Ala. 548, 94 Am. Dec. 665; Gandolfo *v.* Hartman, 49 Fed. 181, 16 L. R. A. 277.

Agreements for the sale of confederate bonds were void. Branch *v.* Haas, 4 Woods (U. S.) 587, 16 Fed. 53.

A covenant not to lease or convey land to a Chinaman is void, as in contravention of the treaty with China, and in violation of the fourteenth amendment of the constitution of the United States. Gandolfo *v.* Hartman, 49 Fed. 181, 16 L. R. A. 277.

Power of legislature to prohibit or regulate contracts.— The legislature has the power to interfere with the freedom to contract by prohibiting the making of some contracts and regulating the making of others only when the public good requires such prohibition. See Constitutional Law.

99. See *supra*, VII, B, 2, a, note 39. And see cases cited note 98, *supra*.

1. Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

2. *Alabama.*— Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523; Stanley *v.* Nelson, 28 Ala. 514; Saltmarsh *v.* Tuthill, 13 Ala. 390; Shippey *v.* Eastman, 9 Ala. 198; O'Donnell *v.* Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

Arkansas.— Tucker *v.* West, 29 Ark. 386.

Georgia.— Kleckley *v.* Leyden, 63 Ga. 215; Taliaferro *v.* Moffert, 54 Ga. 150.

Indiana.— Siter *v.* Sheets, 7 Ind. 132; Skelton *v.* Bliss, 7 Ind. 77; Madison Ins. Co. *v.* Forsythe, 2 Ind. 483.

Iowa.— Dillon *v.* Allen, 46 Iowa 299, 26 Am. Rep. 145; Pike *v.* King, 16 Iowa 49; Bacon *v.* Lee, 4 Iowa 490.

Kentucky.— Smith *v.* Robertson, 106 Ky. 472, 50 S. W. 852, 20 Ky. L. Rep. 1959, 45 L. R. A. 510; Vanmeter *v.* Spurrier, 94 Ky. 22, 21 S. W. 337, 14 Ky. L. Rep. 684; Murphy *v.* Simpson, 14 B. Mon. (Ky.) 419.

Maine.— Randall *v.* Tuell, 89 Me. 443, 36 Atl. 910, 39 L. R. A. 143; Durgin *v.* Dyer, 68 Me. 143; Pickard *v.* Bagley, 46 Me. 200; Buxton *v.* Hamblen, 32 Me. 448; Ellsworth *v.* Mitchell, 31 Me. 247.

Massachusetts.— Miller *v.* Post, 1 Allen 434; Hervey *v.* Moseley, 7 Gray 479, 66 Am. Dec. 515; Gregg *v.* Wyman, 4 Cush. 322; Pattee *v.* Greely, 13 Metc. 284; Robeson *v.* French, 12 Metc. 24, 45 Am. Dec. 236; Wheeler *v.* Russell, 17 Mass. 258; Russell *v.* De Grand, 15 Mass. 35.

Minnesota.— Solomon *v.* Dreschler, 4 Minn. 278.

Mississippi.— Pollard *v.* Phœnix Ins. Co., 63 Miss. 244, 56 Am. Rep. 805.

Missouri.— Downing *v.* Ringer, 7 Mo. 585.

New Hampshire.— Doe *v.* Burnham, 31 N. H. 426; Brackett *v.* Hoyt, 29 N. H. 264; Lewis *v.* Welch, 14 N. H. 294; Pray *v.* Burbank, 10 N. H. 377; Carleton *v.* Whitcher, 5 N. H. 196; Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

New Jersey.— Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479.

New York.— Smith *v.* Albany, 7 Lans. 14; Swords *v.* Owen, 43 How. Pr. 176; Best *v.* Bauder, 29 How. Pr. 489; Ferdon *v.* Cunningham, 20 How. Pr. 154; Griffith *v.* Wells, 3 Den. 226; Pennington *v.* Townsend, 7 Wend. 276; Hallett *v.* Novion, 14 Johns. 273.

Pennsylvania.— Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Holt *v.* Green, 73 Pa. St. 198, 13 Am. Rep. 737; Columbia Bank, etc., Co. *v.* Haldeman, 7 Watts & S. 233, 42 Am. Dec. 229; Hibernia Turnpike Road *v.* Henderson, 8 Serg. & R. 219, 11 Am. Dec. 593; Mitchell *v.* Smith, 1 Binn. 110, 12 Am. Dec. 417; Lutz *v.* Weidner, 1 Woodw. 428.

South Carolina.— McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578.

Tennessee.—Wetmore *v.* Brien, 3 Head 723; Parks *v.* McKamy, 3 Head 297; Hale *v.* Henderson, 4 Humphr. 199.

Vermont.— Bancroft *v.* Dumas, 21 Vt. 456; Territt *v.* Bartlett, 21 Vt. 184; Elkins *v.* Parkhurst, 17 Vt. 105; Lyon *v.* Strong, 6 Vt. 219.

Virginia.— Wilson *v.* Spencer, 1 Rand. 76, 10 Am. Dec. 491.

Wisconsin.— Miller *v.* Larson, 19 Wis. 463; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

United States.— Powhatan Steamboat Co. *v.* Appomatox R. Co., 24 How. 247, 16 L. ed. 682; U. S. Bank *v.* Owens, 2 Pet. 527, 7 L. ed. 508.

England.— *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26; Forster *v.* Taylor, 5 B. & Ad. 887, 3 L. J. K. B. 137, 3 N. & M. 244, 27 E. C. L. 374; Webb *v.* Pritchett, 1 B. & P. 263; Parkin *v.* Dick, 2 Campb. 221, 11 East 502, 11 Rev. Rep. 258; Law *v.* Hodgson, 2 Campb. 147, 11 East 300,

old case: "Every Contract made for or about any Matter or Thing which is prohibited and made unlawful by any Statute, is a void Contract, tho' the Statute it self doth not mention that it shall be so, but only inflicts a Penalty on the offender, because a Penalty implies a Prohibition, tho' there are no prohibiting Words in the Statute."[3] Other courts have held that if the penalty is imposed for the protection of the revenue, it may be presumed that the legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue.[4] Others have regarded the question as one of legislative intent, and declared the proper rule to be that the courts will look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly.[5]

10 Rev. Rep. 513; Cope *v.* Rowlands, 2 Gale 231, 6 L. J. Exch. 63, 2 M. & W. 149; Houstoun *v.* Mills, 1 M. & R. 325; Drury *v.* De Fontaine, 1 Taunt. 131.

See 11 Cent. Dig. tit. "Contracts," § 479.

3. Bartlett *v.* Vinor, Carth. 251, 252.

4. *California.*— Babcock *v.* Goodrich, 47 Cal. 488.

Kentucky.— Lindsey *v.* Rutherford, 17 B. Mon. 245.

Massachusetts.— Larned *v.* Andrews, 106 Mass. 435, 8 Am. Rep. 346.

Minnesota.— Bisbee *v.* McAllen, 39 Minn. 143, 39 N. W. 299; Solomon *v.* Dreschler, 4 Minn. 278.

New Hampshire.— Corning *v.* Abbott, 54 N. H. 469; Lewis *v.* Wild, 14 N. H. 294; Favor *v.* Philbrick, 7 N. H. 357.

Nevada.— Mandelbaum *v.* Gregovick, 17 Nev. 89, 28 Pac. 121, 45 Am. Rep. 433.

Ohio.— Strong *v.* Darling, 9 Ohio 201.

Pennsylvania.— Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393.

Vermont.—Aiken *v.* Blaisdell, 41 Vt. 655.

England.— Bailey *v.* Harris, 12 Q. B. 905, 13 Jur. 341, 18 L. J. Q. B. 115, 64 E. C. L. 905; Brown *v.* Duncan, 10 B. & C. 93, 8 L. J. K. B. O. S. 60, 5 M. & R. 114, 21 E. C. L. 49; Smith *v.* Mawhood, 15 L. J. Exch. 149, 14 M. & W. 452.

5. *Illinois.*— Penn *v.* Bornman, 102 Ill. 523.

Indiana.— Wheeler *v.* Hawkins, 116 Ind. 515, 19 N. E. 470.

Iowa.— Dillon *v.* Allen, 46 Iowa 299, 26 Am. Dec. 145; Pangborn *v.* Westlake, 36 Iowa 546; Hill *v.* Smith, Morr. 70.

Kentucky.— Lindsey *v.* Rutherford, 17 B. Mon. 245.

Maine.— Coombs *v.* Emery, 14 Me. 404.

Maryland.— Lester *v.* Howard Bank, 33 Md. 555, 3 Am. Rep. 211.

Massachusetts.— Bowditch *v.* New England Mut. L. Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; Springfield Bank *v.* Merrick, 14 Mass. 322.

New Hampshire.— Lewis *v.* Welch, 14 N. H. 294.

New Jersey.— Ruckman *v.* Bergholz, 37 N. J. L. 437.

New York.— Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Griffith *v.* Wells, 3 Den. 226; Hunt *v.* Knickerbacker, 5 Johns. 327.

Ohio.— Vining *v.* Bricker, 14 Ohio St. 331.

Pennsylvania.— Holt *v.* Green, 73 Pa. St. 198, 13 Am. Rep. 737.

Vermont.—Aiken *v.* Blaisdell, 41 Vt. 655; Bancroft *v.* Dumas, 21 Vt. 456.

Virginia.— Niemeyer *v.* Wright, 75 Va. 239, 40 Am. Rep. 720.

United States.— Miller *v.* Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. ed. 759; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188; Fackler *v.* Ford, 24 How. 322, 16 L. ed. 690; Harris *v.* Runnels, 12 How. 79, 13 L. ed. 901.

England.— Barton *v.* Muir, L. R. 6 P. C. 134, 44 L. J. P. C. 19, 31 L. T. Rep. N. S. 593, 23 Wkly. Rep. 427; Fergusson *v.* Norman, 1 Arn. 418, 5 Bing. N. Cas. 76, 3 Jur. 10, 6 Scott 794, 35 E. C. L. 51; Johnson *v.* Hudson, 11 East 180, 10 Rev. Rep. 465; Cope *v.* Rowlands, 2 Gale 231, 6 L. J. Exch. 63, 2 M. & W. 149; Hodgson *v.* Temple, 1 Marsh. 5, 5 Taunt. 181, 14 Rev. Rep. 738, 1 E. C. L. 100.

See 11 Cent. Dig. tit. "Contracts," § 477 *et seq.*

Continuity of penalty.— Anson suggests a better test in the continuity of the penalty. If the penalty, he says, is imposed once for all, and is not recurrent on the making of successive contracts of the kind which are thus penalized, or if other circumstances would make the avoidance of the contract a punishment disproportionate to the offense, it may be argued that such contracts are not to be held void. But where the penalty recurs upon the making of every contract of a certain sort, we may assume (apart from revenue cases, as to which there may yet be a doubt), that the contract thus penalized is avoided as between the parties. Anson Contr. 286 [*citing* Cope *v.* Rowlands, 2 Gale 231, 6 L. J. Exch. 63, 2 M. & W. 149; Smith *v.* Mawhood, 15 L. J. Exch. 149, 14 M. & W. 452]. And see the following cases:

Iowa.—Pangborn *v.* Westlake, 36 Iowa 546.

(III) *Statutes Requiring License to Engage in Profession, Trade, or Business.* Where a license or certificate is required by statute as a requisite to one practising a particular profession, an agreement of a professional character without such license or certificate is illegal and void. This is true for example of an agreement made by an unlicensed or uncertificated physician,[6] an attorney at law,[7] or a school-teacher.[8] The authorities are in accord on this point, where the license is required for public protection and to prevent improper persons from acting in a particular capacity and not for revenue purposes only. In the latter cases, as we have seen, the decisions are not in accord.[9] The same is held where a license is required for the carrying on of a particular trade or business, as in the case of a wholesale or retail liquor-dealer,[10] a stock-broker,[11] a real-estate or commercial broker,[12] a pawnbroker,[13] a printer,[14] a peddler,[15] a carpenter or builder,[16] an innkeeper,[17] the keeper of a stallion,[18] a public carman,[19] a grocer,[20] a

Massachusetts.— Larned *v.* Andrews, 106 Mass. 435, 8 Am. Rep. 346.

Nevada.— Mandelbaum *v.* Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433.

New Hampshire.— Corning *v.* Abbott, 54 N. H. 469; Lewis *v.* Welch, 14 N. H. 294; Favor *v.* Philbrick, 7 N. H. 326.

Pennsylvania.— Johnson *v.* Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Rather *v.* Lancaster First Nat. Bank, 92 Pa. St. 393.

Vermont.— Aiken *v.* Baisdell, 41 Vt. 655; Territt *v.* Bartlett, 21 Vt. 184.

Revenue test.— In Tennessee the court say that the revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license. Stevenson *v.* Ewing, 87 Tenn. 46, 9 S. W. 230.

6. Orr *v.* Meek, 111 Ind. 40, 11 N. E. 787; Thompson *v.* Hazen, 25 Me. 104; Bailey *v.* Mogg, 4 Den. (N. Y.) 60; Alcott *v.* Barber, 1 Wend. (N. Y.) 526; Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43. See Licenses; Physicians and Surgeons.

7. Hittson *v.* Browne, 3 Colo. 304; Hall *v.* Bishop, 3 Daly (N. Y.) 109. See Attorney and Client, 4 Cyc. 982; Licenses.

8. Wells *v.* People, 71 Ill. 532; Jackson School Tp. *v.* Farlow, 75 Ind. 118; Ryan *v.* School Dist. No. 13, 27 Minn. 433, 8 N. W. 146. See Licenses.

9. See *supra*, VII, B, 2, c, (II).

10. O'Bryan *v.* Fitzpatrick, 48 Ark. 487, 3 S. W. 527; Griffith *v.* Wells, 3 Den. (N. Y.) 226; Territt *v.* Bartlett, 21 Vt. 184; Miller *v.* Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. ed. 759. See Intoxicating Liquors; Licenses.

11. Dudley *v.* Collier, 87 Ala. 431, 6 So. 304 13 Am. St. Rep. 55; Hustis *v.* Pickands, 27 Ill. App. 270; Harding *v.* Hagar, 60 Me. 340, 63 Me. 515; Buckley *v.* Humason, 50 Minn. 195, 52 N. W. 385, 26 Am. St. Rep. 637, 16 L. R. A. 423. See also Cope *v.* Rowlands, 2 Gale 231, 6 L. J. Exch. 63, 2 M. & W. 149. *Contra*, Lindsey *v.* Rutherford, 17 B. Mon. (Ky.) 245. See Factors and Brokers; Licenses.

12. Harding *v.* Hagar, 60 Me. 340. And see Buckley *v.* Humason, 50 Minn. 195, 52 N. W. 385, 36 Am. St. Rep. 637, 16 L. R. A. 423; Johnson *v.* Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Stevenson *v.* Ewing, 87 Tenn. 46, 9 S. W. 230; De Wit *v.* Lander, 72 Wis. 349, 72 N. W. 120. *Contra*, Prince *v.* Eighth St. Baptist Church, 20 Mo. App. 332; Ruchman *v.* Bergholz, 37 N. J. L. 437; Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393; Justice *v.* Rowand, 10 Phila. (Pa.) 623. See Factors and Brokers; Licenses.

13. Fergusson *v.* Norman, 1 Arn. 418, 5 Bing. N. Cas. 76, 3 Jur. 10, 6 Scott 794, 35 E. C. L. 51. See Licenses; Pawnbrokers.

14. Bensley *v.* Bignold, 5 B. & Ald. 335, 7 E. C. L. 188. See Licenses.

15. Stewartson *v.* Lothrop, 12 Gray (Mass.) 52; Rast *v.* Farley, 91 N. Y. 344; Best *v.* Bauder, 29 How. Pr. (N. Y.) 489. See Licenses.

16. Stevens *v.* Gourley, 7 C. B. N. S. 99, 1 F. & F. 498, 6 Jur. N. S. 147, 29 L. J. C. P. 1, 1 L. T. Rep. N. S. 33, 8 Wkly. Rep. 85, 97 E. C. L. 99.

Illustrations.— An agreement to construct a building not complying with the building regulations is illegal. Beman *v.* Tugnot, 5 Sandf. (N. Y.) 153; Stevens *v.* Gourley, 7 C. B. N. S. 99, 1 F. & F. 498, 6 Jur. N. S. 147, 29 L. J. C. P. 1, 1 L. T. Rep. N. S. 33, 8 Wkly. Rep. 85, 97 E. C. L. 99. And where a statute prohibits, under a penalty, the keeping of a nine-pin alley appurtenant to a tavern, a carpenter who builds a nine-pin alley adjoining a tavern cannot recover the price. Spurgeon *v.* McElwain, 6 Ohio 442, 27 Am. Dec. 266.

17. Randell *v.* Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; Stanwood *v.* Woodward, 38 Me. 192. See Innkeepers; Licenses.

18. Smith *v.* Robertson, 106 Ky. 472, 50 S. W. 852, 20 Ky. L. Rep. 1959, 45 L. R. A. 510; Nelson *v.* Beck, 89 Me. 264, 36 Atl. 374. See Wyman *v.* Wentworth, (Me. 1887) 10 Atl. 454. And see Animals, 2 Cyc. 330; Licenses.

19. Ferdon *v.* Cunningham, 20 How. Pr. (N. Y.) 154. See Licenses.

20. Munsell *v.* Temple, 8 Ill. 93. See Licenses.

plumber,[21] etc. In such instances agreements made without the requisite license are generally held to be void.

(IV) *STATUTES REGULATING DEALINGS IN ARTICLES OF COMMERCE.* Statutes regulating dealings in articles of commerce have been held to render sales void which contravene their provisions, as for example statutes requiring weights and measures to be approved and sealed by the proper officer,[22] or requiring goods to be inspected, branded, labeled, tagged, weighed or stamped, etc.[23]

21. Johnston *v.* Dahlgren, 31 N. Y. App. Div. 204, 52 N. Y. Suppl. 555. See LICENSES.

22. Finch *v.* Barclay, 87 Ga. 393, 13 S. E. 566; Eaton *v.* Kegan, 114 Mass. 433; Ritchie *v.* Boynton, 114 Mass. 431; Smith *v.* Arnold, 106 Mass. 269; Miller *v.* Post, 1 Allen (Mass.) 434; Bisbec *v.* McAllen, 39 Minn. 143, 39 N. W. 299.

23. *Alabama.*— Campbell *v.* Segars, 81 Ala. 259, 1 So. 714; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

Georgia.— Conley *v.* Sims, 71 Ga. 161; Johnston *v.* McConnell, 65 Ga. 129.

Kentucky.— Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, 17 Ky. L. Rep. 1345; Vanmeter *v.* Spurrier, 94 Ky. 22, 21 S. W. 337, 17 Ky. L. Rep. 684.

Maine.—Abbott *v.* Goodwin, 37 Me. 203; Buxton *v.* Hamblen, 32 Me. 448; Whitman *v.* Freeze, 23 Me. 185.

Massachusetts.— Prescott *v.* Battersby, 119 Mass. 285; Sawyer *v.* Smith, 109 Mass. 220; Libby *v.* Downey, 5 Allen 299.

Pennsylvania.— Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811.

South Carolina.— McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

Virginia.—Niemeyer *v.* Wright, 75 Va. 239, 40 Am. Rep. 720.

United States.— Baker *v.* Burton, 31 Fed. 401; Williams *v.* Barfield, 31 Fed. 398.

England.— Forster *v.* Taylor, 5 B. & Ad. 887, 3 L. J. K. B. 137, 3 N. & M. 244, 27 E. C. L. 887; Tyson *v.* Thomas, McClel. & Y. 119.

See 11 Cent. Dig. tit. "Contracts," § 491 *et seq.*

Act of congress relating to cigars.— A sale of cigars at the factory where made, before they are all boxed or any of them stamped, and delivery of possession, will not be invalid between the parties, under the act of congress imposing a forfeiture for selling or offering to sell cigars before they are boxed and stamped, where the contract of sale provides that they shall be stamped as the law requires before their removal. Straus *v.* Minzesheimer, 78 Ill. 492.

Failure to measure wood sold, as required by statute. Pray *v.* Burbank, 10 N. H. 377.

Sale of shingles not of the size prescribed by statute. Wheeler *v.* Russell, 17 Mass. 258.

Statute regulating size of bricks.— Where a statute declared that bricks should be made of a certain size, and prohibited under a penalty the making of bricks of a different size, it was held that a vendor of bricks of the latter size could not maintain an action for the price. Law *v.* Hodgson, 2 Campb. 147, 11 East 300, 10 Rev. Rep. 513.

Machine not boxed.— Where a statute enacted that if any person should run or knowingly permit his grain to be threshed by a threshing-machine, the rods, knuckle-joints, and jacks of which should not be boxed, he should be deemed guilty of and punished as for a misdemeanor, it was held that one who rendered service in threshing the grain of another with a machine not boxed in conformity with the statute could not recover therefor. Dillon *v.* Allen, 46 Iowa 299, 26 Am. Rep. 145. See also Hill *v.* Bell, 29 Ill. App. 136; Wadleigh *v.* Develling, 1 Ill. App. 596; Ingersoll *v.* Randall, 14 Minn. 400.

Platting and registering town lots.—Where a statute prohibited under a penalty the sale of town lots before the map or plat thereof should be made out and filed with the recorder, it was held in Missouri that the sale of a lot before this was done was void. Downing *v.* Ringer, 7 Mo. 585. In other states decisions are to the contrary. Pangborn *v.* Westlake, 36 Iowa 546; Watrous *v.* Blair, 32 Iowa 58; Bemis *v.* Becker, 1 Kan. 226; Strong *v.* Darling, 9 Ohio 201.

Employment of minors.— A contract of service by a minor in violation of a statute prohibiting the employment of a certain class of minors in manufacturing establishments is void. Birkett *v.* Chatterton, 13 R. I. 299, 43 Atl. 30.

Eight-hour law.— An agreement to work more than eight hours a day in violation of an eight-hour statute has been held void. Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603.

Firm-names.— Under the New York statute which forbids the transaction of business in the name of a partner not interested in the firm, requires that the designation "Co." or "Company" shall represent an actual partner, and makes violation of the statute a misdemeanor, all contracts in violation thereof are void. O'Toole *v.* Garvin, 1 Hun (N. Y.) 92; Swords *v.* Owens, 34 N. Y. Super. Ct. 277, 43 How. Pr. (N. Y.) 176. See Donlow *v.* English, 89 Hun (N. Y.) 67, 35 N. Y. Suppl. 82, 69 N. Y. St. 260, 2 Annot. Cas. (N. Y.) 299.

Marriage contracts an exception.— In Hervey *v.* Moseley, 7 Gray (Mass.) 479, 483, 66 Am. Dec. 515, it is said: "While it is true that ordinary contracts, if prohibited by a

(v) *Waiver of Statutory Provisions by Agreement.* A person may lawfully waive by agreement the benefit of a statutory provision.[24] But there is an imputed exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where rights of third parties which the statute was intended to protect are involved.[25]

(vi) *Omission of Penalty For Prohibited Act.* If an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition and not the penalty which makes the act illegal.[26]

(vii) *Agreements Prohibited but Declared Not Void.* Although an agreement may be prohibited by statute, yet if the statute declares also that it

penal statute, are held illegal and invalid, yet in the case of marriage this principle has been, for sound and obvious reasons, disregarded, and the marriage held valid, notwithstanding the penalty incurred by those who should unite a female in marriage under eighteen years of age, without the consent of her parent or guardian." See MARRIAGE.

Mail laws.— A contract by an express company in violation of the mail laws of the United States is void. Hill *v.* Mitchell, 25 Ga. 704. So is a partial assignment of a United States mail contract, being illegal under the laws of the United States and the post-office regulations. Nix *v.* Bell, 66 Ga. 664. But there is no such illegality in an agreement by which a mail contractor employs other parties to execute the contract on his part. Gordon *v.* Dalby, 30 Iowa 223; Wilson *v.* Beach, 11 Ky. L. Rep. 1001. See POST-OFFICE.

Stamps.— The federal revenue laws have at times required certain written contracts to be stamped. As to the construction of such laws and their effect on instruments not stamped and offered in evidence in the courts see *supra*, III, G.

Game laws.— A statute prohibiting the killing of certain game at certain times of the year and making it a misdemeanor for any person to have in his possession any of the game specified during the closed season renders illegal contracts involving a violation thereof. Haggerty *v.* St. Louis Ice Mfg. Co., 143 Mo. 238, 44 S. W. 1114, holding that where a person employed another to store game of this kind during the closed season, which he had on hand at the commencement of such season, intending to withdraw it when the open season returned, the contract to preserve the same and to restore it was void and no recovery could be had for its breach.

Tokens to circulate as money.— Where a statute makes it a misdemeanor to issue brass checks to an employee in payment for labor, a purchaser of such checks cannot make them the basis of an action against the employer issuing them. Naglebaugh *v.* Harder, etc., Coal Min. Co., (Ind. 1898) 51 N. E. 427.

24. *California.*— Bowen *v.* Aubrey, 22 Cal. 566.

Massachusetts.— Morrison *v.* Underwood, 5 Cush. (Mass.) 52.

Michigan.— Beecher *v.* Marquetta, etc., Rolling Mill Co., 45 Mich. 105, 7 N. W. 695.

New York.— Phyfe *v.* Eimer, 45 N. Y. 102; Buel *v.* Lockport, 3 N. Y. 197; Tombs *v.* Rochester, etc., R. Co., 18 Barb. 583.

United States.— Shutte *v.* Thompson, 15 Wall. 151, 21 L. ed. 123.

England.— Rumsey *v.* Northeastern R. Co., 14 C. B. N. S. 641, 10 Jur. N. S. 208, 32 L. J. C. P. 244, 8 L. T. Rep. N. S. 666, 11 Wkly. Rep. 911, 108 E. C. L. 641.

25. Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603.

Exemption laws.— It is held in a number of cases that the benefit of an exemption law cannot be waived by an executory agreement.

Florida.— Carter *v.* Carter, 20 Fla. 558, 51 Am. Rep. 618.

Illinois.— Recht *v.* Kelly, 82 Ill. 147, 25 Am. Rep. 301; Phelps *v.* Phelps, 72 Ill. 545, 22 Am. Rep. 149.

Iowa.— Curtis *v.* O'Brien, 20 Iowa 376, 89 Am. Dec. 543.

Kentucky.— Moxley *v.* Ragan, 10 Bush 156, 19 Am. Rep. 61.

Louisiana.— Levick *v.* Walker, 15 La. Ann. 245, 77 Am. Dec. 187.

North Carolina.— Branch *v.* Tomlinson, 77 N. C. 388.

Tennessee.— Mills *v.* Bennett, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763; Denny *v.* White, 2 Coldw. 283, 88 Am. Dec. 596.

Wisconsin.— Maxwell *v.* Reed, 7 Wis. 582.

See EXEMPTIONS.

Insurance.— An agreement to arbitrate a total loss is void under the valued policy law. O'Keefe *v.* Liverpool, etc., Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819. As to the validity of agreements waiving provisions of a statute as to insurance policies see, generally, INSURANCE.

Statute of limitations.— As to the power to waive by agreement the benefit of the statute of limitations see Miller *v.* State Ins. Co., 54 Nebr. 121, 74 N. W. 416, 69 Am. St. Rep. 709. And see, generally, LIMITATIONS OF ACTIONS.

Usury.— As to waiving the benefit of usury laws see USURY.

26. Gunter *v.* Leckey, 30 Ala. 591; McGehee *v.* Lindsay, 6 Ala. 16; Cotton *v.* Brien, 6 Rob. (La.) 115; Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Cowan *v.* Milbourn,

shall not be void, then it is enforceable by the courts.[27] And for a like reason, the contract is not void where the statute at the same time also otherwise limits the effect or declares the consequences which shall attach to the making of the contract.[28]

3. AGREEMENTS CONTRARY TO PUBLIC POLICY — a. In General. If an agreement binds the parties or either of them, or if the consideration is, to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements it would employ its functions in undoing what it was created to do.[29] It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law.[30] Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted.[31] In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case.[32] The test is the evil tendency of the contract and not its actual injury to the public in a particular

L. R. 2 Exch. 230, 36 L. J. Exch. 124, 16 L. T. Rep. N. S. 290, 15 Wkly. Rep. 750.

27. Lewis *v.* Bright, 4 E. & B. 917, 1 Jur. N. S. 757, 24 L. J. Q. B. 191, 82 E. C. L. 917.

28. Philadelphia Loan Co. *v.* Tower, 13 Conn. 249; Rossman *v.* McFarland, 9 Ohio St. 369.

29. *Alabama.*— State *v.* Metcalfe, 75 Ala. 42.

California.— Danielwitz *v.* Sheppard, 62 Cal. 339.

Dakota.— Peck *v.* Levinger, 6 Dak. 54, 50 N. W. 481.

Georgia.— Mercier *v.* Mercier, 50 Ga. 546, 15 Am. Rep. 594.

Illinois.— Cothran *v.* Ellis, 125 Ill. 496, 16 N. E. 646; Chicago Gaslight, etc., Co. *v.* People's Gaslight, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Ray *v.* Mackin, 100 Ill. 246; Hamilton *v.* Hamilton, 89 Ill. 349; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Paton *v.* Stewart, 78 Ill. 481; Jerome *v.* Bigelow, 66 Ill. 452, 16 Am. Rep. 597.

Indiana.— Blont *v.* Proctor, 5 Blackf. 265.

Iowa.— Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Fawcett *v.* Eberley, 58 Iowa 544, 12 N. W. 580.

Louisiana.—Norton *v.* Dawson, 19 La. Ann. 464, 92 Am. Dec. 548; Bowman *v.* Gonegal, 19 La. Ann. 328, 92 Am. Dec. 537; Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527; Firemen's Charitable Assoc. *v.* Berghaus, 13 La. Ann. 209; Davis *v.* Holbrook, 1 La. Ann. 176.

Massachusetts.— Holcomb *v.* Weaver, 136 Mass. 265; Blasdel *v.* Fowle, 120 Mass. 447, 21 Am. Rep. 533; Shattuck *v.* Eastman, 12 Allen 369.

Michigan.—McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355.

Mississippi.—Adams *v.* Rowan, 8 Sm. & M. 624; Wooten *v.* Miller, 7 Sm. & M. 380.

Nebraska.— Clarke *v.* Omaha, etc., R. Co., 5 Nebr. 314.

New York.— Richardson *v.* Crandall, 48 N. Y. 348 [*affirming* 47 Barb. 335, which *reversed* 30 How. Pr. 134]; New Haven City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

Ohio.— Cumpston *v.* Lambert, 18 Ohio 81, 51 Am. Dec. 442.

Tennessee.— Bledsoe *v.* Jackson, 4 Sneed 429; Ohio L. Ins., etc., Co. *v.* Merchants' Ins. etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

Texas.— Specht *v.* Collins, 81 Tex. 213, 16 S. W. 934.

Vermont.— Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

Wisconsin.— Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105.

United States.— Milne *v.* Huber, 3 McLean 212, 17 Fed. Cas. No. 9,617; Scudder *v.* Andrews, 2 McLean 464, 21 Fed. Cas. No. 12,564.

See 11 Cent. Dig. tit. "Contracts," § 498 *et seq.*

30. Peterson *v.* Christensen, 26 Minn. 377, 4 N. W. 623.

31. Firemen's Charitable Assoc. *v.* Berghaus, 13 La. Ann. 209.

32. *Iowa.*— Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206, 10 Centr. L. J. 298.

Massachusetts.— Fuller *v.* Dame, 18 Pick. 472.

Missouri.— Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369.

New York.— Richardson *v.* Crandall, 48 N. Y. 348.

Ohio.— Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666; Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103.

instance.[33] Thus an agreement for a pecuniary consideration made by a railroad company for the location of a depot is void, although the location in the particular case may be advantageous to the public.[34] An agreement to influence legislation is void, although the legislation sought may be clearly beneficial.[35] An agreement to influence an appointment to office is void, although the intent may be to secure the best qualified person.[36] And agreements whose tendency is to establish a monopoly are void, although they may not in the particular case destroy competition or enhance prices.[37] The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts.[38] An agreement of course will not be declared void as against public policy when it is expressly authorized by a statute.[39]

b. History. The earliest application of the principle of public policy to agreements seems to have been in cases of agreements to promote litigation or marriage or in the endeavor to elude the binding effect of wagers at common law.[40] But whatever the origin, it is now applied by the courts in a large and steadily increasing number of cases, notwithstanding the criticism of individual judges.[41]

c. Sources. The public policy of a state is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts. But when the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it enacts. The only authentic and admissible evidence of public policy of a state on any given subject are its constitutions, laws, and judicial decisions. The public policy of a state of which courts take notice and to which they give effect must be decided from those sources. Where the state has spoken through its legislature, there is no room for speculation as to what the policy of the state is.[42] In the absence of any legislative prohibition of a particular agreement which may be brought before a court the latter, to declare it void on this ground, must find that such contracts have a tendency to injure the public, are against the public good, or inconsistent with sound policy and good morals as to the consideration or thing to be done.

Oregon.— Hollaway *v.* Patterson, 5 Oreg. 177, 2 Centr. L. J. 63.

United States.— Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819, 28 Centr. L. J. 454; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868; Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 953.

33. Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Firemen's Charitable Assoc. *v.* Berghaus, 13 La. Ann. 209; Atcheson *v.* Mallon, 43 N. Y. 147, 3 Am. Rep. 678.

34. See *infra*, VII, B, 3, f, (II), (G).

35. See *infra*, VII, B, 3, f, (II), (B).

36. See *infra*, VII, B, 3, f, (II), (E).

37. See *infra*, VII, B, 3, f, (VIII).

38. Providence Tool Co. *v.* Norris, 2 Wall. (U. S.) 45, 17 L. ed. 868.

39. Parfitt *v.* Kings County Gas, etc., Co., 12 Misc. (N. Y.) 278, 33 N. Y. Suppl. 1111, 67 N. Y. St. 814.

40. See Anson Contr. 183; Pollock Contr. 272.

41. The language of Jessel, M. R., in Printing, etc., Registering Co. *v.* Sampson, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463, is often cited in the reports. "It must not be forgotten," it was there said, "that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

42. Mahorner *v.* Hooe, 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706; Roselle *v.* Farmers' Bank, 141 Mo. 36, 39 S. W. 274, 64 Am. St. Rep. 501; Enders *v.* Enders, 164 Pa. St. 266, 30 Atl. 129, 44 Am. St. Rep. 598, 27 L. R. A. 56; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Swann *v.* Swann, 21 Fed. 299. See also Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. 201, 202, 17 C. C. A. 62, 30 L. R. A. 193, where it is said: "The public policy of a state or nation must be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public."

If by well-settled judicial precedent the law has determined that a certain class of contracts tends to the injury of the public, or are inconsistent with sound morality, the court should follow the law thus declared, without regard to its own notions of the tendency of the contract.[43] Many agreements therefore which have already been discussed as void because contrary to the terms of a statute[44] are also void as being contrary to the policy of the law as expressed in those statutes.[45] But there are many things which the law does not expressly prohibit or penalize, but which are so mischievous in their nature and tendency that on grounds of public policy they are not permitted to be the subject of an enforceable agreement.[46] And it is agreements which fall under this class that are the subject of the following sections.

d. Public Policy Varies With Time and Place. As the habits, opinions, and wants of a people vary with the times so public policy may change with them.[47] So because these habits, opinions, and wants are different in different places, what may be against public policy in one state or country may not be so in another. The public policy, not alone of different countries, but of different states of the Union, on the subject of wagers and lotteries, of Sunday observance, of the liquor traffic, and the like, is very different.[48]

e. Federal Courts. It has been held that in the federal courts the question whether a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent jurisdiction with those of the state, and while the decisions of the latter are always entitled to the weight of persuasive authority the federal courts will exercise their own judgment.[49]

f. Particular Agreements Contrary to Public Policy — (i) *In General.* Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case.[50] It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts,[51] and agreements therefore are not to be held void as being contrary to public policy, unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they mani-

43. See the cases above cited.

44. See *supra*, VII, B, 2, c.

45. Morgan *v.* Menzies, 60 Cal. 341; Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617; McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845. See *supra*, VII, B, 1.

46. West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

47. Dixon *v.* U. S., 1 Brock (U. S.) 177, 7 Fed. Cas. No. 3,934. And see Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 268, 57 N. W. 843, 24 L. R. A. 647, where it is said: "Public policy is variable,— the very reverse of that which is the policy of the public at one time may become public policy at another; hence, no fixed rule can be given by which to determine what is public policy."

48. See *infra*, XI, B, 9.

49. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Smith *v.* Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. ed. 508; Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 325; Brooklyn City, etc., R. Co. *v.* National Bank of Republic, 102 U. S. 14, 26 L. ed. 61; New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865. See Courts.

50. Smith *v.* Du Bose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260; Weber *v.* Shay, 56 Ohio St. 116, 46 N. E. 377, 60 Am. St. Rep. 743, 37 L. R. A. 230; Pierce *v.* Randolph, 12 Tex. 290; Egerton *v.* Brownlow, 4 H. L. Cas. 1, 18 Jur. 71, 23 L. J. Ch. 348.

Burden of proof as to public policy see *infra*, XII, I, 13.

51. See Printing, etc., Registering Co. *v.* Sampson, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463, where it is said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely

festly tend to injure the public in some way.[52] On the other hand the interests of the public do require that there shall be some restrictions on the freedom of

and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

52. The following have been held not against public policy: An agreement by the owners of property fronting on a proposed street to pay the damages assessed for opening the street (Townsend *v.* Hoyle, 20 Conn. 1); a promise to pay money to one through whose land a road has been laid out for withdrawing his opposition to opening it (Weeks *v.* Lippencott, 42 Pa. St. 474); an agreement with an attachment officer to pay plaintiff the amount which he may recover in his action, in consideration of the officer delivering the attached property to the promisor (Hayes *v.* Kyle, 8 Allen (Mass.) 300); an agreement by an employer to pay an employee a certain sum per month for his services, even if he should be discharged for incapacity or dereliction of duty (Edwards *v.* Crepin, 68 Cal. 37, 8 Pac. 616); an agreement to pay attorney's fees and costs of collection by suit if a debt is not paid when due (Brown *v.* Maulsby, 17 Ind. 10; Billingsley *v.* Dean, 11 Ind. 331; Bacas *v.* Klein, 14 La. Ann. 407), although otherwise as to a stipulation to pay a certain percentage on the amount due as attorney's fees (Martin *v.* Belmont Bank, 13 Ohio 250; Shelton *v.* Gill, 11 Ohio 417; State *v.* Taylor, 10 Ohio 378); an agreement to pay a commission on all business brought to the promisor (Vocke *v.* Peters, 58 Ill. App. 338; Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772; Richard *v.* Quintard, 51 N. Y. 636; Ormes *v.* Dauchy, 45 N. Y. Super. Ct. 85); a restriction on the transfer of labor tickets issued by a corporation (Tabler *v.* Sheffield Land, etc., Co., 79 Ala. 377, 58 Am. Rep. 593); an agreement that the pledger of a life-insurance policy shall lose his right to redeem on his death (Edington *v.* Ætna L. Ins. Co., 13 Hun (N. Y.) 543); an agreement that an attorney shall be entitled to receive his whole fee in case the county (his client) should by compromise settle the suit without the attorney's consent (Richland County *v.* Millard, 9 Ill. App. 396); securities taken by the commissioners of highways in negotiating amicable settlements of controversies relating to encroachments upon public roads (Highway Com'rs *v.* Peck, 5 Hill (N. Y.) 215); an agreement by an invalid to pay his nurse for three years' service a stated sum, to become due at once on his death during that time (Stone *v.* Pennock, 31 Mo. App. 544); a stipulation in a deed of trust as to the notice to be given in the event of a sale (Martin *v.* Paxson, 66 Mo. 260); a covenant by a landowner not to permit the owner of an adjoining tract to cut a ditch through the covenantor's premises (Jacobs *v.* Davis, 34 Md. 204); an agreement that if a grantee should die before a day named part of the consideration unpaid should not be payable at all (Clyde *v.* Mohn, 4 Ohio Cir. Ct. 537); agreements for the purchase and sale of gold (Brown *v.* Speyers, 20 Gratt. (Va.) 296); a deed from a landowner adjoining a toll bridge to the owners of the bridge, although a foreign corporation, granting the right to control all passage over such land, which may be sought for the purpose of avoiding payment of toll over the bridge, the right to obstruct any travel over the land for that purpose, etc. (Claremont Bridge *v.* Royce, 42 Vt. 730); a loan to a person to enable him to carry on a liquor business under a license (Germantown Brewing Co. *v.* Booth, 162 Pa. St. 100, 34 Wkly. Notes Cas. (Pa.) 440, 3 Pa. Dist. 142, 29 Atl. 386 [*reversing* 14 Pa. Co. Ct. 189]); a contract between a shipper and a railroad company, whereby the shipper agrees to remove the freight within forty-eight hours after notice of its arrival at its destination or pay a reasonable charge for detention of the car (New York, etc., R. Co. *v.* J. F. Seiberling Co., 8 Ohio Cir. Ct. 593); the joining of claims due to several persons in a note payable to one (Sommers *v.* Hamburger, 91 Wis. 107, 64 N. W. 880); a condition of a bond for a deed that the trustees of a school, as grantees, should be incorporated by a legislative enactment, and thereby authorized to hold the lot for the use of the town for school purposes, etc., "exclusive of any restriction of school law" (Chapman *v.* School Dist., Deady (U. S.) 139, 5 Fed. Cas. No. 2,608); an agreement by the banking department not to close a bank as insolvent, on a promise by a shareholder and depositor to make good its capital (Sickles *v.* Herold, 11 Misc. (N. Y.) 583, 32 N. Y. Suppl. 1083, 66 N. Y. St. 337); an agreement by a corporation organized to build a public bridge with the proprietor of a newspaper to give him stock of the company in consideration of his publishing articles favoring the enterprise and showing the value of it as an investment (Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212); an agreement by an abutting landowner with a railroad granting permission, for a consideration, to construct its road, although such consent affects not only his own property but that of others and the interests of the public at large (Montclair Military Academy *v.* North Jersey St. R. Co., 65 N. J. L. 328, 47 Atl. 890); a contract by a railroad company to give one steady and permanent employment (Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Jessup *v.* Chicago, etc., R. Co., 82 Iowa 243, 48 N. W. 77); a mortgage on railroad property to a foreign trust company to secure bonds made payable out of the state (Hervey *v.* Illinois Midland R.

persons to enter into contracts; and if an agreement binds a party to do or not to do anything, the doing or omission of which is manifestly injurious to the public interests,[53] the courts must declare it contrary to public policy and therefore illegal and void.[54]

(II) *Interference With Administration of Government*—(A) *In General.* A people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. It is therefore a principle of the common law that it will not lend its aid to enforce a contract to do an act which tends to corrupt or contaminate, by improper and sinister influences, the integrity of our social or political institutions. Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead

Co., 28 Fed. 169); an agreement to give a lien to the builder of machinery for a water company on the machinery of the plant (New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399); and an agreement by a private corporation to pay a water company for extending its mains to its mill (Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. Rep. 284).

Influencing or discouraging subscriptions to the stock of a railroad company is not necessarily contrary to public policy, so as to render a contract having such effect void. Beadles *v.* Bless, 27 Ill. 320, 81 Am. Dec. 231.

53. West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 617, 46 Am. Rep. 527, where it is said: "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything, when the thing to be done or omitted is in any degree clearly injurious to the public."

54. The following agreements have been held contrary to public policy and illegal: An agreement to abandon the prosecution of proceedings for the establishment of a public highway in consideration of money to be paid therefor (Jacobs *v.* Tobiason, 65 Iowa 245, 21 N. W. 590, 54 Am. Rep. 9); or to pay money in consideration of withdrawing opposition to a public road (Smith *v.* Applegate, 23 N. J. L. 352); an agreement to pay a property-owner for consenting to the construction of a street railway on the street on which his property abuts, where the consent of one-half the property-owners is necessary before the franchise can be granted by the common council (Doane *v.* Chicago City R. Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 [*reversing* 51 Ill. App. 353]); an agreement guaranteeing to pay a sum of money to certain persons provided they will petition the common council of a city for street improvements (Maguire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353, Wils. (Ind. 92); an agreement whereby, for a direct or indirect consideration, some of the owners of abutting land are induced to sign a petition for grading and paving a street, where an ordinance requires such a petition to be made in good faith, and all the subscribers to bear their proportion of the burden (Howard *v.* Baltimore First Independent Church, 18 Md. 451), or a like agreement to induce a person to sign a petition to have a turnpike laid out and constructed (Miller *v.* Rice, 9 Ky. L. Rep. 620); an agreement between a landowner and commissioners appointed to open a street, by which the former consents to the opening of the street provided no benefits shall be assessed against him (St. Louis *v.* Meier, 77 Mo. 13); an agreement by which a person conveys property to another for no other consideration than that the latter shall use his influence to oppose an extension of a street across the property, when the property is to be reconveyed (Slocum *v.* Wooley, 43 N. J. Eq. 451, 11 Atl. 264); a bond given to indemnify a taxpayer against taxes to be levied to pay bonds issued by a town in aid of a railroad for which the obligee voted (Dean *v.* Clark, 80 Hun (N. Y.) 80, 30 N. Y. Suppl. 45, 61 N. Y. St. 746); an agreement to divide a school district in consideration of the surrender of property rights by the new district (State *v.* Kidd, 63 Wis. 337, 23 N. W. 703); an agreement to suppress competition in bidding on a street-paving contract (Ray *v.* Mackin, 100 Ill. 246, where the agreement was held not only against public policy, but also a fraud upon persons who by the charter were required to pay for the improvement); an agreement by the owners of newspapers whereby they agreed that for the term of two years, in case of the designation of either paper to publish the laws, the net amount received for this service, after paying the expense of the publication, should be equally divided between them, and that their newspapers during said two years should be alternately selected and designated for the purpose of publishing the laws (Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 789, 21 L. R. A. 617); or any other agreement which has for its object the disabling of public agencies from performing their full duties to the public (Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430 [*reversing* 5 Mo. App. 347]; Chouteau *v.* Union R., etc., Co., 22 Mo. App. 286); or the thwarting of public enterprises (Slocum *v.* Wooley, 43 N. J. Eq. 451, 11 Atl. 264).

the judgments of those to whom the high trust is confided is condemned by the courts. The officer may be an executive, administrative, legislative, or judicial officer. The principle is the same in either case.[55]

(B) *Interference With Legislative Action.* It follows from what has been said above that all agreements whose object or tendency is in any way to interfere with or unduly influence legislative action, either by congress, by a state legislature, or by a municipal council or other like body, are contrary to public policy and void.[56] The most common of these are what are known as "lobbying

55. *Alabama.*— Schloss *v.* Hewlett, 81 Ala. 266, 1 So. 263; Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

Arizona.— King *v.* Hawkins, (1888) 16 Pac. 434.

Arkansas.— Martin *v.* Royster, 8 Ark. 74.

California.— Bangs *v.* Dunn, 66 Cal. 72, 4 Pac. 963; Martin *v.* Wade, 37 Cal. 168.

Delaware.— Stroud *v.* Smith, 4 Houst. 448.

District of Columbia.— Weed *v.* Black, 2 MacArthur 268, 29 Am. Rep. 618.

Georgia.— Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93; Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Illinois.— Cook *v.* Shipman, 24 Ill. 614.

Indiana.— Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362; Hall *v.* Gavitt, 18 Ind. 390.

Kansas.— Stout *v.* Ennis, 28 Kan. 706; McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213.

Kentucky.— Field *v.* Chipley, 79 Ky. 260, 42 Am. Rep. 215; Hutchen *v.* Gibson, 1 Bush 270; Love *v.* Buckner, 4 Bibb 506.

Maine.— Hovey *v.* Storer, 63 Me. 486; Groton *v.* Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Massachusetts.— Frost *v.* Belmont, 6 Allen 152.

Michigan.— Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886.

Missouri.— State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827; Beal *v.* McVicker, 8 Mo. App. 202.

New Hampshire.— Cardigan *v.* Page, 6 N. H. 182.

Nevada.— Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548.

New York.— Bowery Nat. Bank *v.* Wilson, 122 N. Y. 478, 25 N. E. 855, 34 N. Y. St. 43, 19 Am. St. Rep. 507, 9 L. R. A. 706; Mills *v.* Mills, 40 N. Y. 543, 100 Am. Dec. 538; Gray *v.* Hook, 4 N. Y. 449; Harris *v.* Roof, 10 Barb. 489.

North Carolina.— Caton *v.* Stewart, 76 N. C. 357.

Pennsylvania.—Spaulding *v.* Ewing, 149 Pa. St. 375, 24 Atl. 219, 34 Am. St. Rep. 608, 15 L. R. A. 727; Hunter *v.* Nolf, 71 Pa. St. 282.

Rhode Island.— Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541.

Texas.— State Nat. Bank *v.* Fink, 86 Tex. 303, 24 S. W. 256.

Vermont.— Nichols *v.* Mudgett, 32 Vt. 546; Thetford *v.* Hubbard, 22 Vt. 440.

Wisconsin.— Morse *v.* Ryan, 26 Wis. 356; Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55.

United States.— Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868.

England.— Card *v.* Hope, 2 B. & C. 661, 4 D. & R. 164, 2 L. J. K. B. O. S. 96, 26 Rev. Rep. 503, 9 E. C. L. 288; Law *v.* Law, 3 P. Wms. 391, 24 Eng. Reprint 1114.

See 11 Cent. Dig. tit. "Contracts," § 570 *et seq.*

56. *Connecticut.*— Pratt *v.* Foot, 6 Conn. 332.

District of Columbia.— Weed *v.* Black, 2 MacArthur 268, 29 Am. Rep. 618.

Georgia.— Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Illinois.— Cook *v.* Shipman, 24 Ill. 614.

Indiana.— Maguire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353; Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

Kansas.— McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213; Kansas Pac. R. Co. *v.* McCoy, 8 Kan. 538.

Kentucky.— Wood *v.* McCann, 6 Dana 366.

Louisiana.— Burney *v.* Ludeling, 47 La. Ann. 73, 16 So. 507; Durbridge *v.* Slaughterhouse Co., 27 La. Ann. 676; Gil *v.* Williams, 12 La. Ann. 219, 68 Am. Dec. 767.

Massachusetts.— Frost *v.* Belmont, 6 Allen 152.

Michigan.— Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189.

Minnesota.—Houlton *v.* Dunn, 60 Minn. 26, 61 N. W. 898, 51 Am. St. Rep. 493, 30 L. R. A. 737.

Nebraska.— Richardson *v.* Scott's Bluff County, 59 Nebr. 400, 81 N. W. 309, 80 Am. St. Rep. 682, 48 L. R. A. 292.

New York.— Mills *v.* Mills, 40 N. Y. 543, 100 Am. Dec. 535 [*affirming* 36 Barb. 474]; Sedgwick *v.* Stanton, 14 N. Y. 289; Cary *v.* Western Union Tel. Co., 47 Hun 610; March *v.* Russell, 2 Lans. 340; Brown *v.* Brown, 34 Barb. 533; Rose *v.* Truax, 21 Barb. 361; Harris *v.* Roof, 10 Barb. 489; Wilbur *v.* New York Electric Constr. Co., 58 N. Y. Super. Ct. 539, 12 N. Y. Suppl. 456, 35 N. Y. St. 81; McKee *v.* Cheney, 52 How. Pr. 144.

North Carolina.— Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

contracts," i. e., agreements to use personal influence, importunity, bribery, or corruption to obtain legislation.[57] Some of the cases go so far as to hold all agreements to influence a legislative body void, even though it is not shown that corrupt action or secret or improper means are contemplated. It makes no difference in this view of the case whether undue influence or solicitation was in fact used. It is sufficient to vitiate the agreement if such means are within its scope, although not actually employed or even expected.[58] In other courts the

Ohio.— Cincinnati R. Co. *v.* Morris, 10 Ohio Cir. Ct. 502, 4 Ohio Cir. Dec. 640.

Oregon.— Sweeney *v.* McLeod, 15 Oreg. 330, 15 Pac. 275.

Pennsylvania.—Spaulding *v.* Ewen, 149 Pa. St. 375, 24 Atl. 219, 34 Am. St. Rep. 608, 15 L. R. A. 727; Clippinger *v.* Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519.

Vermont.— Powers *v.* Skinner, 34 Vt. 274, 80 Am. Dec. 677; Nichols *v.* Mudgett, 32 Vt. 546.

Wisconsin.—Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55.

United States.— Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; Hall *v.* Coppeel, 7 Wall. 542, 19 L. ed. 244; Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 953; Usher *v.* McBratney, 3 Dill. 385, 28 Fed. Cas. No. 16,805.

England.— Vauxhall Bridge Co. *v.* Spencer, Jac. 64, 2 Madd. 356, 4 Eng. Ch. 64.

See 11 Cent. Dig. tit. "Contracts," § 586 *et seq.*

Illustrations.— The following agreements have been held void: An agreement to prevent legislative investigation into the affairs of a railroad company (Usher *v.* McBratney, 3 Dill. (U. S.) 385, 28 Fed. Cas. No. 16,805); an agreement to use one's influence with a municipal council to procure a lease (Pease *v.* Walsh, 49 How. Pr. (N. Y.) 269; Wall *v.* Charlick, 8 N. Y. Leg. Obs. 230); a bond given to induce an alderman to lend his influence to secure the passage of an ordinance (Cook *v.* Shipman, 24 Ill. 614, 51 Ill. 316); an agreement to pay a delegate in congress for services rendered by him in securing the payment of a claim, where legislation by congress is required therefor (Weed *v.* Black, 2 MacArthur (D. C.) 268, 29 Am. Rep. 618); an agreement in consideration of the withdrawal of the opposition to the passage of an act through the legislature (Martin *v.* Second St. Pass. R. Co., 3 Phila. (Pa.) 316, 15 Leg. Int. (Pa.) 405; Pingrey *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Vauxhall Bridge Co. *v.* Spencer, Jac. 64, 2 Madd. 356, 4 Eng. Ch. 64; Edwards *v.* Grand Junction R. Co., 6 L. J. Ch. 47, 1 Myl. & C. 650, 13 Eng. Ch. 650, 1 R. & Can. Cas. 173, 7 Sim. 337, 8 Eng. Ch. 337); an agreement in consideration of a person's forbearing to petition for the repeal of a public law (Reed *v.* Peper Tobacco Warehouse Co., 2 Mo. App. 82); an agreement to use influence to procure a session of the legislature at a particular place (Thorne *v.* Yontz, 4 Cal. 321); an agreement between rival applicants for a street-railway franchise to combine in order to prevent competition between themselves or by others in procuring the franchise, and to avoid the imposition of conditions by the municipal authorities (Hyer *v.* Richmond Traction Co., 80 Fed. 839, 26 C. C. A. 175); and an agreement to procure the passage of a resolution which would result in congressional investigation of a certain corporation, so as to cause a depreciation in the value of its corporate securities, in consideration of which defendant stockbrokers were to speculate on their own account in the shares of the investigated corporation for the mutual profit of themselves and plaintiff (Veazey *v.* Allen, 61 N. Y. App. Div. 119, 70 N. Y. Suppl. 457). In Critchfield *v.* Bermudez Asphalt Co., 174 Ill. 466, 51 N. E. 552, a company employed plaintiffs as its agents "to solicit and promote" the asphalt-paving business in Chicago, the consideration being a small monthly salary and a commission on contracts secured, which in fact amount to ten times the salary. The contracts for paving were to be confined to Chicago and were to be made with said city, and it appeared inferentially from the contract that the procuring of the passage of ordinances for paving streets was to be a part of plaintiffs' duties. Plaintiffs were to bear all incidental expenses in promoting the work, in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt. It was held that the contract was void as against public policy.

57. See the cases above cited.

58. *Minnesota.*—Houlton *v.* Dunn, 60 Minn. 26, 61 N. W. 898, 51 Am. St. Rep. 493, 30 L. R. A. 737.

Nebraska.— Richardson *v.* Scotts Bluff Co., 59 Nebr. 400, 81 N. W. 309, 80 Am. St. Rep. 682, 48 L. R. A. 294, where by an agreement between a female attorney and a county the former was to draft a bill to reimburse the county for money expended, have it introduced in the legislature, explain it to, and make arguments in its favor before, committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill was procured. The fees in case of success were not fixed, but were to be liberal. The court held that the agreement was illegal and void, and that after passage of the bill there could be no recovery of a fee in a suit upon the contract, nor upon an implied contract for the services performed.

New York.— Mills *v.* Mills, 40 N. Y. 543,

agreement will not be invalidated where it does not appear that the personal influence of the promisee was to be exerted in an improper way or that improper means were intended to be used.[59] In the view of some courts, but not of others, the promise of payment of a contingent fee stamps the agreement as one not to be enforced, on the ground that such a fee is a direct and strong incentive to the exertion of not merely personal but sinister influence upon the legislature.[60] There

546, 10 Am. Dec. 535, where it was said: "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff, to resort to corrupt means or improper devices, to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action." And it was held that a contract was void as against public policy where the consideration was that one of the parties thereto would give "all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into a law" of a bill introduced into the legislature.

Oregon.— Sweeney *v.* McLeod, 15 Oreg. 330, 15 Pac. 275.

Pennsylvania.— Clippinger *v.* Hepbaugh, 5 Watts & S. 315, 321, 40 Am. Dec. 519, where it was said: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

Vermont.— Powers *v.* Skinner, 34 Vt. 274, 281, 80 Am. Dec. 677, where it is said that "the law will not concede to any man however honest he may be, the privilege of making a contract which it would not recognize when made by designing or corrupt men."

United States.— Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623.

59. *Alabama.*— Hunt *v.* Test, 8 Ala. 713, 720, 42 Am. Dec. 659, where it was held that an agreement to go to Washington and do all in one's power to prevent the confirmation of a claim which would infringe the rights of his employers, who had the government title to a part of the land in question, or else to have a saving clause inserted in the confirmation of that claim, was not necessarily against public policy, as it does not on the face import that any unfair or improper means are to be resorted to. "To do all in his power," it was said, "evidently means to exert his utmost diligence and ability in establishing the claim of his employer, and is what the law would have implied, if it had not been expressed."

California.— Foltz *v.* Cogswell, 86 Cal. 542, 25 Pac. 60, where the evidence showed that a part of the services rendered by plaintiff as attorney consisted in personal solicitation of members of the legislature to act favorably on a bill she was seeking to have passed for defendant; but there was nothing to show that she used dishonest, secret, or unfair means, and there was evidence that the members knew that she was acting for defendant. It was held that she was not "lobbying" within the meaning of a constitutional provision that "any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying."

Kentucky.— Wood *v.* McCann, 6 Dana 366.

Louisiana.—Burbank *v.* Jefferson City Gas Light Co., 35 La. Ann. 444.

Maine.— Greene *v.* Nash, 85 Me. 148, 26 Atl. 1114.

Michigan.—Beal *v.* Polhemus, 67 Mich. 130, 34 N. W. 532.

New York.— Russell *v.* Burton, 66 Barb. 539; Costar *v.* Brush, 25 Wend. 628.

Wisconsin.— Houlton *v.* Nichol, 93 Wis. 393, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166, where a person of large experience in regard to federal public lands, because satisfied that a certain class of lands that had been kept out of the market on account of a supposed claim under certain railroad grants could be legally thrown open to settlement, entered into an agreement with defendant who was desirous of acquiring such lands to instruct the latter in regard to the manner of procuring the same and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain proportion of the value of the land acquired by defendant. The court held that the contract was not *per se* invalid as a lobbying contract.

United States.— Salinas *v.* Stillman, 66 Fed. 677, 14 C. C. A. 50.

But see Houlton *v.* Dunn, 60 Minn. 26, 61 N. W. 898, 51 Am. St. Rep. 493, 27 L. R. A. 685.

60. *District of Columbia.*— Weed *v.* Black, 2 MacArthur 268.

Illinois.— Bermudez Asphalt Paving Co. *v.* Critchfield, 62 Ill. App. 221.

Indiana.— Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

are many agreements of this kind that are admittedly good. All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. And an agreement express or implied for professional services in drafting petitions to the legislative body, in collecting evidence, preparing arguments, and submitting them either orally or in writing to legislative committees or other proper authorities, is as free from judicial criticism as the retaining of professional services in a court of law.[61] But where persons act as counsel, agents, or in any representative capacity, it is due to those before whom they plead or solicit that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration, for advice or information flowing from the unbiased judgment of disinterested persons will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest.[62] In all cases of this kind the evidence, to warrant a recovery on the contract, should establish with reasonable clearness the fact that the services alleged to have been performed were in reality such as are sanctioned by the law in aiding and promoting legislative action.[63]

Kentucky.— Wood *v.* McCann, 6 Dana 366.

Louisiana.— Gil *v.* Davis, 12 La. Ann. 219, 68 Am. Dec. 767.

Nebraska.— Richardson *v.* Scotts Bluff County, 59 Nebr. 400, 81 N. W. 309, 80 Am. St. Rep. 682, 48 L. R. A. 292.

New York.— Harrs *v.* Roof, 10 Barb. 489.

Pennsylvania.— Clippinger *v.* Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519.

Wisconsin.— Chippewa Valley, etc., R. Co. *v.* Chicago, etc., R. Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601.

United States.—Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 970 [*affirming* Taney 204, 16 Fed. Cas. No. 9,124].

Decisions to the contrary.— In other courts the fact that the compensation is contingent upon success is not alone sufficient to avoid the agreement. Burbridge *v.* Fackler, 2 MacArthur (D. C.) 407; Denison *v.* Crawford County, 48 Iowa 211; Workman *v.* Campbell, 46 Mo. 305; Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55.

61. *California.*— Miles *v.* Thorne, 38 Cal. 335, 98 Am. Dec. 384, holding valid a contract whereby one agreed for hire to work for passage of bills by the legislature, provided he did not conceal his interest in the matter, but let it be known and understood by the members whose judgment he undertook to influence.

District of Columbia.— Weed *v.* Black, 2 MacArthur 268, 29 Am. Rep. 618; Child *v.* Trist, 1 MacArthur 1.

Indiana.— Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

Iowa.— Denison *v.* Crawford County, 48 Iowa 211.

Kansas.— Barber Asphalt Paving Co. *v.* Botsford, 56 Kan. 532, 44 Pac. 3; Kansas Pac. R. Co. *v.* McCoy, 8 Kan. 538, 543, in the latter of which cases it was said: "The use of money to influence legislation is not always wrong. It depends altogether on the manner of its use. If it be used to pay for the publication of circulars or pamphlets, or otherwise, for the collection or distribution of information openly and publicly among the members of the legislature, there is nothing objectionable or improper."

Kentucky.— Wood *v.* McCann, 6 Dana 366; Arthur *v.* Dayton, 4 Ky. L. Rep. 831.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Missouri.— Strathmann *v.* Gorla, 14 Mo. App. 1.

New York.— Chesborough *v.* Conover, 140 N. Y. 282, 35 N. E. 633, 55 N. Y. St. 728 [*affirming* 21 N. Y. Suppl. 566, 50 N. Y. St. 463]; Sedgwick *v.* Stanton, 14 N. Y. 289; Russell *v.* Buton, 66 Barb. 539; Brown *v.* Brown, 34 Barb. 533; Hillyer *v.* Travers, 1 Law Rep. 146.

Oregon.— See Sweeney *v.* McLeod, 15 Oreg. 330, 15 Pac. 275.

Virginia.— Yates *v.* Robertson, 80 Va. 475.

Wisconsin.—Bryan *v.* Reynolds, 5 Wis. 200, 68 Am. Dec. 55, where an agreement to make a public argument before the legislature or its committee for or against an act was held to be valid.

United States.— Trist *v.* Child, 21 Wall. 441, 22 L. ed. 623; Marshall *v.* Baltimore, etc., R. Co., Taney 204, 16 Fed. Cas. No. 9,124.

See 11 Cent. Dig. tit. "Contracts," § 592.

62. See the cases cited in the preceding note.

63. Harris *v.* Simonson, 28 Hun (N. Y.) 318.

Circulating petition among taxpayers.— Where, after the council of a municipal corporation had practically agreed to make a purchase from plaintiff, but had deferred final action until the sense of the taxpayers could in some manner be taken upon the subject, the plaintiff agreed in the presence of the council to pay the mayor a small sum for

(c) *Interference With Executive or Administrative Action.* There is no difference in principle between agreements to procure favors from legislative bodies and to procure favors from or unduly influence executive and administrative officers and the heads of public departments. Any contract, as is said by a writer on this special subject,[64] contemplating the use of secret influence with public officers, or calculated to induce the use of such influence, is illegal and void,[65] especially when one of the parties is a public officer himself,[66] although he be but a representative of a foreign government and his position be merely honorary.[67] By some courts all agreements of this character for a compensation paid or promised are held invalid because of their tendency to introduce corrupt means in the influencing of the public official,[68] while by others the agreement is not held invalid where corrupt means are not intended to be resorted to.[69] The most fre-

circulating the petition among the taxpayers, it was held that this did not amount to lobbying or corruption, so as to render void a contract of purchase subsequently entered into. Bridgford *v.* Tuscumbia, 4 Woods (U. S.) 611, 16 Fed. 910.

64. Greenhood Pub. Pol. Rule 300.

65. *California.*— Spence *v.* Harvey, 22 Cal. 336, 82 Am. Dec. 69.

Connecticut.— Pratt *v.* Foot, 6 Conn. 332.

Georgia.— Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Illinois.— Cook *v.* Shipman, 24 Ill. 614; Bermudez Asphalt Paving Co. *v.* Critchfield, 62 Ill. App. 221.

Indiana.—Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. Rep. 746; Maguire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353.

Kentucky.— Hutchen *v.* Gibson, 1 Bush 270.

Michigan.— Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189; O'Hara *v.* Carpenter, 23 Mich. 410, 9 Am. Rep. 89.

Minnesota.— Houlton *v.* Dunn, 60 Minn. 26, 61 N. W. 898, 51 Am. St. Rep. 493, 30 L. R. A. 737.

Mississippi.— Meridan Water Co. *v.* Schulherr, (1892) 17 So. 167.

Missouri.— Murray *v.* Wakefield, 9 Mo. App. 591.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614.

New York.— Devlin *v.* Brady, 36 N. Y. 531 [*affirming* 32 Barb. 518]; Marsh *v.* Russell, 2 Lans. 340.

North Carolina.—Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; Caton *v.* Stewart, 76 N. C. 357.

Pennsylvania.— Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391; Bowman *v.* Coffroth, 59 Pa. St. 19.

Texas.— Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81.

Vermont.— Baldwin *v.* Coborn, 39 Vt. 441; Nichols *v.* Mudgett, 32 Vt. 546.

United States.— Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 24, 26 L. ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; Hall *v.* Coppell, 7 Wall. 542, 19 L. ed. 244; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868.

See 11 Cent. Dig. tit. "Contracts," §§ 606, 607.

66. Hovey *v.* Storer, 63 Me. 486; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539.

Agreements as to voting between members of board.— An agreement between members of a board of education, who ought to meet and discuss together the questions on which they are to vote and act, as to how they will vote and act at a future meeting, is illegal and void. McCortle *v.* Bates, 29 Ohio St. 419, 23 Am. Rep. 758.

67. Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539.

68. *California.*— Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69.

Illinois.— Cook *v.* Shipman, 51 Ill. 316, 24 Ill. 614.

Indiana.— Elkhart County Lodge *v.* Crary, 98 Ind. 238, 46 Am. Rep. 746.

North Carolina.— Caton *v.* Stewart, 76 N. C. 357.

United States.— Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868.

69. *District of Columbia.*— Burbridge *v.* Fackler, 2 MacArthur 407.

Georgia.— Formby *v.* Pryor, 15 Ga. 258.

Massachusetts.— Barry *v.* Capen, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808.

Michigan.— Beal *v.* Polhemus, 67 Mich. 130, 34 N. W. 532.

Minnesota.— Moyer *v.* Cantieny, 41 Minn. 242, 42 N. W. 1060.

New Hampshire.— Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329.

New York.— Southard *v.* Boyd, 51 N. Y. 177; Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Sedgwick *v.* Stanton, 14 N. Y. 289; Cummins *v.* Barkalow, 1 Abb. Dec. 479; Howland *v.* Coffin, 47 Barb. 653; Bigelow *v.* Law, 5 Abb. Pr. 455.

Ohio.— Winpenny *v.* French, 18 Ohio St. 469.

Pennsylvania.—Painter *v.* Drum, 40 Pa. St. 467; Spalding *v.* Ewing, 9 Pa. Co. Ct. 471.

See 11 Cent. Dig. tit. "Contracts," §§ 606, 607.

quent agreements of this character are agreements to procure a government contract from the officer charged with the letting or making of the same by bribery or secret influence.[70] Other kinds of agreements falling under this head and held void in adjudged cases are agreements to procure a return of duties by an officer in the custom-house for a share of the amount returned;[71] to procure the discharge of a drafted man from the army;[72] to pay money in consideration that the promisee will influence the military authorities to allow the promisor to avail himself of certain privileges to which he is entitled;[73] to use influence with the government officers to secure the location of a public building at a certain place;[74] or to pay to the county commissioners, who are bound by law to build a court-house, a certain sum of money, provided they will build it on a particular lot.[75] The same is true of an agreement by which a jailer undertakes to appropriate rooms in the jail for the accommodation of private persons for uses not prescribed or implied by law;[76] a promise to a collector of taxes to pay him a tax, in consideration that he will forbear to collect the same in the manner required by law;[77] agreements in consideration of a person's opposing or of his approving or not opposing a public improvement or other public project[78] or withdrawing his petition for such an improvement;[79] agreements not to compete with another in making bids, to withdraw a bid for a public or quasi-public contract, to share in the result or profits,[80] or other agreements having a direct tendency to prevent

A contract for contingent compensation for professional services of a legitimate character in prosecuting a claim against the United States pending in one of the executive departments is not illegal. Stanton *v.* Embry, 93 U. S. 548, 23 L. ed. 983; Southard *v.* Boyd, 51 N. Y. 177.

70. *Kansas.*— State *v.* Cross, 38 Kan. 696, 17 Pac. 190.

Missouri.— Nash *v.* Kerr Murray Mfg. Co., 19 Mo. App. 1.

Montana.— Whalen *v.* Harrison, 26 Mont. 316, 67 Pac. 934.

New York.— Lyon *v.* Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Cummins *v.* Barkalow, 1 Abb. Dec. 479; Howland *v.* Coffin, 47 Barb. 653; Pease *v.* Walsh, 49 How. Pr. 269.

Tennessee.— Newman *v.* Davenport, 9 Baxt. 538.

United States.— Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539 [*affirming* 15 Blatchf. 79, 18 Fed. Cas. No. 10,600]; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868.

See 11 Cent. Dig. tit. "Contracts," § 607.

71. Satterlee *v.* Jones, 3 Duer (N. Y.) 102.

72. Bowman *v.* Coffroth, 59 Pa. St. 19.

73. Hutchen *v.* Gibson, 1 Bush (Ky.) 270.

74. Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69; Elkhart County Lodge *v.* Crary, 98 Ind. 238, 49 Am. Rep. 746; State *v.* Johnson, 52 Ind. 197. *Contra*, when no improper means are contemplated. Stilson *v.* Lawrence County, 52 Ind. 213; Wisner *v.* McBride, 49 Iowa 220; Beal *v.* Polhemus, 67 Mich. 130, 34 N. W. 532; State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

75. Randolph County Com'rs *v.* Jones, 1 Ill. 237.

76. Thompson *v.* Probert, 2 Bush (Ky.) 144; Miller *v.* Porter, 8 B. Mon. (Ky.) 282.

77. Packard *v.* Tisdale, 50 Me. 376.

78. Maguire *v.* Smock, 42 Ind. 1, 13 Am. Rep. 353; Howard *v.* Baltimore First Independent Church, 18 Md. 451; Gibbs *v.* Smith, 115 Mass. 592; Smith *v.* Applegate, 23 N. J. L. 352; Slocum *v.* Wooley, 43 N. J. Eq. 451, 11 Atl. 264. See Weeks *v.* Lippencott, 42 Pa. St. 474.

79. Cromwell *v.* Connecticut Brown Stone Quarry Co., 50 Conn. 470; State *v.* Hartford, etc., R. Co., 29 Conn. 538; Jacobs *v.* Tobiason, 65 Iowa 245, 21 N. W. 590, 54 Am. Rep. 9.

80. *Arkansas.*— Woodruff *v.* Berry, 40 Ark. 251.

California.— Swan *v.* Chorpenning, 20 Cal. 182.

Delaware.— Kennedy *v.* Murdock, 5 Harr. 458.

Illinois.— Ray *v.* Mackin, 100 Ill. 246.

Indiana.— Hunter *v.* Pfeiffer, 108 Ind. 197, 9 N. E. 124.

Maine.— Weld *v.* Lancaster, 56 Me. 453.

Massachusetts.— Gibbs *v.* Smith, 115 Mass. 592.

Michigan.— Hannah *v.* Fife, 27 Mich. 172.

Minnesota.—Boyle *v.* Adams, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96.

Missouri.— Durfee *v.* Moran, 57 Mo. 374; Engelman *v.* Skrainka, 14 Mo. App. 433; Lawnin *v.* Bradley, 13 Mo. App. 361.

Nebraska.— Whalen *v.* Brennan, 34 Nebr. 129, 51 N. W. 759.

New Hampshire.— Huntington *v.* Bardwell, 46 N. H. 492; Whitehouse *v.* Langdon, 10 N. H. 331.

New Jersey.— Gulick *v.* Ward, 10 N. J. L. 87, 18 Am. Dec. 389; Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617.

New York.— Marsh *v.* Russell, 66 N. Y. 288; Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706 [*reversing* 53 Barb. 361];

bidding or competition;[81] agreements not to bid at a judicial, execution, foreclosure, or other public sale, or to prevent competition in any way at such a sale;[82]

Atcheson *v.* Mallon, 43 N. Y. 147, 3 Am. Rep. 678; People *v.* Lord, 6 Hun 390; Marsh *v.* Russell, 2 Lans. 340; Sharp *v.* Wright, 35 Barb. 236; Kelly *v.* Devlin, 58 How. Pr. 487; Thompson *v.* Davies, 13 Johns. 112; Wilbur *v.* How, 8 Johns. 444; Doolin *v.* Ward, 6 Johns. 194.

North Carolina.— King *v.* Winants, 71 N. C. 469, 17 Am. Rep. 11.

Vermont.— Noyes *v.* Day, 14 Vt. 384.

United States.— Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410; Hyer *v.* Richmond Traction Co., 80 Fed. 839, 26 C. C. A. 175.

81. This is true for example of an agreement between persons proposing to bid upon the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as big a price as possible and dividing the profits (McMullen *v.* Hoffman, 69 Fed. 509), and of an agreement whereby a person is to enter into and perform a contract with the state for the construction of a swamp-land state road, and to give the other party who, at the public letting of the work under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in the contract, a portion of the swamp-lands to be secured from the state for the performance of the work (Hannah *v.* Fife, 27 Mich. 172).

Agreements not within the rule.— On familiar principles an agreement that one shall bid for several for a public contract is not illegal *per se.* Bellows *v.* Russell, 20 N. H. 427, 51 Am. Dec. 238; Breslin *v.* Brown, 24 Ohio St. 565, 15 Am. Rep. 627; Flanders *v.* Wood, 83 Tex. 277, 18 S. W. 572. And generally an honest coöperation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although in a certain sense and to a limited degree such coöperation might have a tendency to lessen competition. Gibbs *v.* Smith, 115 Mass. 592; Lawnin *v.* Bradley, 13 Mo. App. 361; Atcheson *v.* Mallon, 43 N. Y. 147, 3 Am. Rep. 678; Cocks *v.* Izard, 7 Wall. (U. S.) 559, 19 L. ed. 275; Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410.

82. *California.*— Packard *v.* Bird, 40 Cal. 378.

Georgia.— Mathews *v.* Starr, 68 Ga. 521; Graham *v.* Theis, 47 Ga. 479.

Indiana.—Goldman *v.* Oppenheim, 118 Ind. 95, 20 N. E. 635.

Louisiana.— Merchants' Ins. Co. *v.* Addison, 9 Rob. 486.

Maine.— Gardiner *v.* Morse, 25 Me. 140.

Minnesota.—Boyle *v.* Adams, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96.

Missouri.— Hook *v.* Turner, 22 Mo. 333; Lawnin *v.* Bradley, 13 Mo. App. 361.

New York.— Marie *v.* Garrison, 83 N. Y. 14; Brackett *v.* Wyman, 48 N. Y. 667; Brisbane *v.* Adams, 3 N. Y. 129; Wheeler *v.* Wheeler, 5 Lans. 355; Meech *v.* Bennett, Lalor 191; Herrick *v.* Grow, 5 Wend. 579; Thompson *v.* Davies, 13 Johns. 112; Wilbur *v.* How, 8 Johns. 444; Doolin *v.* Ward, 6 Johns. 194; Jones *v.* Caswell, 3 Johns. Cas. 29, 2 Am. Dec. 134.

North Carolina.— Ingram *v.* Ingram, 49 N. C. 188; Blythe *v.* Lovinggood, 24 N. C. 20, 37 Am. Dec. 402; Graham *v.* Reid, 13 N. C. 364.

Ohio.— Dudley *v.* Little, 2 Ohio 504, 15 Am. Dec. 575.

Oregon.— Kine *v.* Turner, 27 Oreg. 356, 41 Pac. 664.

Pennsylvania.— Barton *v.* Benson, 126 Pa. St. 431, 17 Atl. 642, 12 Am. St. Rep. 883; Pierce *v.* Evans, 61 Pa. St. 415; Slingluff *v.* Eckel, 24 Pa. St. 472.

South Carolina.— Dudley *v.* Odom, 5 S. C. 131, 22 Am. Rep. 6.

Tennessee.—Hale *v.* Henderson, 4 Humphr. 199.

Vermont.— Paige *v.* Hammond, 26 Vt. 375.

United States.— Wicker *v.* Hoppock, 6 Wall. 94, 18 L. ed. 752; Atlas Nat. Bank *v.* Holm, 71 Fed. 489, 19 C. C. A. 94; Piatt *v.* Oliver, 1 McLean 295, 19 Fed. Cas. No. 11,114.

If the agreement is not to prevent competition, but to enable the parties thereto to obtain a portion of the property which he desires, it is not illegal. There is no legal objection to several persons uniting their interests and purchasing the property with the money contributed by each.

California.— Jenkins *v.* Frink, 30 Cal. 586, 89 Am. Dec. 134.

Georgia.— White *v.* Crew, 16 Ga. 416.

Illinois.— Bradley *v.* Coolbaugh, 91 Ill. 148; Garrett *v.* Moss, 20 Ill. 549; Pearsons *v.* Lee, 2 Ill. 193.

Indiana.— Hunt *v.* Elliott, 80 Ind. 245, 41 Am. Rep. 794.

Maryland.— Smith *v.* Ullman, 58 Md. 183, 42 Am. Rep. 329.

Massachusetts.— Hunt *v.* Frost, 4 Cush. 54; Phippen *v.* Stickney, 3 Metc. 384.

Missouri.— Stillwell *v.* Glasscock, 103 Mo. 545, 15 S. W. 556, 91 Mo. 658, 4 S. W. 438.

New York.— Myers *v.* Dorman, 34 Hun 115; Myers *v.* Dean, 16 Daly 251, 10 N. Y. Suppl. 532, 32 N. Y. St. 313; Hopkins *v.* Ensign, 11 N. Y. St. 85.

Pennsylvania.— Smull *v.* Jones, 6 Watts & S. 122.

Texas.— Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

Vermont.— Missisquoi Bank *v.* Sabin, 48 Vt. 239.

United States.— Kearney *v.* Taylor, 15 How. 494, 14 L. ed. 787; Piatt *v.* Oliver, 1 McLean 295, 19 Fed. Cas. No. 11,114.

and other agreements of a similar character.[83] Another class of agreements which are within the rule are those between a state, a county, or other municipal corporation for the doing of work or the furnishing of supplies with one of its own officers or with a company or body of men of which such officer is one, or in which he is interested.[84]

(D) *Interference With Pardoning Power.* The exercise of the pardoning power committed to the executive should be as free from any improper bias or influence as the trial of the convict before the court; consequently the law will not enforce a contract to pay money for soliciting petitions, signing petitions, using influence to obtain a pardon,[85] or the remission of a forfeiture.[86] But as in the case of lobbying contracts many courts have held that the reason for holding such

83. **Other illustrations.**— An agreement made by a postmaster before his commission was issued to remove his post-office to a certain building and continue it there so long as he should hold office is contrary to public policy. Spence *v.* Harvey, 22 Cal. 336, 83 Am. Dec. 69. But see Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73. The same is true of an agreement by members of a township board of education, acting in their individual capacity, to purchase from another person apparatus for the schools of the township, and to ratify said contract of purchase at the next meeting of the board (McCortle *v.* Bates, 29 Ohio St. 419, 23 Am. Rep. 758); of an agreement between the proprietor of a distillery and an officer of the internal revenue service charged with watching the distillery, that the officer will pay the proprietor a monthly sum so long as the latter carries on the distillery (Caton *v.* Stewart, 76 N. C. 357); of a promise to pay money to a mail contractor or other public contractor upon consideration that he will repudiate his contract (Weld *v.* Lancaster, 56 Me. 453); and of an agreement by a bank to extend the time of a note owing to it, in consideration of the maker's inducing the county treasurer to deposit a portion of the county funds with the bank for a certain period (Boyd *v.* Cochrane, 18 Wash. 281, 51 Pac. 383).

84. *Alabama.*—McGehee *v.* Lindsay, 6 Ala. 16.

California.— Edwards *v.* Estell, 48 Cal. 194.

Illinois.— Skeels *v.* Phillips, 54 Ill. 309.

Indiana.— Root *v.* Stevenson, 24 Ind. 115.

Kentucky.— Willis *v.* Baker, 29 S. W. 872, 16 Ky. L. Rep. 751.

New York.— Bell *v.* Quin, 2 Sandf. 146.

Pennsylvania.— Com. *v.* Press Co., 156 Pa. St. 516, 26 Atl. 1035; Washington Tp. *v.* Shoop, 2 Pa. Dist. 639; Funk *v.* Washington Tp., 13 Pa. Co. Ct. 385.

Texas.— Willis *v.* Abbey, 27 Tex. 202; Flanikin *v.* Fokes, 15 Tex. 180.

Vermont.— Baldwin *v.* Coburn, 39 Vt. 441.

Illustrations.— This is true for example of a contract by a mayor while in office, with the city council, to lease a city park for five years, and for an annual sum paid him to keep the park in repair (Macon *v.* Huff, 60 Ga. 221); a contract between a board of supervisors and one of its members, an attorney at law, for legal services to be rendered the board (Beebe *v.* Sullivan County, 64 Hun (N. Y.) 377, 19 N. Y. Suppl. 629, 46 N. Y. St. 222); a contract by the local overseer, appointed by the state to approve and accept a road, with the contractor, whereby he obtains an interest in lands which are to be patented to the contractor by the state in payment for the road (Robinson *v.* Patterson, 71 Mich. 141, 39 N. W. 21); and of a contract taken by a member of the district school-board, during his membership, from the board, for the erection of a school-house, such member having participated in the proceedings for letting the contract (Pickett *v.* Wiota School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105). But public policy does not prevent recovery by a corporation, one of whose stock-holders is a member of a city council, on a *quantum meruit* for work done for the city, where such councilman has no power to direct or control the expenditures of the city for such work. Call Pub. Co. *v.* Lincoln, 29 Nebr. 149, 45 N. W. 245.

85. *Iowa.*— Haines *v.* Lewis, 54 Iowa 301, 6 N. W. 495.

Kansas.— Deering *v.* Cunningham, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410.

Kentucky.—Thompson *v.* Wharton, 7 Bush 563, 3 Am. Rep. 306; McGill *v.* Burnett, 7 J. J. Marsh. 640; Brown *v.* Young, 7 Ky. L. Rep. 664.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Michigan.— Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189.

Missouri.— Kribben *v.* Haycraft, 26 Mo. 396; O'Reilly *v.* Cleary, 8 Mo. App. 186.

Pennsylvania.— Hatzfield *v.* Gulden, 7 Watts 152, 31 Am. Dec. 750.

England.— Norman *v.* Cole, 3 Esp. 253.

See 11 Cent. Dig. tit. "Contracts," § 627 *et seq.*

Conviction and sentence void.— In Thompson *v.* Wharton, 7 Bush (Ky.) 563, 3 Am. Rep. 306, it was held that a note given in consideration of one's using his influence to procure the pardon or commutation of the sentence of a person who had been tried and convicted and sentenced to death by a military court was valid, the conviction and sentence being void. See Rau *v.* Boyle, 5 Bush (Ky.) 253.

86. McGill *v.* Burnett, 7 J. J. Marsh. (Ky.) 640.

agreements void fails when no unlawful means of attaining the desired object are contemplated by the contract itself or in fact employed;[87] and such services, when performed at defendant's request, are a good consideration for a subsequent promise to pay.[88] Such agreements would clearly seem to be lawful, where the services contracted for are publicly rendered by advocates disclosing their true relation to the subject, and not by private individuals keeping secret the character in which they solicit;[89] but where the compensation is contingent on success, this is a strong circumstance against the validity of the agreement.[90]

(E) *Interference With Appointment of Public Officers.* It is to the interest of the state that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office,[91] or for procuring

87. *Georgia.*— Bird *v.* Meadows, 25 Ga. 251; Formby *v.* Pryor, 15 Ga. 258.

Kentucky.— Rau *v.* Boyle, 5 Bush 253.

Massachusetts.—Timothy *v.* Wright, 8 Gray 522.

Minnesota.— Moyer *v.* Cantieny, 41 Minn. 242, 42 N. W. 1060.

New Hampshire.— Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329.

88. Bird *v.* Meadows, 25 Ga. 251, 22 Ga. 246; Chadwick *v.* Knox, 31 N. H. 226, 64 Am. Dec. 329; Lamphugh *v.* Brathwayt, Hob. 147.

89. Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346; Moyer *v.* Cantieny, 41 Minn. 242, 42 N. W. 1060; Bremsen *v.* Engler, 49 N. Y. Super. Ct. 172.

90. McGill *v.* Burnett, 7 J. J. Marsh (Ky.) 646; Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346. In an English case Lord Eldon expressed the opinion that "where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money. The doing an act of that description should proceed from pure motives, not from pecuniary ones." Norman *v.* Cole, 3 Esp. 253.

Services by persons not attorneys at law. — In Bird *v.* Breedlove, 24 Ga. 623, it was held that the business of attending to applications for pardon was not restricted to attorneys at law. But there would seem to be good reason for drawing a distinction between such a contract with an attorney, and one with a private person; for the attorney is bound by his oath of office to refrain from all unlawful actions as such, and may consequently be considered as restrained by the sanction of that oath from the use of improper influence, while a private individual is without that restraining power.

91. *Alabama.*— Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

California.— Martin *v.* Wade, 37 Cal. 168.

Delaware.— Stroud *v.* Smith, 4 Houst. 448.

Indiana.— Johnson County *v.* Mulliken, 7 Blackf. 301.

Kansas.— Stout *v.* Ennis, 28 Kan. 706; Haas *v.* Fenlon, 8 Kan. 601.

Louisiana.— Faurie *v.* Morin, 4 Mart. 39, 6 Am. Dec. 701.

Maine.— Groton *v.* Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

Nevada.— Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548.

New Hampshire.— Carleton *v.* Whitcher, 5 N. H. 196.

New York.— Gray *v.* Hook, 4 N. Y. 449; Hager *v.* Catlin, 18 Hun 448; Mott *v.* Robbins, 1 Hill 21, 37 Am. Dec. 286.

North Carolina.— Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

Pennsylvania.— Hunter *v.* Nolf, 71 Pa. St. 282; Filson *v.* Himes, 5 Pa. St. 452, 47 Am. Dec. 422.

Vermont.— Nichols *v.* Mudgett, 32 Vt. 546.

United States.— Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899 [*affirming* 3 MacArthur (D. C.) 81].

England.— Law *v.* Law, 3 P. Wms. 391, 24 Eng. Reprint 1114; Hartwell *v.* Hartwell, 4 Ves. Jr. 811.

See 11 Cent. Dig. tit. "Contracts," § 577 *et seq.*

An agreement to divide the fees of an office with the person who has the power of appointment is within this rule.

Connecticut.— De Forest *v.* Brainerd, 2 Day 528.

Dakota.— Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

Georgia.— Grant *v.* McLester, 8 Ga. 553.

Indiana.— Hall *v.* Gavitt, 18 Ind. 390.

New York.— Becker *v.* Ten Eyck, 6 Paige 68.

See 11 Cent. Dig. tit. "Contracts," §§ 581, 582.

Illustrations.— The rule applies to an agreement between two persons by which one of them stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that that other will aid him in obtaining it (Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548; Gray *v.* Hook, 4 N. Y. 449); to an agreement by an applicant for an office to divide the receipts, in consideration of the withdrawal of a rival applicant (Martin *v.* Wade, 37 Cal. 168; Glover *v.* Taylor, 38 La. Ann. 634; Gray *v.* Hook, 4 N. Y. 449; Hunter *v.* Nolf, 71 Pa. St. 282); to an agreement by a public officer that third parties may select

his resignation.[92] The rule also applies to an agreement for the sale[93] or the exchange[94] of public office; to an agreement by a public officer to pay another for performing the duties of his office for him;[95] to an agreement to divide the fees of public office with another;[96] and to an agreement by a candidate for a public office to appoint a certain person as his deputy if he is elected.[97]

(F) *Interference With Fees or Emoluments of Public Officers.* It is against public policy for a public officer to assign the fees or emoluments of his office.

his deputies and receive the fees of the office (Willis *v.* Weatherford Compress Co., (Tex. Civ. App. 1901) 66 S. W. 472); and to an agreement whereby in consideration of a person's procuring another's appointment as special counsel in certain causes against the United States, and aiding him in managing the defense of them, the other agrees that he will pay him one half of the fee which he may receive from the government (Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899).

An officer may agree with his deputy that the latter shall have a certain proportion of the fees of the whole office. Cheek *v.* Tilley, 31 Ind. 121; Hall *v.* Gavitt, 18 Ind. 390; Stout *v.* Ennis, 28 Kan. 706; Combs *v.* Brashears, 6 J. J. Marsh. (Ky.) 631.

Appointment as postmaster.— An agreement for a sale of the fixtures of a post-office, in which the seller, who is then postmaster, agrees to resign, and to use his influence to secure the appointment of the buyer to the office, is illegal and void. Edwards *v.* Randle, 63 Ark. 318, 38 S. W. 343, 58 Am. St. Rep. 108, 36 L. R. A. 174. And the same is true of a promise to secure the removal of a post-office and the appointment of a certain person as postmaster. Filson *v.* Himes, 5 Pa. St. 452, 47 Am. Dec. 422.

92. Forbes *v.* McDonald, 54 Cal. 98; Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541; Meacham *v.* Dow, 32 Vt. 721.

The officer's real motive for resigning is immaterial. Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541.

93. *Alabama.*— Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

Dakota.— Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

Georgia.— Grant *v.* McLester, 8 Ga. 553.

Indiana.— Hall *v.* Gavitt, 18 Ind. 390; Ellis *v.* State, 4 Ind. 1; Johnson County *v.* Mullikin, 7 Blackf. 301.

Kentucky.— Lucas *v.* Allen, 80 Ky. 681; Cunningham *v.* Cunningham, 18 B. Mon. 19, 68 Am. Dec. 718; Baldwin *v.* Bridges, 2 J. J. Marsh. 7; Davis *v.* Hull, 1 Litt. 9; Outon *v.* Rodes, 3 A. K. Marsh. 432, 13 Am. Dec. 193; Love *v.* Buckner, 4 Bibb 506; Lewis *v.* Knox, 2 Bibb 453; Field *v.* Chipley, 2 Ky. L. Rep. 269.

Maine.— Groton *v.* Waldoborough, 11 Me. 306, 26 Am. Dec. 530.

Massachusetts.— Alvord *v.* Collin, 20 Pick. 418.

Michigan.— Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886.

New Hampshire.— Cardigan *v.* Page, 6 N. H. 182; Carleton *v.* Whitcher, 5 N. H. 196; Meredith *v.* Ladd, 2 N. H. 517.

North Carolina.— Haralson *v.* Dickens, 4 N. C. 163.

Rhode Island.— Eddy *v.* Capron, 4 R. I. 394, 67 Am. Dec. 541.

Vermont.— Ferris *v.* Adams, 23 Vt. 136; Thetford *v.* Hubbard, 22 Vt. 440.

Virginia.— O'Rear *v.* Kiger, 10 Leigh 622; Salling *v.* McKinney, 1 Leigh 42, 19 Am. Dec. 722; Noel *v.* Fisher, 3 Call 215.

Wisconsin.— Morse *v.* Ryan, 26 Wis. 356.

England.— Card *v.* Hope, 2 B. & C. 661, 4 D. & R. 164, 2 L. J. K. B. O. S. 96, 26 Rev. Rep. 503, 9 E. C. L. 288; Blachford *v.* Preston, 8 T. R. 89.

See 11 Cent. Dig. tit. "Contracts," § 579 *et seq.*

If the legislature has authorized the sale of the office it is good. Thetford *v.* Hubbard, 22 Vt. 440.

94. Stroud *v.* Smith, 4 Houst. (Del.) 448.

95. Schloss *v.* Hewlett, 81 Ala. 266, 1 So. 263; Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886.

Appointment of deputy.— An officer, however, has a right to appoint a deputy or assistant. Price *v.* Caperton, 1 Duv. (Ky.) 207.

Payment of compensation by private individuals.— It is held that an agreement by private individuals to pay a private person for performing the duties of a public officer is illegal. Fawcett *v.* Eberly, 58 Iowa 544, 12 N. W. 580.

96. *Alabama.*— Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

Kentucky.—Outen *v.* Rodes, 3 A. K. Marsh. 432, 13 Am. Dec. 193; Oldham *v.* Hume, 4 Ky. L. Rep. 355.

Massachusetts.— Farrar *v.* Barton, 5 Mass. 395.

New York.—Deyoe *v.* Woodworth, 144 N. Y. 448, 39 N. E. 375, 69 N. Y. St. 731 [*affirming* 70 Hun 599, 24 N. Y. Suppl. 373, 52 N. Y. St. 613]; Deyoe *v.* Ewan, 70 Hun 545, 24 N. Y. Suppl. 372, 53 N. Y. St. 610; Tappan *v.* Brown, 9 Wend. 175. See Becker *v.* Ten Eyck, 6 Paige 68.

Virginia.— Salling *v.* McKinney, 1 Leigh 42, 19 Am. Dec. 722.

See 11 Cent. Dig. tit. "Contracts," § 581 *et seq.*; and *supra*, note 91.

To a private office the rule does not apply. White *v.* Polhamus, 1 N. Y. City Ct. 421.

97. Hagar *v.* Catlin, 18 Hun (N. Y.) 448; O'Rear *v.* Kiger, 10 Leigh (Va.) 622.

If they could be assigned, it is said, the public service would suffer because the officer would no longer have any interest in the compensation to be paid for his labor.[98] While in England it would seem that it is immaterial whether the salary is due or the fees earned at the time of the assignment or not,[99] it seems to be the rule in the United States that the assignment after it is due or earned is not illegal; but before it is due or earned it is.[1] The rule is also well settled that where fees or salary are established for the services of public officers, the policy of the law forbids special contracts as to compensation between them and the public. An agreement by a public officer to accept less than the fees or salary

98. Wells *v.* Foster, 8 M. & W. 149, 151, where it was said: "It is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty." And see the cases in the notes following.

99. Stone *v.* Lidderdale, 2 Anstr. 533, 3 Rev. Rep. 622; McCarthy *v.* Goold, 1 Ball & B. 387; Palmer *v.* Bate, 2 B. & B. 673, 6 Moore C. P. 28, 23 Rev. Rep. 525, 6 E. C. L. 324; Arbuckle *v.* Cowtan, 3 B. & P. 321; Hill *v.* Paul, 8 Cl. & F. 295, 8 Eng. Reprint 116; Barwick *v.* Reade, 1 H. Bl. 627, 2 Rev. Rep. 608; Liverpool *v.* Wright, Johns. 359, 5 Jur. N. S. 1156, 28 L. J. Ch. 868, 7 Wkly. Rep. 728; Wells *v.* Foster, 5 Jur. 464, 10 L. J. Exch. 216, 8 M. & W. 149; Davis *v.* Marlborough, 1 Swanst. 74, 2 Wils. C. P. 120; Lidderdale *v.* Montrose, 4 T. R. 248, 2 Rev. Rep. 375; Flarty *v.* Odlum, 3 T. R. 681, 1 Rev. Rep. 791.

1. *Alabama.*— Schloss *v.* Hewlett, 81 Ala. 268, 1 So. 263.

Arizona.— King *v.* Hawkins, (1888) 16 Pac. 434.

California.— Bangs *v.* Dunn, 66 Cal. 72, 4 Pac. 963.

Kentucky.— Field *v.* Chipley, 79 Ky. 260, 42 Am. Rep. 215.

Massachusetts.—Brackett *v.* Blake, 7 Metc. 335, 41 Am. Dec. 442.

Missouri.— State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827; Beal *v.* McVicker, 8 Mo. App. 202.

New York.— Bowery Nat. Bank *v.* Wilson, 122 N. Y. 478, 25 N. E. 855, 34 N. Y. St. 43, 19 Am. St. 507, 9 L. R. A. 706; Columbia Institute *v.* Cregan, 11 N. Y. Civ. Proc. 87; Billings *v.* O'Brien, 14 Abb. Pr. N. S. 238; Bliss *v.* Lawrence, 48 How. Pr. 21; Billings *v.* O'Brien, 45 How. Pr. 392.

Texas.— El Paso Nat. Bank *v.* Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833; Willis *v.* Weatherford Compress Co., (Civ. App. 1901) 66 S. W. 472; Williams *v.* Ford, (Civ. App. 1894) 27 S. W. 723.

West Virginia.— Stevenson *v.* Kyle, 42 W. Va. 299, 24 S. E. 886, 57 Am. St. Rep. 854.

United States.— Emerson *v.* Hall, 13 Pet. 409, 10 L. ed. 223.

Illustrations.— The rule has been applied to an assignment by a clerk of the court of all the fees of his office to pay a debt (Field *v.* Chipley, 79 Ky. 260, 42 Am. Rep. 215); to an assignment of his salary by a district attorney (Holt *v.* Thurman, 63 S. W. 280, 23 Ky. L. Rep. 92) or by a United States postal clerk (State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827); of unearned salary by clerks and deputies in a city or county clerk's office (Bangs *v.* Dunn, 36 Cal. 72, 4 Pac. 963); of his fees by an executor before they are ascertained and fixed as provided by statute (*In re* Wortbington, 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97); of the unearned pay of a retired United States army officer (Schwenck *v.* Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 19 Am. St. Rep. 438, 9 L. R. A. 221); to an assignment to the county superintendent of the poor of claims of a contractor with him as such superintendent for providing homes for indigent children of the county (People *v.* Saratoga County, 34 Misc. (N. Y.) 740, 70 N. Y. Suppl. 1048); and to an agreement between a sheriff and an attorney that the former should be paid nothing for the service of certain writs by the attorney or his clients, unless the actions resulted successfully (Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679).

Effect of void assignment.—Where the fees of a public officer are collected by another under a void assignment thereof, such collection is ineffectual as to such officer, and they are still due, so far as he is concerned. Willis *v.* Weatherford Compress Co., (Tex. Civ. App. 1901) 66 S. W. 472.

Pensions.— An assignment of pensions not granted exclusively for past services is void as against public policy. Bliss *v.* Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Wells *v.* Foster, 5 Jur. 464, 10 L. J. Exch. 216, 8 M. & W. 149. By federal law the assignment of a pension granted by the United States is void. Act Cong. Feb. 28, 1883. See PENSIONS.

Contrary and anomalous rulings.—In State Bank *v.* Hastings, 15 Wis. 75, the court sees nothing against public policy in a public officer assigning his unearned salary "if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable." In Manly *v.* Bitzer, 91 Ky. 596, 16 S. W. 464, 13 Ky. L. Rep. 166, 34 Am. St. Rep. 242, the controversy was over the wages of a policeman in the city of Louisville. He had, about the first of the month, sold and assigned his claim against the city for the wages of that month, and after the assignment a creditor sought to subject it by attachment. It was held that

prescribed by law is contrary to public policy and void.[2] And the same is true of a promise to give a public officer more than the legal salary or fees.[3]

as the policeman had an existing contract with the city for the payment of such a salary, and his term of office extended beyond the time when it could be presumed because of the existence of the contract that the salary would be earned, it had such a potential existence that he had a right to transfer it, and having done so for value it vested the assignee with an equity which, being older in time than that of the attachment, must prevail. The opinion does not discuss or decide the question from the standpoint of public policy, and the authorities cited to support it do not in any way consider or involve this question. There is no suggestion in the opinion of any distinction whatever between the unearned wages of a person occupying a mere private position and one who is discharging the duties of a public officer.

2. Hawkeye Ins. Co. *v.* Brainard, 72 Iowa 130, 132, 33 N. W. 603, where it was held that a contract by which a justice of the peace agrees to accept a less or a greater compensation than is prescribed by statute or whereby he agrees not to avail himself of a statutory mode of enforcing a collection of his fees is contrary to public policy. The court, after stating that he could perhaps remit accrued fees for past services, said: "But a different question is presented where a public officer, prior to the transaction of an official act, agrees to accept a less compensation for the performance of the act than is prescribed by statute. If, by contract, he may take less, why may not the parties contract for an enlarged compensation? We think a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of a statutory mode of enforcing the collection of his fees, is contrary to public policy and void." See also Miller *v.* U. S., 103 Fed. 413, 415, where an agreement made by an assistant inspector of steam vessels with the secretary of the treasury, to accept a less salary than was provided for the office by the federal statutes was held void. The court said: "Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel." And see Settle *v.* Sterling, 1 Ida. 259; Gilman *v.* Des Moines Valley R. Co., 40 Iowa 200; People *v.* Board of Police, 75 N. Y. 38. See also OFFICERS.

Agreement for fixed sum by one entitled to percentage.— It has been held that where a person receives a public office which entitles him by statute to a certain percentage upon the fees and emoluments of the office of his principal, and on receiving his appointment, enters into an agreement to perform the duties of his office at a fixed salary, such agreement is void, although it be not certain that the stipulated sum would be less than the percentage allowed by law. Tappan *v.* Brown, 9 Wend. (N. Y.) 175. But see Bloom *v.* Hazzard, 104 Cal. 310, 37 Pac. 1037.

3. *Indiana.*— Williams *v.* Segur, 106 Ind. 368, 1 N. E. 707.

Iowa.— Adams County *v.* Hunter, 78 Iowa 328, 43 N. W. 208, 6 L. R. A. 615; Day *v.* Townsend, 70 Iowa 538, 30 N. W. 753; Fawcett *v.* Eberly, 58 Iowa 544, 12 N. W. 580.

Louisiana.— Kernion *v.* Hills, 1 La. Ann. 419.

Michigan.— Burk *v.* Webb, 32 Mich. 173.

Mississippi.—Hendricks *v.* Lowndes County, 49 Miss. 612.

New Jersey.—Evans *v.* Trenton, 24 N. J. L. 764; Morris *v.* Goff, 3 N. J. L. 624.

New York.— O'Connor *v.* O'Connor, 47 N. Y. Super. Ct. 498; Satterlee *v.* Jones, 3 Duer 102; McCarthy *v.* Bonynge, 12 Daly 356; Downs *v.* McGlynn, 2 Hilt. 14; Brady *v.* Kingsland, 67 How. Pr. 168; Crofut *v.* Brandt, 46 How. Pr. 481; Hatch *v.* Mann, 15 Wend. 44 [*reversing* 9 Wend. 262]; Callagan *v.* Hallett, 1 Cai. 104; Weaver *v.* Whitney, Hopk. 13.

Pennsylvania.— Hahn *v.* Derr, 1 Woolw. 178.

Texas.— Keith *v.* Fountain, 3 Tex. Civ. App. 391, 22 S. W. 191.

West Virginia.—Honaker *v.* Board of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413.

See OFFICERS.

Reward for performance of services.— This principle applies to all promises of reward to public officers to induce them to perform a duty required of them by law. Such promises are void, not only for want of consideration (see *supra*, IV, D, 12, b), but also because they are contrary to public policy and illegal.

Alabama.— Morrell *v.* Quarles, 35 Ala. 544.

Illinois.— Neustadt *v.* Hall, 58 Ill. 172.

Kentucky.— Trundle *v.* Riley, 17 B. Mon. 396; Mitchell *v.* Vance, 5 T. B. Mon. 528, 17 Am. Dec. 96.

Michigan.— Foley *v.* Platt, 105 Mich. 635, 63 N. W. 520.

(G) *Interference With Duties of Quasi-Public Corporations.*[4] Agreements by railroad companies and other common carriers, water and gas companies, and other quasi-public corporations owing duties to the public, which interfere with the performance of such duties, are illegal and void as being contrary to public policy.[5] This principle has been applied for example to an agreement or combination by or between railroad companies leasing or conveying property necessary to enable them to perform their duties to the public, or discontinuing a line, etc.;[6] to an agreement between two connecting railroad companies that one should discontinue the use of a part of its road by which it had long been connected with a line of steamboats at tidewater, which was one of its termini under its charter, and that the other should use its influence to prevent the extension of a third road which would interfere with the business of the first one;[7] and to agreements by which a railroad company binds itself not to build its railroad along a par-

Mississippi.— Odineal *v.* Barry, 24 Miss. 9.
New York.— Deuhert *v.* Schwend, 13 N. Y. St. 712; Weaver *v.* Whitney, Hopk. 13.
Pennsylvania.— McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. St. 139, 25 Atl. 579.
Texas.— Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405.

The rule does not apply where the act is beyond what the officer's official duty requires of him (Bronnenberg *v.* Coburr, 110 Ind. 169, 11 N. E. 29; Trundle *v.* Riley, 17 B. Mon. (Ky.) 396; and see *supra*, IV, D, 12, b) or where the service is one for which the law does not fix any compensation (Maguin *v.* Rosenthal, 62 How. Pr. (N. Y.) 504). And where the defendant in an execution paid commissions to a constable, with an agreement that the constable should refund such commissions if he was not entitled to them, it was held that this was a valid agreement. Smith *v.* Keith, 9 Humphr. (Tenn.) 116.

4. This section is restricted to agreements attacked on the ground that they interfere with the performance of their duties by quasi-public corporations. As to other agreements in relation to or affecting such corporations see *supra*, VII, B, 3, f, (I).

Permanent employment of persons.—A contract by a railroad company to give one steady and permanent employment is not illegal as being contrary to public policy. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Jessup *v.* Chicago, etc., R. Co., 82 Iowa 243, 48 N. W. 177.

5. *Colorado.*— Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512.
Connecticut.— State *v.* Hartford, etc., R. Co., 29 Conn. 538.
Florida.— Florida, etc., R. Co. *v.* State, 31 Fla. 182, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.
Illinois.— Chicago Gas-Light, etc., Co. *v.* People's Gas-Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; Peoria, etc., R. Co. *v.* Coal Valley Min. Co., 68 Ill. 489; Marsh *v.* Fairbury, etc., R. Co., 64 Ill. 414, 16 Am. Rep. 564; Linder *v.* Carpenter, 62 Ill. 309; Bestor *v.* Wathen, 60 Ill. 138.
Iowa.— Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206.
Kansas.— St. Joseph, etc., R. Co. *v.* Ryan, 11 Kan. 602, 15 Am. Rep. 357.
Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.
Massachusetts.— Fuller *v.* Dame, 18 Pick. 472.
Missouri.— Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369.
Nebraska.— Clarke *v.* Omaha, etc., R. Co., 5 Nebr. 314.
Ohio.—Schofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.
Oregon.— Holladay *v.* Patterson, 5 Oreg. 177.
Pennsylvania.— Peters *v.* Rylands, 20 Pa. St. 497, 59 Am. Dec. 746.
Texas.— Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.
Washington.— Reed *v.* Johnson, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404.
United States.— Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; York, etc., R. Co. *v.* Winans, 17 How. 30, 15 L. ed. 27; Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 15 Fed. 650.

See 11 Cent. Dig. tit. "Contracts," § 570 *et seq.*; and, generally, CARRIERS, 6 Cyc. 59; CORPORATIONS; GAS; RAILROADS; WATERS.

6. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950. See CORPORATIONS; RAILROADS.

Individuals as common carriers.— It has been said that this does not apply to individuals engaged in the business of common carriers. Leslie *v.* Lorrillard, 110 N. Y. 519, 18 N. E. 363, 18 N. Y. St. 520, 1 L. R. A. 456. But see Anderson *v.* Jett, 89 Ky. 375, 12 S. W. 670, 11 Ky. L. Rep. 570, 6 L. R. A. 390.

7. State *v.* Hartford, etc., R. Co., 29 Conn. 538.

ticular route, not to locate its station or depot at a particular point, or to locate it at a particular point,[8] unless, according to some of the cases, where the agreement is to locate along a particular route or at a particular point it is not restricted from locating lines, stations, or depots along other lines, or at other points also, or otherwise doing whatever the public convenience may require.[9] Contracts by common carriers and other quasi-public corporations making undue discrimination in favor of particular persons are generally prohibited by statute, but they are also illegal as contrary to public policy.[10]

(H) *Interference With Elections.* Agreements which are particularly obnoxious to the courts as being contrary to public policy are all those which tend to impair the integrity of public elections.[11] The law therefore condemns as illegal, not only agreements to directly or indirectly bribe a voter,[12] but also those which

8. *Colorado.*— Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Connecticut.— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Florida.— Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

Illinois.—Doane *v.* Chicago City R. Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; Marsh *v.* Fairbury, etc., R. Co., 64 Ill. 414, 16 Am. Rep. 564; Linder *v.* Carpenter, 62 Ill. 309; Bestor *v.* Wathen, 60 Ill. 138.

Iowa.— Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206.

Kansas.— St. Joseph, etc., R. Co. *v.* Ryan, 11 Kan. 602, 15 Am. Rep. 357.

Massachusetts.— Fuller *v.* Dame, 18 Pick. 472.

Missouri.— Workman *v.* Campbell, 46 Mo. 305; Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369.

New York.— Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. 411.

Oregon.— Holladay *v.* Patterson, 5 Oreg. 177.

Washington.— Reed *v.* Johnson, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404.

United States.— Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, 9 S. Ct. 402, 32 L. ed. 819.

See RAILROADS.

9. *Indiana.*—Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

Iowa.— Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206; Cedar Rapids First Nat. Bank *v.* Hendrie, 49 Iowa 402, 31 Am. Rep. 153; Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371.

Michigan.— Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389.

Nebraska.— Harris *v.* Roberts, 12 Nebr. 631, 12 N. W. 89, 41 Am. Rep. 779.

Texas.— International, etc., R. Co. *v.* Dawson, 62 Tex. 260; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. Rep. 268.

10. Indianapolis, etc., R. Co. *v.* Ervin, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369; Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907 54 Am. Rep. 846. See, generally, COMMERCE, 7 Cyc. 407; GAS; RAILROADS; TELEGRAPHS AND TELEPHONES; WATERS.

11. *Illinois.*— Gillett *v.* Logan County, 67 Ill. 256; Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153.

Kansas.— Stout *v.* Ennis, 28 Kan. 706.

Maryland.— Wroth *v.* Johnson, 4 Harr. & M. 284.

Missouri.— Keating *v.* Hyde, 23 Mo. App. 555.

New Jersey.— Swayze *v.* Hull, 8 N. J. L. 54, 14 Am. Dec. 399.

Nevada.— Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548.

New York.— Foley *v.* Speir, 100 N. Y. 552, 3 N. E. 477; Robinson *v.* Kalbfleisch, 5 Thomps. & C. 212; Jackson *v.* Walker, 5 Hill 27.

North Carolina.— Duke *v.* Asbee, 33 N. C. 112.

Pennsylvania.— Ham *v.* Smith, 87 Pa. St. 63.

Texas.— Roby *v.* Carter, 6 Tex. Civ. App. 295, 25 S. W. 725.

Vermont.— Nichols *v.* Mudgett, 32 Vt. 546, 549, where it is said: "Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty. If for money or other personal profit, he agrees to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void."

England.— Simpson *v.* Yeend, L. R. 4 Q. B. 626, 10 B. & S. 752, 38 L. J. Q. B. 313, 21 L. T. Rep. N. S. 56, 17 Wkly. Rep. 1100; Cooper *v.* Slade, 6 E. & B. 447, 2 Jur. N. S. 1016, 25 L. J. Q. B. 324, 88 E. C. L. 447; Allen *v.* Hearn, 1 T. R. 56, 1 Rev. Rep. 149.

12. Gaston *v.* Drake, 14 Nev. 175, 33 Am. Rep. 548; Swayze *v.* Hull, 8 N. J. L. 54, 14 Am. Dec. 399; Roby *v.* Carter, 6 Tex. Civ. App. 295, 25 S. W. 725; Nichols *v.* Mudgett, 32 Vt. 546.

Indirect bribery.— A promise to a voter to pay his traveling expenses or to remunerate him for his loss of time is illegal and void. Simpson *v.* Yeend, L. R. 4 Q. B. 626, 10 B. & S. 752, 38 L. J. Q. B. 313, 21 L. T. Rep. N. S. 56, 17 Wkly. Rep. 1100; Cooper *v.* Slade, 6 E. & B. 447, 2 Jur. N. S. 1016, 25 L. J. Q. B. 324, 88 E. C. L. 447. And the same is true of an agreement to furnish liquor, refresh-

in any way tend to curtail a free exercise of the elective franchise, as for example a promise in consideration of the promisee procuring the nomination of the promisor[13] or his election;[14] a promise in consideration of another's withdrawing himself as a candidate;[15] or an agreement to pay money in consideration of abandoning a petition against the return of a member for bribery.[16] A bet on the result of an election is illegal, even in the absence of a statutory provision.[17] Under this head may also be classed contracts by which one agrees for money or personal profit to use his efforts and influence to induce a majority of the voters to vote for any proposition submitted to the vote of the people, as the change of a county-seat, a subscription of a city or county in aid of a railroad, etc., or to vote in a particular way at such an election.[18] There is nothing illegal, however, in an agreement to pay for the open advocacy of the election of a candidate for office, for legitimate political work,[19] or for work and labor, as in putting up a tent in which to hold political meetings, and similar expenses.[20]

(i) *Interference With Course of Justice* — (1) In General. Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.[21] Within the condemned category are

ments, or other like entertainment to influence voters. Jackson *v.* Walker, 5 Hill (N. Y.) 27; Duke *v.* Asbee, 33 N. C. 112.

13. Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153; Keating *v.* Hyde, 23 Mo. App. 555.

14. Swayze *v.* Hull, 8 N. J. L. 54, 14 Am. Dec. 399; Foley *v.* Speir, 100 N. Y. 552, 3 N. E. 477; Ham *v.* Smith, 87 Pa. St. 63.

15. Robinson *v.* Kalbfleisch, 5 Thomps. & C. (N. Y.) 212; Ham *v.* Smith, 87 Pa. St. 63.

16. Coppock *v.* Bower, 8 L. J. Exch. 9, 4 M. & W. 361.

17. *Illinois.*— Gregory *v.* King, 58 Ill. 169 (where the bet was made in one state on the result of a presidential election in another); Guyman *v.* Burlingame, 36 Ill. 201; Gordon *v.* Casey, 23 Ill. 70; Lockhart *v.* Hullinger, 2 Ill. App. 465.

Maryland.— Wroth *v.* Johnson, 4 Harr. & M. 284.

New York.—Vischer *v.* Yates, 11 Johns. 23.

Pennsylvania.— McAllister *v.* Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556.

England.— Allen *v.* Hearn, 1 T. R. 56, 1 Rev. Rep. 149.

See Elections; Gaming.

18. Wilcox *v.* Puryear, 12 Ky. L. Rep. 556. See Counties; Elections; Municipal Corporations.

19. Sizer *v.* Daniels, 66 Barb. (N. Y.) 426; Murphy *v.* English, 64 How. Pr. (N. Y.) 362.

20. Hurley *v.* Van Wagner, 28 Barb. (N. Y.) 109.

21. *Alabama.*— Dawkins *v.* Gill, 10 Ala. 206.

California.— Patterson *v.* Donner, 48 Cal. 369.

Colorado.— Hoyt *v.* Macon, 2 Colo. 502.

Illinois.— Goodrich *v.* Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371 [*affirming* 44 Ill. App. 331]; Boehmer *v.* Foval, 55 Ill. App. 71.

Indiana.— Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Ricketts *v.* Harvey, 106 Ind. 564, 6 N. E. 325.

Iowa.— Gray *v.* McReynolds, 65 Iowa 461, 21 N. W. 777, 54 Am. Rep. 16; Adye *v.* Hanna, 47 Iowa 264, 29 Am. Rep. 484.

Kansas.— Clark *v.* Spencer, 14 Kan. 398, 19 Am. Rep. 96.

Kentucky.— Averbeck *v.* Hall, 14 Bush 505.

Louisiana.— Morgan *v.* Nye, 14 La. Ann. 30.

Maine.— Shaw *v.* Reed, 30 Me. 105.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Michigan.— Crisup *v.* Grosslight, 79 Mich. 380, 44 N. W. 621; Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189.

Montana.— Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 43 Am. St. Rep. 647, 25 L. R. A. 87.

New Hampshire.— Dudley *v.* Butler, 10 N. H. 281; Dudley *v.* Cilley, 5 N. H. 558.

New York.— Lyon *v.* Hussey, 82 Hun 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531; Pollak *v.* Gregory, 9 Bosw. 116.

Ohio.— Weber *v.* Shay, 56 Ohio St. 116, 46 N. E. 377, 60 Am. St. Rep. 743, 37 L. R. A. 230; Roll *v.* Raguet, 4 Ohio 400, 22 Am. Dec. 759.

Pennsylvania.— Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391.

Tennessee.— Bledsoe *v.* Jackson, 4 Sneed 429.

Texas.— Arrington *v.* Sneed, 18 Tex. 135.

Vermont.— Barron *v.* Tucker, 53 Vt. 338, 38 Am. Rep. 684; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599.

United States.— Pope Mfg. Co. *v.* Gormully, 144 U. S. 224, 12 S. Ct. 632, 36 L. ed. 414; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868; Bierbaur *v.* Wirth, 10 Biss. 60, 5 Fed. 336.

England.— Collins *v.* Blantern, 1 Smith Lead. Cas. 646, 2 Wils. C. P. 341.

agreements to compound a crime or a penal action;[22] agreements involving champerty or maintenance;[23] agreements to refer to arbitration;[24] agreements to procure a witness to swear to a particular thing[25] or to procure evidence of any kind;[26] agreements to induce a witness to testify,[27] or to abstain from testifying, or suppress evidence,[28] or to influence the testimony of a witness in any way;[29] agreements to stifle or prevent a criminal prosecution or to unduly influence its termination;[30] agreements involving the evasion of the service of judicial

See 11 Cent. Dig. tit. "Contracts," § 616 *et seq.*

22. See *infra*, VII, B, 3, f, (II), (I), (2).

23. See *infra*, VII, B, 3, f, (II), (I), (6).

24. See *infra*, VII, B, 3, f, (II), (I), (6).

25. *Alabama.*— Dawkins *v.* Gill, 10 Ala. 206.

California.— Patterson *v.* Donner, 48 Cal. 369.

Georgia.— Kennedy *v.* Hodges, 97 Ga. 753, 25 S. E. 493.

Illinois.— Paton *v.* Stewart, 78 Ill. 481; Boehmer *v.* Foval, 55 Ill. App. 71.

Montana.— Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 43 Am. St. Rep. 647, 25 L. R. A. 87.

New York.— Lyon *v.* Hussey, 82 Hun 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531; Pollak *v.* Gregory, 9 Bosw. 116.

Vermont.—Badger *v.* Williams, 1 D. Chipm. 137.

England.— Hutley *v.* Hutley, L. R. 8 Q. B. 112, 42 L. J. Q. B. 52, 28 L. T. Rep. N. S. 63, 21 Wkly. Rep. 479.

See 11 Cent. Dig. tit. "Contracts," §§ 617, 618.

26. Goodrich *v.* Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371 [*affirming* 44 Ill. App. 331]; Gillet *v.* Logan County, 67 Ill. 256; Hagan *v.* Wellington, 7 Kan. App. 74, 52 Pac. 909; Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 43 Am. St. Rep. 647, 25 L. R. A. 87; Getchell *v.* Welday, 4 Ohio S. & C. Pl. Dec. 65, 113, 2 Ohio N. P. 390.

Valid agreements.— An agreement by a stranger to an action to furnish evidence therein, for a compensation contingent upon the result, is not necessarily illegal. Wellington *v.* Kelly, 84 N. Y. 543. And see Harris *v.* More, 70 Cal. 502, 11 Pac. 780. An offer of a reward for the detection of crime is not illegal. See REWARDS. An agreement to compensate a deputy sheriff for procuring evidence which would lead to the conviction of a person implicated in a certain crime is not contrary to public policy, if the crime was committed and the trial had in a county other than that in which the deputy sheriff was an officer. Harris *v.* More, 70 Cal. 502, 11 Pac. 780. A contract to give information in respect to evidence for a trial is not always void as against public policy; but a contract to suppress evidence is. Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370. As to agreements to suppress evidence see *infra*, note 28.

Turning state's evidence by joint defendant.—An agreement with one of several jointly indicted that if he will testify candidly and fully, the facts will be presented to the court with a recommendation of the prosecuting officer that a *nolle prosequi* be entered, is not illegal. Nickelson *v.* Wilson, 60 N. Y. 362 [*reversing* 1 Hun (N. Y.) 615, 4 Thomps. & C. (N. Y.) 104].

27. Where a party promised a witness a sum in excess of his legal fees, the amount to depend on the promisor's success in the suit, the promise was held void as against public policy; the court saying: "Such contracts are against sound policy, because their inevitable tendency would be, if not to invite to perjury, at least to sway the mind of the witness, by giving him the interest of a party to the cause, and thus contaminate the stream of justice at its source." Dawkins *v.* Gill, 10 Ala. 206, 208. And see Dodge *v.* Stiles, 26 Conn. 463; Pollak *v.* Gregory, 9 Bosw. (N. Y.) 116; Willis *v.* Peckham, 1 B. & B. 515, 4 Moore C. P. 300, 21 Rev. Rep. 706, 5 E. C. L. 774. But such agreements are usually held to be non-enforceable for lack of consideration, unless the witness is to do more than the law requires. Dodge *v.* Stiles, 26 Conn. 463. See *supra*, IV, D, 12, b.

28. *California.*— Valentine *v.* Stewart, 15 Cal. 387.

Colorado.— Hoyt *v.* Macon, 2 Colo. 502.

Iowa.— Haines *v.* Lewis, 54 Iowa 301, 6 N. W. 495, 37 Am. Rep. 202.

Kentucky.— Swan *v.* Chandler, 8 B. Mon. 97.

Michigan.— Crisup *v.* Grosslight, 79 Mich. 380, 44 N. W. 621.

Vermont.— Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Badger *v.* Williams, 1 D. Chipm. 137.

United States.— Bierbauer *v.* Wirth, 10 Biss. 60, 5 Fed. 336.

England.— Fallowes *v.* Taylor, 7 T. R. 475, Peake Add. Cas. 155.

See 11 Cent. Dig. tit. "Contracts," § 618.

29. Dawkins *v.* Gill, 10 Ala. 206; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369 (holding illegal and void an agreement between a physician and a party injured by a railroad, that the physician should go with the latter to the counsel and medical advisers of the company, explain the nature and extent of the injuries, and receive as compensation for doing so an amount dependent on the amount awarded by the company).

30. Dunkin *v.* Hodge, 46 Ala. 523; McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Merwin *v.* Huntington, 2 Conn. 209; Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93.

Agreements to influence prosecuting attorney see *infra*, note 33.

process;[31] agreements to conceal the fact that a party is breaking the law;[32] agreements interfering with the proper discharge of the duties of a judicial officer or other person charged with the enforcement of the law;[33] and in

Illinois.— Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117.

Indiana.— Ricketts *v.* Harvey, 78 Ind. 152, 106 Ind. 564, 6 N. E. 325; Collier *v.* Waugh, 64 Ind. 456.

Kentucky.— Averbeck *v.* Hall, 14 Bush 505.

Maine.— Shaw *v.* Reed, 30 Me. 105.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Massachusetts.— Com. *v.* Pease, 16 Mass. 91.

Pennsylvania.— Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391; Riddle *v.* Hall, 99 Pa. St. 116; Oxford Nat. Bank *v.* Kirk, 90 Pa. St. 49.

Tennessee.— Armstrong *v.* Southern Express Co., 4 Baxt. 376.

Vermont.— Barron *v.* Tucker, 53 Vt. 338, 38 Am. Rep. 684; Pierce *v.* Kibbee, 51 Vt. 559.

England.— Clubb *v.* Hutson, 18 C. B. N. S. 414, 114 E. C. L. 414; Collins *v.* Blantern, 2 Wils. C. P. 347.

See 11 Cent. Dig. tit. "Contracts," §§ 626, 627.

Illustrations.— An agreement by attorneys at law to render services to prevent the finding of an indictment against one accused or suspected of crime is illegal and void. Weber *v.* Shay, 56 Ohio St. 116, 46 N. E. 377, 60 Am. St. Rep. 743, 37 L. R. A. 230; Barron *v.* Tucker, 53 Vt. 338, 38 Am. Rep. 684. And the same is true of an agreement to procure the quashing of an indictment or conviction (Collier *v.* Waugh, 64 Ind. 456; Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346; Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391) or to "use every legal and proper endeavor to have the criminal prosecutions dismissed against the promisee (Averbeck *v.* Hall, 14 Bush (Ky.) 505); of a promise to pay a person for endeavoring to induce the prosecutors of a criminal case to discontinue it (Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93; Ricketts *v.* Harvey, 78 Ind. 152, 106 Ind. 564, 6 N. E. 325); of an agreement for aiding a prisoner to escape (Doughty *v.* Owen, 24 Miss. 404); and of an agreement by which one party receives a sum of money to become the bail of another accused of felony, in order that the latter may be released from custody so as to escape trial (Dunkin *v.* Hodge, 46 Ala. 523).

31. Arrington *v.* Sneed, 18 Tex. 135 (holding void an agreement between an attorney and client, the consideration of which was such advice to the client as was calculated to enable, if not to induce, him to elude the process of the law); Bierbauer *v.* Wirth, 10 Biss. (U. S.) 60, 5 Fed. 336 (holding that expenses incurred by an employee in evading the process of a court at the request and for the benefit of his employer could not be recovered).

32. As an agreement to pay money in consideration that the obligee will conceal from the public and from the obligor's wife the fact of the obligor's criminal intimacy with a certain woman. Case *v.* Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341, 31 L. R. A. 282. But see Wells *v.* Sutton, 85 Ind. 70.

33. Dudley *v.* Butler, 10 N. H. 281; Dudley *v.* Cilley, 5 N. H. 558.

Illustrations.— The following agreements have been held illegal: An agreement whereby a justice of the peace agreed to charge smaller fees in suits to be brought before him by a certain corporation than prescribed by statute, and that such fees should not be collected unless paid over by defendants to the corporation (Hawkeye Ins. Co. *v.* Brainard, 72 Iowa 130, 33 N. W. 603); a contract by a justice of the peace with an attorney that he might carry on suits without having his client bound for costs, and to charge no fees unless the judgments should be collected (Willemin *v.* Bateson, 63 Mich. 309, 29 N. W. 734); an agreement by a justice of the peace before whom an affidavit had been filed charging with larceny a person who had fled to a foreign country and beyond his jurisdiction, whereby, in case the justice secured his arrest and the return of the stolen property, he was to receive a percentage thereof (Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206); an agreement to pay liquidated damages if the court should fail to make a specified order affecting substantial interests (Cowdrey *v.* Carpenter, 1 Rob. (N. Y.) 429, 19 Abb. Pr. (N. Y.) 373 [*reversed* on construction of the contract in 1 Abb. Dec. (N. Y.) 445]); and a note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency toward a relative of the makers who was under arrest for robbing the bank (Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189).

Influencing prosecuting attorney.— Agreements to use influence or tending to encourage the use of influence with the prosecuting attorney in respect to criminal prosecutions are illegal.

Connecticut.— Merwin *v.* Huntington, 2 Conn. 209.

Georgia.— Rhodes *v.* Neal, 64 Ga. 704, 37 Am. Rep. 93.

Maine.— Shaw *v.* Reed, 30 Me. 105.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Pennsylvania.— Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391.

Vermont.— Barron *v.* Tucker, 53 Vt. 338, 38 Am. Rep. 684.

Wisconsin.— Wight *v.* Rindskopf, 43 Wis. 344.

some jurisdictions agreements indemnifying bail furnished in a criminal

See 11 Cent. Dig. tit. "Contracts," §§ 626, 627.

Agreement between officers as to process.— A contract between two constables holding several executions against the same defendant, by which they agree to levy on certain property claimed by a third person, divide the proceeds, and jointly bear the expense of any suit brought against them by the third person is contrary to public policy and illegal. Bishop *v.* Harvey, 3 N. J. L. 644.

Promise of compensation to officer.— A promise to pay a sheriff or constable greater compensation than that allowed by law for executing process or other official acts is contrary to public policy. Downs *v.* McGlynn, 2 Hilt. (N. Y.) 14. See *supra*, VII, B, 3, f, (II), (F), note 3. Such contracts are also void for want of consideration. See *supra*, IV, D, 12, b.

Indemnity for neglect of duty or illegal act. — The principle also applies to a promise or bond to indemnify an officer for releasing a person from arrest (Webber *v.* Blunt, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445) or for the voluntary escape of a prisoner in his charge (Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232). And it applies generally to a bond or promise to indemnify an officer for neglecting to serve or execute process, for the execution of process known to be illegal or illegal execution of valid process, or for any other neglect of duty or illegal act.

Alabama.— Renfro *v.* Heard, 14 Ala. 23, 48 Am. Dec. 105.

California.— Buffendeau *v.* Brooks, 28 Cal. 641; Stark *v.* Raney, 18 Cal. 622.

Colorado.— Hardesty *v.* Price, 3 Colo. 556.

Indiana.— Anderson *v.* Farns, 7 Blackf. 343.

Iowa.— Cass County *v.* Beck, 76 Iowa 487, 41 N. W. 200; Cole *v.* Parker, 7 Iowa 167, 71 Am. Dec. 439.

Maine.— Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347.

Massachusetts.— Churchill *v.* Perkins, 5 Mass. 541; Denny *v.* Lincoln, 5 Mass. 385; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232. But see Foster *v.* Clark, 19 Pick. 329.

Mississippi.—Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83.

Missouri.— Ashby *v.* Dillon, 19 Mo. 619; Harrington *v.* Crawford, 61 Mo. App. 221 [*reversed* in 136 Mo. 467, 38 S. W. 80, 58 Am. St. Rep. 653, 35 L. R. A. 477]; Carroll *v.* Partridge, 12 Mo. App. 583.

New York.— Murtagh *v.* Conner, 15 Hun 488; Perkins *v.* Proud, 62 Barb. 420; Webbers *v.* Blunt, 19 Wend. 188, 32 Am. Dec. 445; Millard *v.* Canfield, 5 Wend. 61; Goodale *v.* Holdridge, 2 Johns. 193.

North Carolina.— Griffin *v.* Hasty, 94 N. C. 438; Denson *v.* Sledge, 13 N. C. 136. But see Joyce *v.* Williams, 1 N. C. 20.

Pennsylvania.— Taylor *v.* Worrel, 4 Leg. Gaz. 401.

South Carolina.— Greenwood *v.* Colcock, 2 Bay 67.

Tennessee.— Barnes *v.* Jackson, 2 Sneed 416.

Virginia.— Kemper *v.* Kemper, 3 Rand. 8.

West Virginia.—Morgan *v.* Hale, 12 W. Va. 713.

England.—Blackett *v.* Crissop, 1 Ld. Raym. 278.

See 11 Cent. Dig. tit. "Contracts," § 598 *et seq.*; and, generally, INDEMNITY; SHERIFFS AND CONSTABLES.

A bond to induce a levy on exempt property has been held void in some states. Renfro *v.* Heard, 14 Ala. 23, 48 Am. Dec. 82. But see Mays *v.* Joseph, 34 Ohio St. 22; Miller *v.* Rhoades, 20 Ohio St. 494; Jameison *v.* Calhoun, 2 Speers (S. C.) 19. See INDEMNITY; SHERIFFS AND CONSTABLES.

Bonds or promises in consideration of "ease or favor" to prisoners held under civil or criminal process are illegal.

Maine.—Kavanagh *v.* Saunders, 8 Me. 422; Baker *v.* Haley, 5 Me. 240; Winthrop *v.* Dockendorff, 3 Me. 156.

Massachusetts.— Clap *v.* Cofran, 7 Mass. 98; Morse *v.* Hodsdon, 5 Mass. 314.

New Jersey.— Fanshor *v.* Stout, 4 N. J. L. 367.

New York.— Winter *v.* Kinney, 1 N. Y. 365; Wheeler *v.* Bailey, 13 Johns. 366; Love *v.* Palmer, 7 Johns. 159.

Pennsylvania.— Claasen *v.* Shaw, 5 Watts 468, 30 Am. Dec. 338.

See 11 Cent. Dig. tit. "Contracts," § 602.

Officer's agreement as to escaped prisoner. — Where a sheriff from whose custody a prisoner confined for debt had escaped agreed with another to pay the latter a certain sum if he would retake the prisoner and deliver him at the county town within a certain time, and the other took the prisoner and had him under his care at his own house, intending to deliver him to the sheriff, when the sheriff went to the house and seized the prisoner himself, it was held that the agreement was not illegal and that the sheriff was liable in assumpsit. Ashcraft *v.* Allen, 26 N. C. 96.

Payment of fine by note or by promise of third person.—According to some cases a note given to a magistrate or other public officer in payment of a fine, or a promise by a third person to pay the fine, in order to secure the liberation of a person from imprisonment, is not illegal.

Connecticut.— Stonington *v.* Powers, 37 Conn. 439.

Georgia.— Blain *v.* Hitch, 70 Ga. 275.

Maine.— Joy *v.* Phillips, 29 Me. 255.

New Hampshire.—Strafford County *v.* Jackson, 14 N. H. 16.

Vermont.— St. Albans Bank *v.* Dillon, 30 Vt. 122, 73 Am. Dec. 295.

In other cases it is held illegal as against public policy.

Illinois.— Good *v.* Allen, 15 Ill. App. 663.

Indiana.— Kenworthy *v.* Stringer, 27 Ind. 498.

Kansas.— McCartney *v.* Wilson, 17 Kan. 294.

case.[34] Other agreements of an analogous character might be enumerated which the courts have refused to enforce because of their manifest tendency to subvert public justice.[35] All agreements, it is said in a recent case, relating to proceed-

Maine.— Kendrick *v.* Crowell, 38 Me. 42.

Massachusetts.—Kingsbury *v.* Ellis, 4 Cush. 578; Bills *v.* Comstock, 12 Metc. 468.

See 11 Cent. Dig. tit. "Contracts," § 603.

34. In England it has been recently held that any agreement to indemnify bail in a criminal case is against public policy and void. Herman *v.* Jeuchner, 15 Q. B. D. 561, 49 J. P. 502, 54 L. J. Q. B. 340, 53 L. T. Rep. N. S. 94, 95, 33 Wkly. Rep. 606 [*overruling* Wilson *v.* Strugnell, 7 Q. B. D. 548, 14 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep. N. S. 218]. Brett, M. R., said: "Now the whole of the contract in the present case is this. The plaintiff asked the defendant to enter into a bail bond to bail out the plaintiff who had been convicted on a criminal charge, and ordered to find security, and the plaintiff agreed, if the defendant would enter into the bond, to deposit with the defendant a sum of money which was to remain in the defendant's hands for two years. The promise, therefore, was that the defendant would enter into the bond, and the consideration was the deposit of the money, and the question is whether either of these is illegal. This depends on whether it is illegal to bail out a person on a criminal charge in consideration of receiving money in hand sufficient to meet the bond. I am of opinion that this is illegal, because the effect is to take away from the authority of the law the protection which is intended to be given when sureties are required. The reason for requiring sureties is that it makes it the interest of the sureties to take care that the principal obeys, and does that which he is called upon to do. If the principal puts into the hands of the surety the means of meeting the bond when the principal breaks his promise, then the surety has no such interest as I have mentioned, and the contract is illegal." There are some decisions to this effect in the United States. Ratcliffe *v.* Smith, 13 Bush (Ky.) 172; U. S. *v.* Simmons, 47 Fed. 575. But see Simpson *v.* Robert, 35 Ga. 180; Richardson *v.* Randall, 48 N. Y. 348, 47 Barb. (N. Y.) 335; Maloney *v.* Nelson, 16 Misc. (N. Y.) 474, 39 N. Y. Suppl. 930 [*affirmed* in 12 N. Y. App. Div. 545, 42 N. Y. Suppl. 418].

35. Other agreements held illegal are: An agreement by an attorney to pay any judgment which may be finally rendered against his client, if the latter will appeal a pending suit and pay him for conducting the case (Adye *v.* Hanna, 47 Iowa 264, 29 Am. Rep. 484); an agreement between attorneys and liquor-dealers that the former defend for a stated monthly compensation all cases brought against the latter for violation of the prohibitory liquor law (Bowman *v.* Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631; and see Treat *v.* Jones, 28 Conn. 334); an agreement between the father and grandfather of an infant legatee and an heir at law not a legatee not to insist on probate, and that if the will shall be set aside the heir shall pay the infant the amount of his legacy (Gray *v.* McReynolds, 65 Iowa 461, 21 N. W. 777, 54 Am. Rep. 16); an agreement by which an administrator agrees to sell certain real property belonging to the estate which he represents for a certain sum, and to make the title to the purchaser named therein through the medium of the orphans' court (Myers *v.* Hodges, 2 Watts (Pa.) 381, 27 Am. Dec. 319); an agreement by an administratrix and heir with a third person to pay him all that may be obtained above a certain amount for his efforts in procuring bids at the administratrix's sale of the land of the estate (Danielwitz *v.* Sheppard, 62 Cal. 339); and an agreement whereby one agrees for a certain sum of money to furnish sureties so that the other party to the contract can be appointed as administrator (Aycock *v.* Brann, 66 Tex. 201, 18 S. W. 500).

Dividing reward with criminal.—An agreement with a criminal for whose arrest a reward has been offered and another to share the reward on the latter giving him up is illegal and void. Bledsoe *v.* Jackson, 3 Sneed (Tenn.) 429.

A contract to procure bail for a person arrested is not illegal. Lehndorf *v.* Schields, 13 Mo. App. 486; Winter *v.* Kinney, 1 N. Y. 365. An agreement by a railroad company to procure bail for a detective in its employ in case he shall be arrested in the course of his employment and to pay all expense of his arrest is legal. Hewlett *v.* Cincinnati, etc., R. Co., 65 Miss. 463, 4 So. 547.

Contracts of indemnity or guaranty are not against public policy where the act contemplated is not illegal (Knight *v.* Sawin, 6 Me. 361; New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586; Coats *v.* Donnell, 94 N. Y. 168; Maloney *v.* Nelson, 16 Misc. (N. Y.) 474, 39 N. Y. Suppl. 930 [*affirmed* in 42 N. Y. Suppl. 418]; as a bond to secure performance of either public or private official duties (Samuels *v.* Fidelity, etc., Co., 49 Hun (N. Y.) 122, 1 N. Y. Suppl. 850, 16 N. Y. St. 917; Dewey *v.* Littlejohn, 37 N. C. 495; Bing *v.* Willey, 146 Pa. St. 381, 23 Atl. 440; Culbertson *v.* Stillinger, Taney (U. S.) 75, 6 Fed. Cas. No. 3,463) or a conveyance of property to secure a defalcation (Territory *v.* Golding, 3 Utah 39, 5 Pac. 546). A bond or promise of indemnity to an officer for the consequence of an act known to be illegal or a violation of duty is illegal (*supra*, note 3), but it is otherwise if the act is lawful or apparently lawful and is done in good faith.

California.— Stark *v.* Raney, 18 Cal. 622.

Illinois.— Wolfe *v.* McClure, 79 Ill. 564.

ings in court, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, although not open to the charge of actual corruption, and regardless of the good faith of the parties or of the fact that no evil resulted therefrom.[36]

(2) Compounding Offenses — (a) In General. Subject to the exceptions hereafter stated, the compromise or compounding of offenses, whether felonies or misdemeanors, is illegal, and agreements involving such compromises, either in whole or in part, are void.[37] As was said in a leading English case: "This is a contract

Indiana.— Anderson *v.* Farns, 7 Blackf. 343.

Massachusetts.— Marsh *v.* Gold, 19 Mass. 285.

New York.— Griffiths *v.* Hardenbergh, 41 N. Y. 464.

Ohio.— Martin *v.* Bolenbaugh, 42 Ohio St. 508.

Vermont.— Gleason *v.* Briggs, 28 Vt. 135.

Military service.— Agreements to provide substitutes for persons drafted into the military service have generally been sustained as not contrary to public policy. Fowler *v.* Donovan, 79 Ill. 310; Proctor *v.* Fombelle, 3 Bush (Ky.) 672; Combs *v.* Scott, 12 Allen (Mass.) 493; Wagner *v.* Schmehl, 1 Woolw. (Pa.) 164. See O'Hara *v.* Carpenter, 23 Mich. 410, 9 Am. Rep. 89; Verona *v.* Peckham, 66 Barb. (N. Y.) 103.

Feigned suit.— Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or purpose, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court. Connoly *v.* Cunningham, 2 Wash. Terr. 242, 5 Pac. 473; Lord *v.* Veazie, 8 How. (U. S.) 251, 12 L. ed. 1067. A contract between a county and a bidder for an issue of its bonds, by which the county agrees to sell the bonds to the bidder on condition that he will cause a feigned suit to be brought and prosecuted to the supreme court of the state to determine the validity of the bonds prior to the issuance, the expense to be paid by the county, is void. Van Horn *v.* Kittitas County, 112 Fed. 1.

36. Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206.

37. *Alabama.*— Folmar *v.* Siler, 132 Ala. 297, 31 So. 719; Clark *v.* Colbert, 67 Ala. 92; Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; Wynne *v.* Whisenant, 37 Ala. 46.

Arkansas.— Rogers *v.* Blythe, 51 Ark. 519; Martin *v.* Tucker, 35 Ark. 279.

California.— Amestoy *v.* Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550.

Connecticut.—McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Staron *v.* Gager, 46 Conn. 189.

Georgia.— Wheaton *v.* Ansley, 71 Ga. 35; Godwin *v.* Crowell, 56 Ga. 566; Chandler *v.* Johnson, 39 Ga. 85; Brown *v.* Padgett, 36 Ga. 609.

Illinois.— Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595; Wolf *v.* Fletemeyer, 83 Ill. 418; Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Schommer *v.* Farwell, 56 Ill. 542; Dionne *v.* Matzenbaugh, 49 Ill. App. 527; Halthaus *v.* Kuntz, 17 Ill. App. 434.

Indiana.— Ricketts *v.* Harvey, 106 Ind. 564, 6 N. E. 325; Stout *v.* Turner, 102 Ind. 418, 26 N. E. 85; Crowder *v.* Reed, 80 Ind. 1; Golden *v.* State, 49 Ind. 424; Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111.

Iowa.— Smith *v.* Steeley, 80 Iowa 738, 45 N. W. 912; Malli *v.* Willett, 57 Iowa 705, 11 N. W. 661; Peed *v.* McKee, 42 Iowa 689, 20 Am. Rep. 631; Allison *v.* Hess, 28 Iowa 388.

Kansas.— Friend *v.* Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

Kentucky.— Kimbrough *v.* Lane, 11 Bush 556; Barclay *v.* Breckinridge, 4 Metc. 374; Gardner *v.* Maxey, 9 B. Mon. 90; Swan *v.* Chandler, 8 B. Mon. 97; Miller *v.* Payne, 7 Ky. L. Rep. 287; Wheeler, etc., Mfg. Co. *v.* Hord, 4 Ky. L. Rep. 240.

Louisiana.— O'Zanne *v.* Haber, 30 La. Ann. 1384.

Maine.— Morrill *v.* Goodenow, 65 Me. 178; Shaw *v.* Reid, 30 Me. 105.

Massachusetts.— Gorham *v.* Keyes, 137 Mass. 583; Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Taylor *v.* Jaques, 106 Mass. 291; Atwood *v.* Fish, 101 Mass. 363, 100 Am. Dec. 124; Leonard *v.* Travis, 6 Allen 129; Com. *v.* Johnson, 3 Cush. 454; Jones *v.* Rice, 18 Pick. 440, 29 Am. Dec. 612; Worcester *v.* Eaton, 11 Mass. 368.

Michigan.— Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383; Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931; Wisner *v.* Bardwell, 38 Mich. 278; Snyder *v.* Willey, 33 Mich. 483; Buck *v.* Paw Paw First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189.

Missouri.— McCoy *v.* Green, 83 Mo. 626; Baker *v.* Farris, 61 Mo. 389; Murphy *v.* Bottomer, 40 Mo. 67; Janis *v.* Roentgen, 52 Mo. App. 114.

Nebraska.—Smith *v.* Columbus State Bank, 9 Nebr. 31, 1 N. W. 893.

New Hampshire.—Merrill *v.* Carr, 60 N. H. 114; Clark *v.* Ricker, 14 N. H. 44; Shaw *v.* Spooner, 9 N. H. 197, 32 Am. Dec. 348; Plumer *v.* Smith, 5 N. H. 553, 22 Am. Dec. 478.

New Jersey.— Price *v.* Summers, 5 N. J. L. 578; Den *v.* Moore, 5 N. J. L. 470.

New York.— Haynes *v.* Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. St. Rep. 815, 85 N. Y. 251 [*reversing* 30 Hun 237]; Collins *v.* Lane, 80 N. Y. 627; English *v.* Rumsey, 32 Hun 486; Hill *v.* Northrup, 1 Hun 612; Conderman *v.* Trenchard, 58 Barb. 165; Osborne *v.* Robbins, 37 Barb. 481; Daimouth

to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice."[38] Compounding a crime being itself criminal, an agreement not to prosecute is void not only because it is against the policy of the law, but also because the agreement is itself a crime.[39] The common forms of such agreements are bonds, deeds, or other instruments, the consideration of which is a promise not to prosecute for an offense which has been committed.[40]

(b) THE AGREEMENT NOT TO PROSECUTE. To render an agreement illegal as an agreement to compound a crime, it is essential that there shall be an agreement not to prosecute,[41] although the agreement may be either express or implied.[42] The law does not prevent one whose property has been stolen or whose rights have been interfered with through the commission of a crime to compromise with the wrong-doer, if it is not agreed either expressly or impliedly that the prosecution for the offense shall be suppressed or stayed.[43] Even a promise not to prose-

v. Bennett, 15 Barb. 541; Loomis *v.* Cline, 4 Barb. 453; Howk *v.* Eckert, 4 Thomps. & C. 300; Fellows *v.* Van Hyring, 23 How. Pr. 230; Steuben County Bank *v.* Mathewson, 5 Hill 249.

North Carolina.—Guilford County *v.* March, 89 N. C. 268; Lindsay *v.* Smith, 78 N. C. 328, 24 Am. Rep. 463; Vanover *v.* Thompson, 49 N. C. 485; Garner *v.* Qualls, 49 N. C. 223; Cameron *v.* McFarland, 4 N. C. 299, 6 Am. Dec. 566.

Ohio.— Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; Roll *v.* Raguet, 4 Ohio 400, 22 Am. Dec. 759; Tracy *v.* Deatrick, 6 Ohio Cir. Dec. 427.

Pennsylvania.— Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391; Riddle *v.* Hall, 99 Pa. St. 116; Bradin's Appeal, 92 Pa. St. 241, 37 Am. Rep. 677; Oxford Nat. Bank *v.* Kirk, 90 Pa. St. 49; Prough *v.* Entriken, 11 Pa. St. 81; Sharp *v.* Philadelphia Warehouse Co., 14 Phila. 513, 38 Leg. Int. 404.

Rhode Island.— Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204; Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

South Carolina.— Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743; Williams *v.* Walker, 18 S. C. 577; Corley *v.* Williams, 1 Bailey 588; Bell *v.* Wood, 1 Bay 249.

Tennessee.— Cain *v.* Southern Express Co., 1 Baxt. 315; Porter *v.* Jones, 6 Coldw. 313; Simmons *v.* Kincaid, 5 Sneed 450.

Vermont.— Pierce *v.* Kibbee, 51 Vt. 559; Hinsdill *v.* White, 34 Vt. 558; Bowen *v.* Buck, 28 Vt. 308; Woodruff *v.* Hinman, 11 Vt. 592, 34 Am. Dec. 712; Bailey *v.* Buck, 11 Vt. 252; Dixon *v.* Olmstead, 9 Vt. 310, 31 Am. Dec. 629; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599; Mattocks *v.* Owens, 5 Vt. 42.

West Virginia.— Rock *v.* Mathews, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508.

Wisconsin.—Schultz *v.* Culbertson, 46 Wis. 313, 1 N. W. 19; Catlin *v.* Henton, 9 Wis. 746; Fay *v.* Oatley, 6 Wis. 42.

England.— Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308; Williams *v.* Bayley, L. R. 1 H. L. 200, 12 Jur. N. S. 875, 35 L. J. Ch. 717, 14 L. T. Rep. N. S. 802; McCatchie *v.* Haslam, 65 L. T. 691; Jones *v.* Merionethshire Permanent Ben. Bldg. Soc., 65 L. T. Rep. N. S. 685, 40 Wkly. Rep. 273; Collins *v.* Blantern, 1 Smith Lead. Cas. 646, 2 Wils. C. P. 341.

See 11 Cent. Dig. tit. "Contracts," § 633.

38. Collins *v.* Blantern, 2 Wils. C. P. 347, 350.

39. See COMPOUNDING FELONY.

40. See cases cited in note 37, *supra*.

A promissory note given to secure the restoration of stolen goods and in part consideration of an agreement not to search the house of the maker before the next day, is void, as a contract to suppress a criminal prosecution for a limited time. Merrill *v.* Carr, 60 N. H. 114.

41. See the cases in the notes following.

Both the parties must understand that there is to be no prosecution. Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931.

42. Clark *v.* Pomeroy, 4 Allen (Mass.) 534; Sumner *v.* Summers, 54 Mo. 340; Janis *v.* Roentgen, 52 Mo. App. 114; Conderman *v.* Hicks, 3 Lans. (N. Y.) 108, 40 How. Pr. (N. Y.) 71; Riddle *v.* Hall, 99 Pa. St. 116.

43. *Alabama.*— Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288.

Colorado.— Percheron-Norman Horse Co. *v.* Downen, 18 Colo. 71, 31 Pac. 501. In this case plaintiff, having bought certain property from A sold the same and took promissory notes in payment. A was afterward charged with the larceny of the property as the bailee of defendant. Plaintiff delivered the notes to defendant, with the express agreement that the latter should retain them in case of A's conviction, but that he should return them in case of his acquittal. Neither plaintiff nor defendant was implicated in the criminal charge, and the transaction concerning the delivery of the notes was not intended as a compromise of a criminal offense nor an attempt to prevent the due administration of justice. It was held that the agreement was not illegal.

cute is not illegal, where it is made, not for the sake of gain, but from motives of kindness and compassion [44] or on account of relationship.[45] And mere threats to prosecute, while they may amount to duress or undue influence, so as to render a promise voidable,[46] will not avoid an agreement made by a defaulter for the purpose of making reparation to the person injured by his misdoing, if there be no agreement not to prosecute.[47]

Connecticut.— Von Windisch *v.* Klaus, 46 Conn. 433; Walbridge *v.* Arnold, 21 Conn. 424.

Georgia.— Wheaton *v.* Ansley, 71 Ga. 35; Godwin *v.* Crowell, 56 Ga. 566. And see Dodson *v.* McCauley, 62 Ga. 130, where after a widow had retained counsel with intent to institute a civil suit against defendant for killing her husband, without attempting to prosecute him for the homicide, defendant voluntarily gave her his promissory notes in fair compromise of her claim for damages, one of them payable to her counsel to liquidate his fee, and it was held that the notes were valid.

Illinois.— Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588; Bothwell *v.* Brown, 51 Ill. 234.

Iowa.— Deere *v.* Wolff, 65 Iowa 32, 21 N. W. 168, holding that the mere delivery of a forged note to the forger, on payment of the same by him, by one who had received it from him as collateral security in good faith, was not compounding a felony so as to render void a transfer of personal property which constituted the payment.

Louisiana.— Morgan *v.* Knox, 15 La. Ann. 176; Butterly *v.* Blanchard, 1 Rob. 340.

New Hampshire.— Souhegan Bank *v.* Wallace, 61 N. H. 24.

New Jersey.— Brittin *v.* Chegary, 20 N. J. L. 625, holding that a note given by the maker of another note, having his name as maker written by a forger, was valid, where there was no agreement not to prosecute.

New York.— Cohoes *v.* Cropsey, 55 N. Y. 685; Earl *v.* Chute, 2 Abb. Dec. 1, 1 Keyes 36.

Ohio.— Herbst *v.* Mauss, 7 Ohio Dec. (Reprint) 701, 4 Cinc. L. Bul. 1038.

Tennessee.— Provident Sav. L. Assur. Soc. *v.* Edwards, 95 Tenn. 53, 31 S. W. 168.

Wisconsin.— Catlin *v.* Henton, 9 Wis. 476, where an employer accused his cashier of theft, but did not have him arrested, and the cashier acknowledged that he had omitted to enter certain sums, begged his employer not to expose him, and gave his note secured by his father's indorsement and a mortgage for the amount which he said he had taken. The employer made no agreement not to prosecute, and did not agree that the money so secured was all that had been taken. It was held that the note was not given to compound a felony.

United States.— Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304.

See 11 Cent. Dig. tit. "Contracts," § 647.

44. Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Hatch *v.* Collins, 34 Hun (N. Y.) 314.

45. Dodson *v.* Swan, 2 W. Va. 511, 98 Am. Dec. 787.

46. See *supra*, VI, E, F.

47. *Alabama.*— Moog *v.* Strang, 69 Ala. 98; Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288.

Arkansas.— Martin *v.* Tucker, 35 Ark. 279; Breathwit *v.* Rogers, 32 Ark. 758.

Connecticut.— Von Windisch *v.* Klaus, 46 Conn. 433.

Florida.— Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 173.

Illinois.— Ford *v.* Cratty, 52 Ill. 313; Keith *v.* Buck, 16 Ill. App. 121.

Iowa.— State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235.

Kansas.— Hoover *v.* Wood, McCahon 79.

Kentucky.— Powell *v.* Flanary, 109 Ky. 342, 59 S. W. 5, 22 Ky. L. Rep. 908.

Nebraska.— Cass County Bank *v.* Bricker, 34 Nebr. 516, 52 N. W. 575, 33 Am. St. Rep. 649.

New York.— Weber *v.* Barrett, 125 N. Y. 18, 25 N. E. 1068, 34 N. Y. St. 358 [*affirming* 52 Hun 612, 6 N. Y. Suppl. 434, 23 N. Y. St. 3]; Smith *v.* Crego, 54 Hun 22, 7 N. Y. Suppl. 86, 26 N. Y. St. 64; Conderman *v.* Hicks, 3 Lans. 108; Steuben County Bank *v.* Mathewson, 5 Hill 249.

Ohio.— Fribly *v.* State, 42 Ohio St. 205.

Pennsylvania.— Swope *v.* Jefferson F. Ins. Co., 93 Pa. St. 251.

South Carolina.— Hudson *v.* Brown, 11 Rich. 643.

Tennessee.—Armstrong *v.* Southern Express Co., 4 Baxt. 376.

Texas.— Nunn *v.* Lackey, 1 Tex. App. Civ. Cas. § 1331.

United States.— Plant *v.* Gunn, 2 Woods 372, 19 Fed. Cas. No. 11,205.

Illustrations.— In Ford *v.* Cratty, 52 Ill. 313, it was held that a client who, by threatening to arrest his attorney on a charge of larceny or embezzlement, had procured from him a note with security for the amount which he had collected and refused to pay over, could maintain an action on the note. It was held that the transaction was not compounding a criminal offense, although such refusal by an attorney to pay over was made by statute a misdemeanor, and that the case was unaffected by the fact that the note would not have been given had not the principal maker been threatened with a criminal prosecution. In School Dist. No. 61 *v.* Collins, 6 Dak. 145, 41 N. W. 466, an outgoing treasurer's shortage in his accounts was settled by the payment of a certain amount of cash and the execution of a note by a third party for the balance agreed on as due. There was some testimony that prior to the

(c) Proof of Commission of Crime. In this connection a distinction is made between a criminal prosecution actually pending and a charge or suspicion of crime where no criminal proceedings have yet been commenced. If a criminal prosecution is in fact pending at the time, either by the finding of an indictment or otherwise, then the public interest in the prosecution of the actual pending charge is of such a nature as to avoid any security for a debt given upon an agreement for the stifling of the pending prosecution, even though the debt thus secured was due.[48] But where no criminal proceedings are pending, the actual commission of the crime alleged to have been compounded is one of the facts at issue in the case, and necessary to be alleged and satisfactorily proved in order to make out the defense of illegality.[49] The reason is that if no criminal charge is actually pending for trial or prosecution, the public interest is, not that there should be a charge in any event, but only in case a crime has been actually committed; and proof therefore that the crime had been committed lies at the basis of the charge of illegality.[50]

(d) Offenses Which May Be Compromised — aa. *In General.* In applying the doctrine that agreements involving compounding of crime are illegal and void, most of the courts seem to make no distinction between felonies and misdemeanors, but to hold that it is illegal to compound any public offense.[51] In a number of states the settlement of some offenses, generally minor misdemeanors, the prosecution of which is not a matter of particular public interest, is permitted by judicial

settlement threats of prosecution had been made by the officer representing the district, that such officer had said that he would stop the prosecution if the note was executed, and that the maker signed under such representations, but there was no evidence that by prosecution was meant a criminal prosecution, and it did not appear what the terms of the agreement were in relation thereto. It was held that it did not appear that the note was given to compound a felony.

48. Crowder *v.* Reed, 80 Ind. 1; Baker *v.* Farris, 61 Mo. 389; Manning *v.* Columbia Lodge No. 117, I. O. O. F., 57 N. J. Eq. 338, 38 Atl. 444, 45 Atl. 1092. But see Deere *v.* Wolff, 65 Iowa 32, 21 N. W. 168.

49. *Maine.*— Soule *v.* Bonney, 37 Me. 128.

New Jersey.— Manning *v.* Columbia Lodge No. 117, I. O. O. F., 57 N. J. Eq. 338, 38 Atl. 444, 45 Atl. 1092.

New York.— Steuben County Bank *v.* Mathewson, 5 Hill 249.

Pennsylvania.— Carroll *v.* Doster, 1 Mona. 161.

Wisconsin.— Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946; Catlin *v.* Henton, 9 Wis. 476.

United States.— Plant *v.* Gunn, 2 Woods 372, 19 Fed. Cas. No. 11,205.

50. Thus where a physician who had attended a girl in an illness falsely represented to her father and a neighbor that the agent of a humane society was about to institute a criminal prosecution against both families for procuring an abortion, and suggested that he could hush up the matter on payment of a specified sum, and the money was paid to the physician, and he told the two persons to tell no one of the transaction, and seven years later the father discovered that the statement was false, and that the physician had pocketed the money, it was held that the transaction did not prevent a recovery by the father from the physician of the money so paid. Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887.

51. *Connecticut.*— McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Smith *v.* Richards, 29 Conn. 232.

Massachusetts.— Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Clark *v.* Pomeroy, 4 Allen 534; Jones *v.* Rice, 18 Pick. 440, 29 Am. Dec. 612.

New Hampshire.— Hinds *v.* Chamberlin, 6 N. H. 225.

New York.— Porter *v.* Havens, 37 Barb. 343.

North Carolina.— Vanover *v.* Thompson, 49 N. C. 485.

Pennsylvania.— Brown *v.* McCreight, 187 Pa. St. 181, 41 Atl. 45; Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; Jackson *v.* Polack, 2 Miles 362; Oakford *v.* Johnson, 2 Miles 203.

South Carolina.— Gray *v.* Seigler, 2 Strobh. 117.

Texas.— McGowen *v.* Bush, 17 Tex. 195.

United States.— Sharp *v.* Philadelphia Warehouse Co., 10 Fed. 379.

See 11 Cent. Dig. tit. "Contracts," § 637 *et seq.* And see the cases cited as *contra* in the notes following.

The distinction between the law of England and of the United States in regard to prosecution for crime should not be overlooked. By the common law it was the duty of every one against whose person or property a crime had been committed to prosecute the guilty one to conviction. He was, in the discharge of his duty, often compelled to employ counsel, procure the indictment to be drawn and laid before the grand jury, with the evidence in its support, and, if it should be found, to see that it was properly prosecuted before the jury of trials. The common-law rule, however, is

decision or by statute.[52] Where the prosecution is criminal in form only, or where the injury complained of is of a purely private and personal nature, in no way involving the interests of the public, an agreement for its settlement is not invalid.[53] In some states there may be a compromise or settlement of prosecutions for obtaining money or goods by false pretenses,[54] for embezzlement,[55] for the offense of removing goods of a debtor to prevent a levy,[56] for criminal conversation,[57] and for assault or assault and battery.[58] In an English case it is said that it is safe to say that the law will permit a compromise of all offenses, although made the subject of a criminal prosecution, for which offenses the injured party might sue and recover damages in an action.[59] This doctrine, however, is not recognized to any great extent in the states of the United States. On the contrary it has been many times held that it is illegal to compromise or settle a prosecution for obtaining money or goods by false pretenses,[60] for larceny or

not observed in the United States, where we have public prosecutors in every state and in almost every county. With us, whatever be the English usage, the party may institute the proceedings for damages as promptly as he chooses, only he must not bring on the trial in advance of his public duty. The duty of the private person ceases when he has made his complaint, appeared before the grand jury, and secured or failed to secure an indictment. See McBlain *v.* Edgar, 65 N. J. L. 634, 48 Atl. 600. In a Massachusetts case it is said that according to the great weight of American authority, any act which is made punishable by law as a crime is an offense against the public, and especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, it cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524.

52. *Arkansas.*— Bone *v.* State, 18 Ark. 109.

Georgia.— McDaniel *v.* State, 27 Ga. 197. And see Stratham *v.* State, 41 Ga. 507.

Louisiana.— State *v.* Hunter, 14 La. Ann. 71.

Massachusetts.— Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524; Commonwealth *v.* Dowdican's Bail, 115 Mass. 133.

New Jersey.— Price *v.* Summers, 5 N. J. L. 578.

New York.— People *v.* Bishop, 5 Wend. 111.

Ohio.— Tracy *v.* Deatrick, 6 Ohio Cir. Dec. 427.

Oregon.— Saxon *v.* Conger, 6 Oreg. 388.

Pennsylvania.— Noble *v.* Peebles, 13 Serg. & R. 319; Salfield *v.* Morrow, 15 Pa. Co. Ct. 497; Castner *v.* Cornell, 1 Luz. Leg. Obs. 58.

53. *Alabama.*— Moog *v.* Strang, 69 Ala. 98; Merritt *v.* Flemming, 42 Ala. 234.

Arkansas.— Breathwit *v.* Rogers, 32 Ark. 758.

Connecticut.— McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67; Sharon *v.* Gager, 46 Conn. 189.

Maine.— Soule *v.* Bonney, 37 Me. 128.

Pennsylvania.— Geier *v.* Shade, 109 Pa. St. 180; Maurer *v.* Mitchell, 9 Watts & S. 69.

South Carolina.— Mathison *v.* Hanks, 2 Hill 625.

Vermont.— Holcomb *v.* Stimpson, 8 Vt. 141.

54. Rothermal *v.* Hughes, 134 Pa. St. 510, 19 Atl. 677; Geier *v.* Shade, 109 Pa. St. 180. But see to the contrary the cases cited *infra*, note 60.

55. Williams *v.* Dreshler, 14 Wkly. Notes Cas. (Pa.) 211. To the contrary see the cases cited *infra*, note 61.

56. Brown *v.* McCreight, 187 Pa. St. 181, 41 Atl. 45.

57. Wells *v.* Sutton, 85 Ind. 70.

58. Price *v.* Summers, 5 N. J. L. 578; Rushworth *v.* Dwyer, 1 Phila. (Pa.) 26, 7 Leg. Int. (Pa.) 15; Castner *v.* Cornell, 1 Luz. Leg. Obs. (Pa.) 58; Mathison *v.* Hanks, 2 Hill (S. C.) 625; Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308. *Contra*, after a prosecution has been commenced. See Goolsby *v.* Bush, 53 Ga. 353; Corley *v.* Williams, 1 Bailey (S. C.) 588; Vincent *v.* Groom, 1 Yerg. (Tenn.) 430.

59. Keir *v.* Leeman, 6 Q. B. 308, 8 Jur. 824, 13 L. J. Q. B. 259, 51 E. C. L. 308. In this case the court ventured the opinion that for an assault the sufferer might legally undertake not to prosecute on behalf of the public, but was not disposed to extend the exception further; and the agreement before the court being in consideration that the plaintiff, being the prosecutor of an indictment against the defendant for an assault and a riot and the obstruction of a public officer, would not proceed further on the indictment, it was held illegal because the riot and obstruction of a public officer were matters of public concern which could not be thus stifled. See also Breathwit *v.* Rogers, 32 Ark. 758; Soule *v.* Bonney, 37 Me. 128; Castner *v.* Cornell, 1 Luz. Leg. Obs. (Pa.) 58; Kearney *v.* Smith, 2 Luz. Leg. Reg. (Pa.) 170; Bowen *v.* Buck, 28 Vt. 308.

60. *Connecticut.*— McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67.

Louisiana.— Ozanne *v.* Haber, 30 La. Ann. 1384.

Michigan.— Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

New York.— Porter *v.* Havens, 37 Barb. 343; Conderman *v.* Trenchard, 40 How. Pr. 71.

Vermont.— Bowen *v.* Buck, 28 Vt. 308.

embezzlement,[61] for mortgaging property subject to an existing encumbrance without disclosing such fact,[62] for fraud against the insolvency laws,[63] for forgery,[64] for seduction or rape,[65] for obstructing a highway,[66] and for malicious mischief.[67]

bb. *Bastardy.* In many of the states prosecutions for bastardy are regarded merely as a species of civil action, although criminal in form, and therefore their discontinuance will furnish a good consideration for a pecuniary settlement or compromise.[68]

(3) OUSTING JURISDICTION OF COURTS. Agreements whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[69] Thus it is held that any stipulation between parties to a contract distinguishing

Wisconsin.— Fay *v.* Oatley, 6 Wis. 42.

To the contrary see the cases cited *supra*, note 54.

See 11 Cent. Dig. tit. "Contracts," § 644.

61. *Arkansas.*— Rogers *v.* Blythe, 51 Ark. 519, 11 S. W. 822.

Georgia.— Smith Express Co. *v.* Duffey, 48 Ga. 358.

Illinois.— Bothwell *v.* Brown, 51 Ill. 234; Rouse *v.* Mohr, 29 Ill. App. 321; Halthaus *v.* Kuntz, 17 Ill. App. 434.

Indiana.— Crowder *v.* Reed, 80 Ind. 1.

Iowa.— Smith *v.* Steely, 80 Iowa 738, 45 N. W. 912; Peed *v.* McKee, 42 Iowa 689, 20 Am. Rep. 631.

Kentucky.— Kentucky Flour Co. *v.* Smith, 14 Ky. L. Rep. 237.

Louisiana.— Field *v.* Rogers, 26 La. Ann. 574.

New York.— Buffalo Press Club *v.* Greene, 86 Hun 20, 33 N. Y. Suppl. 286, 67 N. Y. St. 105 [*affirming* 5 Misc. 501, 26 N. Y. Suppl. 525]; Decker *v.* Morton, 1 Redf. Surr. 477.

Ohio.— Roll *v.* Raguet, 4 Ohio 400, 22 Am. Dec. 759; Tracy *v.* Deatrick, 10 Ohio Cir. Ct. 111.

Pennsylvania.— Pearce *v.* Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; Kearney *v.* Smith, 2 Luz. Leg. Reg. 170.

Rhode Island.— Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204.

South Carolina.— Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

Texas.— Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537; Wegner *v.* Biering, 73 Tex. 89, 11 S. W. 155; Wegner *v.* Biering, 65 Tex. 506.

But as to embezzlement see *supra*, note 55.

See 11 Cent. Dig. tit. "Contracts," § 646.

62. Partridge *v.* Hood, 120 Mass. 403, 21 Am. Rep. 524.

63. Perry *v.* Frilot, 6 Mart. N. S. (La.) 217; Leggett *v.* Peet, 1 La. 288.

64. *Illinois.*— Dronne *v.* Matzenbaugh, 49 Ill. App. 527.

New Jersey.— Den *v.* Moore, 5 N. J. L. 470.

New York.— Maxfield *v.* Hoecker, 49 Hun 605, 2 N. Y. Suppl. 77, 17 N. Y. St. 344.

North Carolina.— Thompson *v.* Whitman, 49 N. C. 47.

Pennsylvania.— Oxford Nat. Bank *v.* Kirk, 90 Pa. St. 49; Tebay's Appeal, 9 Wkly. Notes Cas. 151.

Texas.— Welborn *v.* Norwood, 1 Tex. Civ. App. 614, 20 S. W. 1129.

Vermont.— Ring *v.* Windsor County Mut. F. Ins. Co., 51 Vt. 563; Laing *v.* McCall, 50 Vt. 657.

See 11 Cent. Dig. tit. "Contracts," § 641.

65. Smith *v.* Richards, 29 Conn. 232; Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111; Forshner *v.* Whitcomb, 44 N. H. 14. But see Armstrong *v.* Lester, 43 Iowa 159.

66. Amestoy *v.* Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550.

67. Cameron *v.* McFarland, 4 N. C. 299, 6 Am. Dec. 566.

68. *Connecticut.*— Hinman *v.* Taylor, 2 Conn. 357.

Georgia.— Davis *v.* Moody, 15 Ga. 175.

Illinois.— Coleman *v.* Frum, 4 Ill. 378.

Indiana.—Allyn *v.* Allyn, 108 Ind. 327, 9 N. E. 279; Harter *v.* Johnson, 16 Ind. 271.

New Hampshire.— Hoit *v.* Cooper, 41 N. H. 111; Parker *v.* Way, 15 N. H. 45.

Ohio.— Maxwell *v.* Campbell, 8 Ohio St. 265.

Pennsylvania.— Wynant *v.* Lesher, 23 Pa. St. 338; Maurer *v.* Mitchell, 9 Watts & S. 69.

Vermont.— Holcomb *v.* Stimpson, 8 Vt. 141.

See BASTARDS, 5 Cyc. 647.

69. *Massachusetts.*— Noyes *v.* Marsh, 123 Mass. 286.

Missouri.— King *v.* Howard, 27 Mo. 21.

Ohio.— Conner *v.* Drake, 1 Ohio St. 166.

United States.— Guarantee Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; Potomac Steamboat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365; Trott *v.* City Ins. Co., 1 Cliff. 439, 24 Fed. Cas. No. 14,189; Tobey *v.* Bristol County, 3 Story 800, 23 Fed. Cas. No. 14,065.

England.— Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457; Hope *v.* International Financial Soc., 4 Ch. D. 327, 46 L. J. Ch. 200, 35 L. T. Rep. N. S. 924, 25 Wkly. Rep. 203; Scott *v.* Avery, 8 Exch. 487 [*affirmed* in 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746]; Horton *v.* Sayer, 4 H. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. 28, 7 Wkly. Rep. 735; Thompson *v.* Charnock, 8 T. R. 139; Mitchell *v.* Harris, 2 Ves. Jr. 129.

Merely imposing conditions.— An agreement will not be construed to oust the courts of their jurisdiction when it merely imposes certain conditions in respect to the exercise

between the different courts of the country is contrary to public policy.[70] The principle has also been applied to a stipulation in a contract that a party who breaks it may not be sued,[71] to an agreement designating a person to be sued for its breach who is nowise liable and prohibiting action against any but him,[72] to a provision in a lease that the landlord shall have the right to take immediate judgment against the tenant in case of a default on his part, without giving the notice and demand for possession and filing the complaint required by statute,[73] to a by-law of a benefit association that the decisions of its officers on a claim shall be final and conclusive,[74] and to many other agreements of a similar tendency.[75] In some courts any agreement as to the time for suing different from the time allowed by the statute of limitations within which suit shall be brought or the right to sue be barred is held void.[76]

(4) REFERENCE TO ARBITRATION. Agreements to refer disputes to arbitration present an example of what the common law regarded as attempts to oust the jurisdiction of the courts, and as against public policy. The reason of the rule

of the right to sue. Seibert *v.* Minneapolis, etc., R. Co., 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535.

70. *Indiana.*— Indiana Mut. F. Ins. Co. *v.* Routledge, 7 Ind. 25.

Massachusetts.— Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray 596; Nute *v.* Hamilton Mut. Ins. Co., 6 Gray 174.

Missouri.— Reichard *v.* Manhattan L. Ins. Co., 31 Mo. 518.

United States.— Slocum *v.* Western Assur. Co., 42 Fed. 235; Prince Steam-Shipping Co. *v.* Lehman, 39 Fed. 704, 5 L. R. A. 464.

England.— Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746.

Illustrations.— This is true for example of a stipulation in a policy of life insurance that no suit in law or in equity shall be brought upon it, except in the circuit court of the United States (Mutual Reserve Fund L. Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212), and of an agreement not to remove any suit which may be begun against one in a state court to a federal court (Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365 [*reversing* 49 How. Pr. (N. Y.) 314]). The same has been held in Massachusetts of an agreement that an action on a contract shall be brought in a certain county. Nute *v.* Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174. *Contra*, Greve *v.* Ætna Live Stock Ins. Co., 81 Hun (N. Y.) 28, 30 N. Y. Suppl. 668, 62 N. Y. St. 566, 1 N. Y. Annot. Cas. 14. And see Bundy *v.* Newton, 19 N. Y. Suppl. 734, 47 N. Y. St. 242.

71. Knorr *v.* Bates, 14 Misc. (N. Y.) 501, 35 N. Y. Suppl. 1060, 70 N. Y. St. 686 [*affirming* 12 Misc. (N. Y.) 395, 33 N. Y. Suppl. 691, 67 N. Y. St. 592, 24 N. Y. Civ. Proc. 377].

72. Walker *v.* Beecher, 15 Misc. (N. Y.) 149, 36 N. Y. Suppl. 470, 71 N. Y. St. 458; Knorr *v.* Bates, 14 Misc. (N. Y.) 501, 35 N. Y. Suppl. 1060, 70 N. Y. St. 686 [*affirming* 12 Misc. (N. Y.) 395, 33 N. Y. Suppl. 691, 67 N. Y. St. 592, 24 N. Y. Civ. Proc. 377]. And see New Jersey, etc., Concentrating Works Co. *v.* Ackermann, 15 Misc. (N. Y.) 605, 37 N. Y. Suppl. 489, 73 N. Y. St. 114 [*reversed* in 6 N. Y. App. Div. 540, 39 N. Y. Suppl. 585].

73. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717.

74. Supreme Council, O. of C. F. *v.* Forsinger, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501.

75. Other illustrations.— The rule has also been applied to an agreement between a fidelity insurance company and an employee whose honesty is guaranteed that the voucher showing payment by the company to the employer of loss occasioned through the employee's dishonesty should be conclusive evidence against the employee as to the fact and extent of his liability to the company (New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586); to an agreement between a corporation and an employee that a deposit given by him to secure the faithful discharge of his duties should be retained in whole or in part, if the president should deem proper, and that his certificate that the deposit was forfeited should be conclusive evidence of the fact in the courts, and should bar the employee of all right to recover the deposit (White *v.* Middlesex R. Co., 135 Mass. 216); and to an agreement between a surviving partner, the widow of a deceased partner who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner and retain all the partnership property (Cox *v.* Grubb, 47 Kan. 435, 28 Pac. 157, 27 Am. St. Rep. 303).

76. French *v.* Lafayette Ins. Co., 5 McLean (U. S.) 461, 9 Fed. Cas. No. 5,102 [*affirmed* in 18 How. (U. S.) 404, 15 L. ed. 451]. But in other courts it has been held that parties may agree on a period less than the statutory time, provided the time is reasonable. Brown *v.* Savannah Mut. Ins. Co., 24 Ga. 97; Eliot Nat. Bank *v.* Beal, 141 Mass. 566, 6 N. E. 742; Northwestern Ins. Co. *v.* Phœnix Oil, etc., Co., 31 Pa. St. 448. See LIMITATIONS OF ACTIONS.

adopted by the courts is by some traced to the jealousy of the courts and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. But whatever may be the reason, it is a well-settled rule of the common law that a clause in an agreement, or a separate agreement, that any or all disputes which may arise thereunder shall be referred to an arbitrator or arbitrators is unenforceable as an attempt to oust the courts of jurisdiction, and either party may have recourse to them without carrying out his agreement to refer.[77] There is a strong tendency in modern times to relax the common-law

77. *Alabama.*— Stone *v.* Dennis, 3 Port. 231.

California.— Trask *v.* California Southern R. Co., 63 Cal. 96; Holmes *v.* Rickett, 56 Cal. 307, 38 Am. Rep. 54.

Connecticut.— Chamberlain *v.* Connecticut Cent. R. Co., 54 Conn. 472, 9 Atl. 244.

Delaware.— Randal *v.* Chesapeake, etc., Canal, 1 Harr. 233.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Georgia.— Liverpool, etc., Ins. Co. *v.* Creighton, 51 Ga. 95; Leonard *v.* House, 15 Ga. 473.

Illinois.— Frink *v.* Ryan, 4 Ill. 322; Waugh *v.* Schlenk, 23 Ill. App. 433.

Indiana.— Louisville, etc., R. Co. *v.* Donegan, 111 Ind. 179, 12 N. E. 153; Supreme Council, O. of C. F. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Bauer *v.* Sampson Lodge, 102 Ind. 262, 1 N. E. 571; Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460.

Iowa.— Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

Kansas.— Richardson *v.* Emmert, 44 Kan. 262, 24 Pac. 478.

Kentucky.— McClanahans *v.* Kennedy, 1 J. J. Marsh. 332; Gaither *v.* Dougherty, 38 S. W. 2, 18 Ky. L. Rep. 709.

Maine.— Perry *v.* Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389; Dugan *v.* Thomas, 79 Me. 221, 9 Atl. 354; Stephenson *v.* Piscataqua F., etc., Ins. Co., 54 Me. 55; Hill *v.* More, 40 Me. 515; Robinson *v.* Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239.

Maryland.—Allegree *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289; Contee *v.* Dawson, 2 Bland 264.

Massachusetts.— Miles *v.* Schmidt, 168 Mass. 339, 47 N. E. 115; Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 172; White *v.* Middlesex R. Co., 135 Mass. 216; Vass *v.* Wales, 129 Mass. 38; Noyes *v.* Marsh, 123 Mass. 286; Evans *v.* Clapp, 123 Mass. 165, 65 Am. Rep. 52; Pearl *v.* Harris, 121 Mass. 390; Wood *v.* Humphrey, 114 Mass. 185; Rowe *v.* Williams, 97 Mass. 163; Cavanagh *v.* Dooley, 6 Allen 66; Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray 192.

Minnesota.— Whitney *v.* National Masonic Acc. Assoc., 52 Minn. 378, 54 N. W. 184.

Nebraska.— National Masonic Acc. Assoc. *v.* Burr, 44 Nebr. 256, 62 N. W. 466; German-American Ins. Co. *v.* Etherton, 25 Nebr. 505, 41 N. W. 406.

New Hampshire.— Leach *v.* Republic F. Ins. Co., 58 N. H. 245; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 50 N. Y. 250; Hurst *v.* Litchfield, 39 N. Y. 377; Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Binsse *v.* Paige, 1 Abb. Dec. 138; Keeffe *v.* National Acc. Soc., 4 N. Y. App. Div. 392, 38 N. Y. Suppl. 854; Sinclair *v.* Tallmadge, 35 Barb. 602; Hart *v.* Lauman, 29 Barb. 410; Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352; National Contracting Co. *v.* Hudson River Water-Power Co., 34 Misc. 652, 70 N. Y. Suppl. 585; Gay *v.* Lathrop, 6 N. Y. St. 603; Smith *v.* Briggs, 3 Den. 73.

Pennsylvania.— Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80; Lauman *v.* Young, 31 Pa. St. 306; Snodgrass *v.* Gavit, 28 Pa. St. 221; Gray *v.* Wilson, 4 Watts 39. But see O'Reilly *v.* Kerns, 52 Pa. St. 214; Reynolds *v.* Caldwell, 51 Pa. St. 298.

South Carolina.— Herbemont *v.* Percival, 1 McMull. 59.

West Virginia.— Kinney *v.* Baltimore, etc., Relief Assoc., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142.

Wisconsin.— Fox *v.* Masons' Fraternal Acc. Assoc., 96 Wis. 390, 71 N. W. 363; Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504.

United States.— Hamilton *v.* Home Ins. Co., 137 U. S. 370, 11 S. Ct. 133, 34 L. ed. 708; Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. ed. 419; Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365; Mitchell *v.* Dougherty, 90 Fed. 639, 33 C. C. A. 205; Laflin *v.* Chicago, etc., R. Co., 34 Fed. 859; Trott *v.* City Ins. Co., 1 Cliff. 439, 24 Fed. Cas. No. 14,189.

England.— Viney *v.* Bignold, 20 Q. B. D. 172, 57 L. J. Q. B. 82, 58 L. T. Rep. N. S. 26, 36 Wkly. Rep. 479; Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457; Tattersall *v.* Groote, 2 B. & P. 131, 14 Rev. Rep. 8; Goldstone *v.* Osborn, 2 C. & P. 550, 12 E. C. L. 726; Dawson *v.* Fitzgerald, 1 Ex. D. 257, 45 L. J. Exch. 893, 35 L. T. Rep. N. S. 220, 24 Wkly. Rep. 773; Tredwen *v.* Holman, 1 H. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. 389, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652; Horton *v.* Sayer, 4 H. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. 28, 7 Wkly. Rep. 735; Lee *v.* Page, 7 Jur. N. S. 768, 30 L. J. Ch. 857, 9 Wkly. Rep.

rule,[78] and in some states the settlement of disputes by arbitration is permitted by statute.[79] There is also a qualification made in the modern decisions, following an English case,[80] which is this: that it is not illegal for parties to agree to arbitration as a condition precedent to suit, with respect to the mode of settling the amount of damages or the time of paying it or any matters of that kind that do not go to the root of the action, and that if an agreement does not deprive the plaintiff absolutely of his right to sue, but only renders it a condition precedent that the amount to be recovered shall first be ascertained by a committee of arbitrators, such an agreement does not oust the courts of their jurisdiction; and therefore, that where a covenant or agreement creates a condition precedent of this kind, the courts cannot be resorted to for the settlement of the controversy until the condition precedent is fulfilled.[81] Where rights have already accrued

754; Thompson *v.* Charnock, 8 T. R. 139; Kill *v.* Hollister, 1 Wils. C. P. 129.

See 11 Cent. Dig. tit. "Contracts," § 611.

Agreement for trial before referee.—A stipulation in a contract that any action thereon should be tried before a referee is void. Sanford *v.* Commercial Travelers' Mut. Acc. Assoc., 147 N. Y. 326, 41 N. E. 694, 69 N. Y. St. 689 [*affirming* 86 Hun (N. Y.) 380, 33 N. Y. Suppl. 512, 67 N. Y. St. 225, *distinguishing In re* New York, etc., R. Co., 98 N. Y. 447, and *criticizing* Greve *v.* Ætna Live Stock Ins. Co., 81 Hun (N. Y.) 28, 30 N. Y. Suppl. 668, 62 N. Y. St. 566, 1 N. Y. Annot. Cas. 14].

78. Thus in Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 50 N. Y. 250, 258, the court said: "Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned." And in Hood *v.* Hartshorn, 100 Mass. 117, 122, 1 Am. Rep. 89, Chapman, J., said: "Judicial tribunals are provided by the government to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection." This is in line with the remark of Pollock, B., in Dawson *v.* Fitzgerald, 1 Ex. D. 257, 45 L. J. Exch. 893, 35 L. T. Rep. N. S. 220, 24 Wkly. Rep. 773, that "it has been shown, not only by decision, but by the legislation of late years, that the same pious reverence is not felt for litigation in open court that was felt in olden times."

79. Zindorf Const. Co. *v.* Western American Co., 27 Wash. 31, 67 Pac. 374.

80. Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746 [*affirming* 8 Exch. 487, and *followed* in Lowndes *v.* Stamford, 18 Q. B. 425, 16 Jur. 903, 21 L. J. Q. B. 371, 83 E. C. L. 425; Viney *v.* Bignold, 20 Q. B. D. 172, 27 L. J. Q. B. 82, 58 L. T. Rep. N. S. 26, 36 Wkly. Rep. 479; Babbage *v.* Coulburn, 9 Q. B. D. 235, 51 L. J. Q. B. 638, 46 L. T. Rep. N. S. 283, 30 Wkly. Rep. 950 (*affirmed* in 9 Q. B. D. 237 note, 52 L. J. Q. B. 50, 46 L. T. Rep. N. S. 794, 30 Wkly. Rep. 950 note); London Tramways Co. *v.* Bailey, 3 Q. B. D. 217, 47 L. J. M. C. 3, 37 L. T. Rep. N. S. 499, 26 Wkly. Rep. 494; Elliott *v.* Royal Exch. Assur. Co., L. R. 2 Exch. 237, 36 L. J. Exch. 129, 16 L. T. Rep. N. S. 399, 15 Wkly. Rep. 907; Spackman *v.* Plumstead Dist. Bd. of Works, 10 App. Cas. 229, 49 J. P. 420, 54 L. J. M. C. 81, 53 L. T. Rep. N. S. 157, 33 Wkly. Rep. 661; Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 8 Jur. N. S. 506, 31 L. J. Q. B. 17, 5 L. T. Rep. N. S. 550, 101 E. C. L. 782; Scott *v.* Liverpool, 3 De G. & J. 334, 5 Jur. N. S. 105, 28 L. J. Ch. 236, 7 Wkly. Rep. 153, 60 Eng. Ch. 261; Dawson *v.* Fitzgerald, 1 Ex. D. 257, 45 L. J. Exch. 893, 35 L. T. Rep. N. S. 220, 24 Wkly. Rep. 773; Tredwen *v.* Holman, 1 H. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. 389, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652; Horton *v.* Sayer, 4 H. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. 28, 7 Wkly. Rep. 735].

In Canada see Calvin *v.* Provincial Ins. Co., 27 U. C. Q. B. 403.

81. *Alabama.*—Western Assur. Co. *v.* Hall, 112 Ala. 318, 20 So. 447.

California.— Holmes *v.* Ricket, 56 Cal. 307, 38 Am. Rep. 54.

Colorado.— Denver, etc., Constr. Co. *v.* Stout, 8 Colo. 61, 5 Pac. 627.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Illinois.— Niagara F. Ins. Co. *v.* Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47.

Indiana.— Prudential Ins. Co. *v.* Meyers, 15 Ind. App. 339, 44 N. E. 55.

Kansas.— Berry *v.* Carter, 19 Kan. 135.

Maine.— Cushing *v.* Babcock, 38 Me. 452.

Massachusetts.— Hutchinson *v.* Liverpool, etc., Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Thorndike *v.* Wells Memorial Assoc., 146 Mass. 619, 16 N. E. 747; Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572; Haley *v.* Bellamy, 137 Mass. 357; Hood *v.* Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Rowe *v.* Williams, 97 Mass. 163.

the parties may by agreement submit the determination of the same to arbitration.[82]

(5) Limiting Right to Prosecute or Defend Civil Action or Proceeding As public policy is in no way concerned with the option which a man has to sue or to forbear suit, it is universally held that a good consideration may spring from an agreement to refrain from prosecuting a civil claim.[83] But if public interests or the interests of third persons become involved in a mere private controversy the rule is different.[84] Thus it is held that an agreement to withdraw a plea of usury is against public policy and void.[85] And the same is true of divoree pro-

Michigan.— Weggner *v.* Greenstine, 114 Mich. 310, 72 N. W. 170.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New Jersey.— Wolff *v.* Liverpool, etc., Ins. Co., 50 N. J. L. 453, 14 Atl. 561.

New York.— Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 50 N. Y. 250; Hurst *v.* Litchfield, 39 N. Y. 377.

Pennsylvania.— Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80.

South Carolina.— Maxwell *v.* Thompson, 15 S. C. 612.

Wisconsin.— Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405; Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504; Hudson *v.* McCartney, 33 Wis. 331.

United States.— Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. ed. 419; U. S. *v.* Robeson, 9 Pet. 319, 9 L. ed. 142; Gauche *v.* London, etc., Ins. Co., 4 Woods 102, 10 Fed. 347.

See 11 Cent. Dig. tit. "Contracts," § 611; and, generally, Arbitration and Award, 3 Cyc. 595.

Statement of principle.— The principle is best stated by Bramwell, J., who after referring to the fact that in the argument of Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746 [*affirming* 8 Exch. 487], Mr. Manisty and himself were counsel for defendants, said: "We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below and by the House of Lords. That proposition was that if two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then the cause of action does not arise until the third person has so assessed the sum." Elliott *v.* Royal Exch. Assur. Co., L. R. 2 Exch. 237, 36 L. J. Exch. 129, 16 L. T. Rep. N. S. 399, 15 Wkly. Rep. 907. Referring to this, in a late case in the federal court it is said that the cases where an action will lie are here precisely distinguished. Gauche *v.* London, etc., Ins. Co., 4 Woods (U. S.) 102, 10 Fed. 347. The principle was again very well put by Mr. Baron Bramwell in the case of Tredwen *v.* Holman, 1 H. & C. 72, 79, 8 Jur. N. S. 1080, 31 L. J. Exch. 389, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652. He says: "If a tenant covenants that he will cultivate the demised land in a husbandlike manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them." And see Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457.

82. See Arbitration and Award, 3 Cyc. 568.

83. Perryman *v.* Allen, 50 Ala. 573. See *supra*, IV, D, 11.

Forbearance to contest a will is sufficient to support a promise to pay money.

California.— *In re* Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 70, 32 L. R. A. 595.

Illinois.— Hindert *v.* Schneider, 4 Ill. App. 203.

Kentucky.—Gaither *v.* Bland, 7 Ky. L. Rep. 518.

New York.— Palmer *v.* North, 35 Barb. 282.

Vermont.— Barrett *v.* Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876.

84. In an action by materialmen against contractors for building certain houses, it appeared that plaintiffs had previously filed their liens against the houses, but failed, as to a certain part of the claims, to recover on them. Defendants set up as a defense an alleged agreement with plaintiffs that in consideration that defendants would take no defense in the *scire facias* on the lien, plaintiffs would look to the buildings alone. It was held that, as defendants' duty to the owner of the property required them to state and make a defense, the agreement was a fraud on the owner and void as against public policy. Young *v.* Burtman, 1 Phila. (Pa.) 203, 8 Leg. Int. (Pa.) 106. So where a person was obstructing a public street, it was held that an agreement between him and an adjoining owner that the latter would take no steps to prevent such obstruction was void. Amestoy *v.* Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550.

85. Clark *v.* Spencer, 14 Kan. 398, 19 Am. Rep. 96; Mellon's Appeal, (Pa. 1886) 7 Atl. 201. See Usury.

ceedings, which are "triangular actions of tort" the state being the third party. Hence an agreement that the defendant in an action for divorce shall withdraw his or her papers and make no defense has been held illegal and void.[86] And so it has been held of agreements not to set up any defense to an action for royalties under a patent contesting in any way its validity,[87] and of agreements to prevent proceedings which have been commenced by or against a bankrupt or insolvent, or to prevent his discharge, under the bankruptcy or insolvency laws.[88]

(6) CHAMPERTY AND MAINTENANCE. At common law agreements involving maintenance, which is an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it; or champerty, which is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it, are illegal as contrary to public policy, because of their tendency to encourage litigation; but this doctrine is not now recognized to the full extent in all jurisdictions.[89]

(III) *INJURY TO, OR VIOLATION OF, LAWS OF FOREIGN STATE.* An agreement is illegal as contrary to public policy where its object or tendency is to injure the state in its relation with foreign states.[90] This is true not only of dealings with a hostile state, as in the case of contracts with an alien enemy,[91] but also of hostile dealings with a friendly state,[92] as in the case of agreements whose object is the fomenting or aiding of a rebellion in a foreign state,[93] or agreements

86. *California.*— Loveren *v.* Loveren, 106 Cal. 509, 39 Pac. 801.

Colorado.— Smutzer *v.* Stimson, 9 Colo. App. 326, 48 Pac. 314.

Illinois.— Hamilton *v.* Hamilton, 89 Ill. 349.

New Hampshire.— Sayles *v.* Sayles, 21 N. H. 312, 53 Am. Dec. 208.

Ohio.—Stoutenburg *v.* Lybrand, 13 Ohio St. 228.

Oregon.— Phillips *v.* Thorp, 10 Oreg. 494.

Pennsylvania.— Kilborn *v.* Field, 78 Pa. St. 194.

But see Adams *v.* Adams, 91 N. Y. 381, 43 Am. Rep. 675.

87. Pope Mfg. Co. *v.* Gormully, etc., Mfg. Co., 144 U. S. 224, 238, 12 S. Ct. 632, 637, 36 L. ed. 414, 419. But see Philadelphia Creamery Supply Co. *v.* Davis, etc., Bldg., etc., Mfg. Co., 77 Fed. 879; Dunham *v.* Bent, 72 Fed. 60.

88. *Georgia.*— Austin *v.* Markham, 44 Ga. 161.

Illinois.— Paton *v.* Stewart, 78 Ill. 481; Thimming *v.* Miller, 13 Ill. App. 595.

Louisiana.— Leggett *v.* Peet, 1 La. 288; Slidell *v.* Pritchard, 5 Rob. 101; Robinson *v.* His Creditors, 1 Rob. 452.

Maine.— Marble *v.* Grant, 73 Me. 423.

Massachusetts.— Blasdel *v.* Fowle, 120 Mass. 447, 21 Am. Rep. 533; Dexter *v.* Snow, 12 Cush. 594, 59 Am. Dec. 206; Case *v.* Gerrish, 15 Pick. 49.

Mississippi.—Rice *v.* Maxwell, 13 Sm. & M. 289, 53 Am. Dec. 85.

New Jersey.— Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479.

New York.— Bell *v.* Leggett, 7 N. Y. 176 [*reversing* 2 Sandf. 450]; Tuxbury *v.* Miller, 19 Johns. 311; Wiggin *v.* Bush, 12 Johns. 306, 7 Am. Dec. 324; Yeomans *v.* Chatterton, 9 Johns. 295, 6 Am. Dec. 277; Bruce *v.* Lee, 4 Johns. 410; Waite *v.* Harper, 2 Johns. 386; Payne *v.* Eden, 3 Cai. 213. But see Repplier *v.* Bloodgood, 1 Sweeny 34.

Pennsylvania.— Simons *v.* West, 2 Miles 196; Baker *v.* Matlack, 1 Ashm. 68.

Wisconsin.— Fulton *v.* Day, 63 Wis. 112, 23 N. W. 99.

Compare Sanford *v.* Huxford, 32 Mich. 313, 20 Am. Rep. 647.

See 11 Cent. Dig. tit. "Contracts," § 523; and, generally, BANKRUPTCY, 5 Cyc. 227; INSOLVENCY.

Before proceedings in bankruptcy have been commenced, a creditor may take from a third person a contract, covenant, or security for the payment of money, as an inducement to forbear instituting proceedings in bankruptcy against his debtor, without violating any provision of the Bankruptcy Act or contravening public policy. Ecker *v.* Bohn, 45 Md. 278.

89. See CHAMPERTY AND MAINTENANCE, 6 Cyc. 847.

90. Anson Contr. 197.

91. See *supra*, VII, B, 2, (II).

92. Anson Contr. 197, 198.

93. Kennett *v.* Chambers, 14 How. (U. S.) 38, 14 L. ed. 316 (holding that a contract made in Cincinnati after Texas had declared itself independent, but before its independence was acknowledged by the United States, whereby the complainants agreed to furnish and did furnish money to a general in the Texan army to enable him to raise and equip troops to be employed against Mexico, was illegal and void, and would not be enforced in a court of the United States); De Wütz *v.* Hendricks, 2 Bing. 314, 9 Moore C. P. 586, 9 E. C. L. 314 (holding that it was illegal to raise loans in England for subjects in arms against a foreign government in amity with the government of England). *Compare,*

whose object is unlawful privateering against the commerce of a foreign power.[94] This rule does not apply, however, so as to render it illegal for a neutral to engage in a contraband trade, even though the adventure may contemplate blockade-running; but such trade is done at the risk of seizure, of which the neutral trader or his government cannot complain.[95] An agreement is illegal as being contrary to public policy if its object or necessary effect is to violate the laws (except, in some jurisdictions, the revenue laws) of a foreign friendly country or a sister state.[96]

(IV) *AIDING PUBLIC ENEMY.* As has been already stated all agreements with alien enemies are illegal and void as contrary to a rule of the common law prohibiting intercourse between a subject and an alien enemy.[97] In the same class are agreements in aid of the public enemy.[98]

(V) *AGREEMENTS AGAINST GOOD MORALS.* The only aspect of immorality with which courts of law have dealt on the ground of public policy is sexual immorality.[99] A promise in consideration of future illicit cohabitation is given upon an immoral consideration and is void whether made by parol or under seal.[1]

however, Bailey *v.* Belmont, 10 Abb. Pr. N. S. (N. Y.) 270, holding that moneys might be lawfully subscribed in the United States to be used in Ireland to aid it in a revolutionary struggle against England, provided there was no violation of the neutrality laws.

94. Pond *v.* Smith, 4 Conn. 297.

95. Pollock Contr. 284. See Pond *v.* Smith, 4 Conn. 297; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454; *Ex p.* Chavasse, 4 De G. J. & S. 655, 11 Jur. N. S. 400, 34 L. J. Bankr. 17, 12 L. T. Rep. N. S. 249, 13 Wkly. Rep. 627, 69 Eng. Ch. 501. See also INTERNATIONAL LAW. *Compare* Gray *v.* Sims, 3 Wash. (U. S.) 276, 10 Fed. Cas. No. 5,729, holding that if the trade in which a vessel is to be engaged during the voyage be contrary to the laws of the country or the law of nations, a policy upon the ship, equally with one on the cargo, the peculiar subject of interdiction, is void.

96. Graves *v.* Johnson, 156 Mass. 211, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834. See *infra*, XI, B, 9.

97. See *supra*, VII, B, 2, b, (II).

98. See WAR.

99. Moral turpitude is not enough to invalidate an agreement. Nevins *v.* Chapman, 15 La. Ann. 353; Moore *v.* Remington, 34 Barb. (N. Y.) 427; Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256. See Denton *v.* English, 3 Brev. (S. C.) 147.

Immoral show.— An action will lie for the breach of a contract to perform at a theater as a "burlesque opera bouffe artist," even though the evidence is that such performance requires the artist to "show her limbs in silk stockings" for "while it is tolerated by law and patronized openly and freely by the public, the court can not arbitrarily outlaw those who earn a livelihood in that way." Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397.

1. *Alabama.*— Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748; Walker *v.* Gregory, 36 Ala. 180.

Delaware.— Walraven *v.* Jones, 1 Houst. 355.

Kentucky.— Winebrinn *v.* Weisiger, 3 T. B. Mon. 32.

Louisiana.— Cole *v.* Cole, 7 Mart. N. S. 414.

South Carolina.— Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937; Sherman *v.* Barrett, 1 McMull. 147; Elders *v.* Vauters, 4 Desauss. 155.

See 11 Cent. Dig. tit. "Contracts," § 514.

A promise to marry a woman in consideration of her allowing the promisor to have sexual connection with her before marriage is illegal and void.

California.— Boigneres *v.* Boulon, 54 Cal. 146; Hanks *v.* Naglee, 54 Cal. 51, 35 Am. Rep. 67.

Illinois.— Wallace *v.* Rappleye, 103 Ill. 229.

Indiana.— Wilson *v.* Ensworth, 85 Ind. 399; Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Saxon *v.* Wood, 4 Ind. App. 242, 30 N. E. 797.

Maine.— Brown *v.* Tuttle, 80 Me. 162, 13 Atl. 583.

Maryland.— De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

New York.— Steinfeld *v.* Levy, 16 Abb. Pr. N. S. 26; Trovinger *v.* McBurney, 5 Cow. 253 (holding illegal and void an agreement to board a bastard and its mother, the father to be allowed to continue the illicit intercourse).

Ohio.— Forsythe *v.* State, 6 Ohio 19.

Pennsylvania.— Baldy *v.* Stratton, 11 Pa. St. 316.

Tennessee.— Goodal *v.* Thurman, 1 Head 209.

England.— Averst *v.* Jenkins, L. R. 16 Eq. 275, 42 L. J. Ch. 690, 29 L. T. Rep. N. S. 126, 21 Wkly. Rep. 878; Walker *v.* Perkins, 3 Burr. 1568, 1 W. Bl. 517.

Illicit intercourse not entering into consideration.— In Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275, where a man promised to marry a woman in September or October if they could agree and get along and be true

And the same is true of all agreements which are based upon, as a consideration, or which contemplate present or future illicit cohabitation or prostitution.[2] If the object of the agreement be to induce immorality, no technical nicety in the instrument, or stipulation of moneyed consideration, or form of deed or writing can give it validity. Such agreements are void *in toto*.[3] A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous promise in reparation of the wrong, valid at common law if made under seal, but otherwise unenforceable because lacking a real consideration.[4]

to each other; and that if she became pregnant from their intercourse, he would marry her immediately, and she became pregnant in July but he then refused to marry her, it was held that the illicit intercourse did not enter into the promise as a consideration, and that an action would lie for its breach.

Recovery for labor or services.— The law will not imply any promise to pay for services rendered by one living as housekeepeer and mistress of the defendant. Walraven *v.* Jones, 1 Houst. (Del.) 355; McDonald *v.* Fleming, 12 B. Mon. (Ky.) 285. But see Robbins *v.* Potter, 98 Mass. 532. But an illegal cohabitation between a man and a woman does not preclude a recovery for work and labor done by her for him under an express contract. Rhodes *v.* Stone, 17 N. Y. Suppl. 561, 44 N. Y. St. 17.

Living together under void marriage.— An agreement by a husband to give a wife certain furniture if she would continue to live with him is illegal and void, where it appears that at the time they were married the wife knew that the husband had a former wife living, from whom there is no evidence of a divorce, and that they went to another state to have the ceremony performed. Tyrrell *v.* York, 57 Hun (N. Y.) 292, 10 N. Y. Suppl. 611, 32 N. Y. St. 368.

Promise to make will.— A promise by a man who has connection with a married woman, who threatens him with prosecution, that he will make a will in favor of her and her child is illegal and void. Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595.

2. *Colorado.*— Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823.

Massachusetts.— Adams *v.* Coulliard, 102 Mass. 167.

Michigan.— Case *v.* Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341, 31 L. R. A. 282, holding void a promise to pay money in consideration that one would conceal the fact of the promisor's criminal intimacy with a certain woman.

Texas.— Reed *v.* Brewer, (Civ. App. 1896) 36 S. W. 99, holding that where plaintiff with full knowledge of the facts sold furniture for use in a house of prostitution, under a contract providing for monthly payments, and that the purchaser should use the furniture in her house, the title to remain in the seller until the price should be paid, the contract was illegal and void, and that notes given for the price were void as based on an immoral consideration.

United States.— Rice *v.* Williams, 32 Fed. 437 (holding void a contract by an advertising solicitor to sell to a specialist letters written by persons afflicted with diseases to another person who advertised articles and instruments that it was claimed would cure them, in order that such specialist might send his advertisements to them); Mackabee *v.* Griffith, 2 Cranch C. C. 336, 15 Fed. Cas. No. 8,660 (holding that a woman who keeps prostitutes for gain cannot recover for their board and lodging); Holmead *v.* Maddox, 2 Cranch C. C. 161, 12 Fed. Cas. No. 6,629.

England.— Pearce *v.* Brooks, L. R. 1 Exch. 213, 12 Jur. N. S. 342, 35 L. J. Exch. 134, 14 L. T. Rep. N. S. 288, 14 Wkly. Rep. 614.

See 11 Cent. Dig. tit. "Contracts," § 512 *et seq.*

Lease of bawdy-house.— No rent can be recovered under a lease of premises to be used, with the knowledge of the lessor, as a bawdy-house; nor can there be a recovery for use and occupation.

Colorado.— Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823.

Georgia.— Ralston *v.* Boady, 20 Ga. 449.

Louisiana.— Kathman *v.* Walters, 22 La. Ann. 54.

Missouri.— Ashbrook *v.* Dale, 27 Mo. App. 649.

Texas.— Hunstock *v.* Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294. And see Reed *v.* Brewer, (Civ. App. 1896) 36 S. W. 99.

United States.— Holmead *v.* Maddox, 2 Cranch C. C. 161, 12 Fed. Cas. No. 6,629, holding that the owner of a race-field, who knowingly lets it for the purpose of public races, and for booths and stands for the accommodation of licentious persons for the purpose of gross immorality and debauchery, cannot recover the rent.

England.— Pearce *v.* Brooks, L. R. 1 Exch. 213, 12 Jur. N. S. 342, 35 L. J. Exch. 134, 14 L. T. Rep. N. S. 288, 14 Wkly. Rep. 614.

See 11 Cent. Dig. tit. "Contracts," § 513½.

3. See cases cited note 2, *supra.*

4. *Alabama.*— Hill *v.* Freeman, 73 Ala. 200, 49 Am. Rep. 48; Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748.

Illinois.— Wallace *v.* Rappleye, 103 Ill. 229; Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595.

New York.— Bunn *v.* Winthrop, 1 Johns. Ch. 329.

North Carolina.— Brown *v.* Kinsey, 81 N. C. 245.

Pennsylvania.— Wyant *v.* Lesher, 23 Pa. St. 338.

(VI) *AGREEMENTS AFFECTING MARITAL RELATIONS* — (A) *Restraint of Marriage.* A class of agreements which are frequently held invalid on the ground of public policy are agreements affecting marital relations. Chief among these are agreements in restraint of marriage. Restrictions on marriage are contrary to public policy, and therefore agreements or conditions creating or involving such restrictions are illegal and void.[5] Thus where a man agreed to pay a woman a certain sum of money if he married any one but her, the agreement was held void.[6] And so it has been held of a contract or wager by a person that he will not marry within a certain number of years,[7] and of a marriage benefit certificate which was in fact an agreement to pay a sum of money to another on condition that the payee should not marry within a certain time, and if he should, then to pay a certain sum per day during the time he should remain unmarried.[8]

(B) *Marriage Brokage Contracts.* Contracts by which one person agrees to give another a compensation if he will negotiate or procure an advantageous

South Carolina.— Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937; Singleton *v.* Bremar, Harp. 201.

United States.— Conley *v.* Nailor, 118 U. S. 127, 6 S. Ct. 1001, 30 L. ed. 112.

England.— Beaumont *v.* Reeve, 8 Q. B. 483, 10 Jur. 284, 15 L. J. Q. B. 141, 55 E. C. L. 483; Gray *v.* Mathias, 5 Ves. Jr. 286, 5 Rev. Rep. 48.

Past consideration see *supra*, IV, D, 14.

There are cases to the contrary resting it would seem on sentimental considerations rather than on legal principles.

Connecticut.— Smith *v.* Richards, 29 Conn. 232.

Georgia.— Smith *v.* Du Bose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260.

Kentucky.— Burgen *v.* Straughan, 7 J. J. Marsh. 583.

New York.— People *v.* Hayes, 70 Hun 111, 24 N. Y. Suppl. 194, 54 N. Y. St. 184; Hotchkins *v.* Hodge, 38 Barb. 117.

Pennsylvania.— Maurer *v.* Mitchell, 9 Watts & S. 69; Shenk *v.* Mingle, 13 Serg. & R. 29.

South Carolina.— Cusack *v.* White, 2 Mill 279, 12 Am. Dec. 669.

Tennessee.— Bivins *v.* Jarnigan, 3 Baxt. 282.

England.— In Priest *v.* Parrot, 2 Ves. 160, 28 Eng. Reprint 103, Lord Hardwicke refused to sustain even a deed to secure an annuity given by a married man to a female servant in his family who had been living in adultery with him. But his decision is criticized by Leach, V. C., in Knye *v.* Morre, 1 L. J. Ch. O. S. 18, 1 Sim. & St. 61, 1 Eng. Ch. 61.

On settlement of an action for criminal conversation, a contract to pay damages agreed on is not immoral, as being based on the consideration of past illicit intercourse with plaintiff's wife. Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.

5. *Indiana.*— Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586.

Maryland.— Bostick *v.* Blades, 59 Md. 231, 43 Am. Rep. 548; Waters *v.* Tazewell, 9 Md. 291.

New Jersey.— Sterling *v.* Sinnickson, 5 N. J. L. 756.

New York.— Hogan *v.* Curtin, 88 N. Y. 162, 42 Am. Rep. 244; Conrad *v.* Williams, 6 Hill 444.

Virginia.— Maddox *v.* Maddox, 11 Gratt. 804.

Agreements held not in restraint of marriage.— It has been held that the rule does not apply to a contract by which a husband agrees to pay his divorced wife forty-five dollars a month for her support "for so long a time as she does not marry again," such a contract not being a restraint of marriage nor against public policy (Jones *v.* Jones, 1 Colo. App. 28, 27 Pac. 85); to promises of members of a society of Shakers not to marry while they continue members (Waite *v.* Merrill, 4 Me. 102, 16 Am. Dec. 238); or to a deed giving personal leasehold property to the grantor's sisters for life as tenants in common, and to the survivor for life "or so long as they both shall remain unmarried; and from and after the marriage of either of them, then unto the one remaining unmarried so long as she shall live, and no longer" (Arthur *v.* Cole, 56 Md. 100, 40 Am. Rep. 409). See also Shafer *v.* Senseman, 125 Pa. St. 310, 17 Atl. 350, where plaintiff and his wife, who were residing with the wife's father, had made arrangements to remove to another place on account of the contemplated remarriage of the father, and the father, with the apparent object of retaining the society of his daughter, executed an obligation to plaintiff payable a certain length of time after the date when plaintiff should lose the situation he was then filling, provided he lost it before the second marriage of the father or the death of the daughter. It was held that the obligation was not void as in restraint of marriage.

6. Lowe *v.* Peers, 4 Burr. 2225. And see Conrad *v.* Williams, 6 Hill (N. Y.) 444.

7. Hartley *v.* Rice, 10 East 22, 10 Rev. Rep. 228; Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586. See Shafer *v.* Senseman, 125 Pa. St. 310, 17 Atl. 350.

8. Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586. And see White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325; James *v.* Jellison, 94 Ind. 292, 48 Am. Rep. 151.

marriage for him are contrary to public policy and void.[9] So a promise by a person to pay another for services to be rendered in procuring a wife for him is void.[10]

(c) *Agreements to Dissolve Marital Relations.* If the object of a contract is to divorce man and wife the agreement is against public policy and void.[11] The reason of the repugnance with which the law views all contracts with the purpose of dissolving the marriage relation may be found in its regard for virtue, the good order of society, the welfare of the children as the fruit of the marriage, and the sacred character of the conjugal relation. It will not suffer husband and wife to dissolve of their own accord a contract which is in its nature indissoluble except so far as the legislative will has allowed it, and then only by the method authorized. To induce a wife to sue for a divorce by a promise on the part of the husband to remunerate her for it, or for a husband and wife to agree that one of them shall bring a suit for a divorce and the other shall not defend, is against the law which recognizes and upholds the sanctity of marriage and is void.[12] The same is true of an agreement after a divorce has been granted

9. *California.*— Morrison *v.* Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.
New Hampshire.— Weeks *v.* Hill, 38 N. H. 199.
New York.—Duval *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964; Crawford *v.* Russell, 62 Barb. 92.
North Carolina.— Overman *v.* Clemmons, 19 N. C. 185.
England.— Drury *v.* Hooke, 2 Ch. Cas. 176, 1 Vern. 442.
Setting aside conveyance or mortgage.— Where a husband conveyed a house and lot to his wife, and she mortgaged the same to an agent in consideration of his services in procuring her marriage, and in accordance with an agreement entered into with him before her marriage, it was held that the husband could have the property restored to him freed from the lien of the mortgage, the contract being void as against public policy, and the wife not objecting to the reconveyance. Place *v.* Conklin, 23 Misc. (N. Y.) 40, 51 N. Y. Suppl. 407.

10. Johnson *v.* Hunt, 81 Ky. 321.

11. Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724; Cross *v.* Cross, 58 N. H. 373; Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L. R. A. 292.

12. *Arkansas.*— Viser *v.* Bertrand, 14 Ark. 267.
California.— Loveren *v.* Loveren, 106 Cal. 509, 39 Pac. 801.
Illinois.— Hamilton *v.* Hamilton, 89 Ill. 349.
Indiana.— Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; Everhart *v.* Puckett, 73 Ind. 409; Muckenburg *v.* Holler, 29 Ind. 139, 92 Am. Dec. 345.
Kansas.—Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191.
Minnesota.— Adams *v.* Adams, 25 Minn. 72; Belden *v.* Munger, 5 Minn. 211, 80 Am. Dec. 407.
Missouri.— Blank *v.* Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350.
Nebraska.— Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724.
New Hampshire.— Cross *v.* Cross, 58 N. H. 373; Weeks *v.* Hill, 38 N. H. 199; Sayles *v.* Sayles, 21 N. H. 312, 53 Am. Dec. 208.
New York.— Armstrong *v.* Armstrong, 1 N. Y. St. 529.
Ohio.— Stoutenburg *v.* Lybrand, 13 Ohio St. 228.
Oregon.— Phillips *v.* Thorp, 10 Oreg. 494.
Pennsylvania.— Kilborn *v.* Field, 78 Pa. St. 194.
See 11 Cent. Dig. tit. "Contracts," § 517 *et seq.*
Illustration.— Where husband and wife, having agreed to separate, mutually covenanted that he would secure a separate maintenance to her through the intervention of trustees and that she should be no further chargeable to him; that he would furnish money and testimony for the purpose of securing a divorce, for which there was ground; and that she would pursue the proper means to procure one, all of which should be under his direction, it was held that the agreement was illegal and void. Goodwin *v.* Goodwin, 4 Day (Conn.) 343; Sampson *v.* Cresson, 6 Phila. (Pa.) 229, 24 Leg. Int. (Pa.) 132. Such agreements are also void as a fraud on the courts of justice. See *supra*, VII, B, 3, f, (II), (I).
Promise in consideration of condoning adultery.—A promise by a husband to pay money to his wife in consideration of her condoning an act of adultery committed by him is void as against public policy and cannot be enforced. Van Order *v.* Van Order, 8 Hun (N. Y.) 315.
Agreements held valid.— An agreement between parties to a divorce, declaring the terms upon which a divorce may be decreed, does not necessarily show connivance or collusion and is not illegal where no fraud is intended to be practised upon the court and no facts are suppressed. Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604. An agreement by a wife who has separated from her husband that she will not assign any other cause for a divorce than desertion in any action that she may bring against her husband is not

that the husband will pay the wife money if she will not move for a new trial,[13] or where the divorce has been wrongfully granted, that the parties will not disturb it.[14] And an agreement not to sue or make claim for alimony has been held void.[15] A promise to marry made by a man already married, to take effect when he has obtained a divorce from his present wife, is illegal and void.[16]

(D) *Agreements For Separation.* It seems that according to the early common law of England any agreement whose object was the separation of man and wife was void as against the policy of the law, which would not permit husband and wife to dissolve in any respect a contract which is indissoluble at the will of the parties.[17] Some American cases still adhere to this rule in all its strictness,[18] but the later English cases,[19] as well as the great majority of the American

unlawful. Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L. R. A. 292.

13. Blank *v.* Nohl, 112 Mo. 159, 19 S. W. 65, 20 S. W. 477, 18 L. R. A. 350.

14. Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191.

15. Seeley's Appeal, 56 Conn. 202, 14 Atl. 291; Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628.

Agreement pending suit for divorce.— Any agreement as to alimony between the parties pending the suit for divorce is open to suspicion. Adams *v.* Adams, 25 Minn. 72; Speck *v.* Dausman, 7 Mo. App. 165; Daggett *v.* Daggett, 5 Paige (N. Y.) 509, 28 Am. Dec. 442. See DIVORCE.

A contract in settlement of a claim for alimony is valid if there be no collusion to procure a divorce. Badger *v.* Hatch, 71 Me. 562; Burnett *v.* Paine, 62 Me. 122. See Nieukirk *v.* Nieukirk, 84 Iowa 367, 51 N. W. 10. And see DIVORCE.

16. Noice *v.* Brown, 38 N. J. L. 228, 20 Am. Rep. 388 [*affirmed* in 39 N. J. L. 133, 23 Am. Rep. 213].

17. In the ecclesiastical courts, which had sole jurisdiction in England of causes concerning marriage and the marital status, up to the time of their abolition, it was always the rule that separation agreements were void. Barlee *v.* Barlee, 1 Add. Eccl. 301; Mortimer *v.* Mortimer, 2 Hagg. Cons. 310; Nash *v.* Nash, 1 Hagg. Cons. 140; Smith *v.* Smith, 2 Hagg. Eccl. Suppl. 44, note *a*; Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1. And the courts of equity took the same view of such agreements. Wilkes *v.* Wilkes, 2 Dick. 791; St. John *v.* St. John, 11 Ves. Jr. 526. And see Foote *v.* Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554, where the English cases on the subject are exhaustively reviewed.

18. *Connecticut.*— See Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Kentucky.— McCrocklin *v.* McCrocklin, 2 B. Mon. 370; Simpson *v.* Simpson, 4 Dana 140.

New Hampshire.— Foote *v.* Nickerson, 70 N. H. 496, 497, 48 Atl. 1088, 54 L. R. A. 554. In this case the opinion of the court contains an exhaustive review of the history of the subject and of the decided cases both in England and the United States, and it is said: "It may fairly be said that the question is not settled by the decisions in this state. It has been touched upon incidentally, but in no case has it been directly involved. It therefore becomes necessary to examine the law on the subject elsewhere. Turning to other jurisdictions, it will be found that the question has been the subject of much litigation, and with varied results. Not only do the cases in one state conflict with those in other states, but in the same jurisdiction the views of one generation have often been held to be erroneous in later times. There is disagreement not only as to what the law is, and what the policy on this subject should be, but also as to the history of the law, and how it was held to be in former times."

North Carolina.— Collins *v.* Collins, 62 N. C. 153, 93 Am. Dec. 606.

Ohio.—Mansfield *v.* Mansfield, Wright 284.

Pennsylvania.— McKennan *v.* Phillips, 6 Whart. 571, 37 Am. Dec. 438.

Appointment of trustee.— Some of the earlier cases, both English and American, recognized the separation agreement as valid only when a trustee was appointed by the agreement, so that it could be enforced by or against a third person acting in behalf of the wife. Simpson *v.* Simpson, 4 Dana (Ky.) 140; Stephenson *v.* Osborne, 41 Miss. 119, 90 Am. Dec. 358; Carter *v.* Carter, 14 Sm. & M. (Miss.) 59; Clark *v.* Fosdick, 13 Daly (N. Y.) 500; Dupre *v.* Rein, 7 Abb. N. Cas. (N. Y.) 256; Allen *v.* Affleck, 64 How. Pr. (N. Y.) 380; Rogers *v.* Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; Caeson *v.* Murray, 3 Paige (N. Y.) 483; Beetle *v.* Wilson, 14 Ohio 257. But this distinction has now little weight.

Indiana.— Dutton *v.* Dutton, 30 Ind. 452.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Ohio.— Garver *v.* Miller, 16 Ohio St. 527; Thomas *v.* Brown, 10 Ohio St. 247.

Pennsylvania.— Hutton *v.* Hutton, 3 Pa. St. 100.

England.— McGregor *v.* McGregor, 20 Q. B. D. 529; Hunt *v.* Hunt, 4 De G. F. & J. 221, 31 L. J. Ch. 161, 65 Eng. Ch. 171; Wilson *v.* Wilson, 1 H. L. Cas. 538, 12 Jur. 467.

19. McGregor *v.* McGregor, 20 Q. B. D. 529; Sanders *v.* Rodway, 16 Beav. 207, 16 Jur. 1005; Besant *v.* Wood, 12 Ch. D. 605, 40 L. T. Rep. N. S. 445; Hunt *v.* Hunt, 4 De G. F. & J. 221, 31 L. J. Ch. 161, 65 Eng. Ch. 171; Cartwright *v.* Cartwright, 3 De G.

decisions,[20] distinguish between agreements for future and agreements for immediate separation, holding that agreements for separation of husband and wife are valid if made in prospect of an immediate separation, but illegal if they provide for a possible separation in the future; and it is immaterial whether they are made before or after marriage.[21] "The distinction rests on the following ground:

M. & G. 982, 17 Jur. 584, 22 L. J. Ch. 841, 52 Eng. Ch. 762; Westmeath *v.* Westmeath, 1 Dow. & C. 519, 6 Eng. Reprint 619; Wilson *v.* Wilson, 1 H. L. Cas. 588, 12 Jur. 467; Marshall *v.* Marshall, 48 L. J. P. 49, 39 L. T. Rep. N. S. 640, 5 P. D. 19, 27 Wkly. Rep. 399.

20. *California.*— Joyce *v.* McAvoy, 31 Cal. 273, 89 Am. Dec. 172; Wells *v.* Stout, 9 Cal. 479.

Connecticut.— Boland *v.* O'Neil, 72 Conn. 217, 44 Atl. 15; Deming *v.* Williams, 26 Conn. 226, 68 Am. Dec. 386; Nichols *v.* Palmer, 5 Day 47.

Georgia.— Chapman *v.* Gray, 8 Ga. 341.

Indiana.— Stokes *v.* Anderson, 118 Ind. 523, 21 N. E. 331, 4 L. R. A. 313; Dutton *v.* Dutton, 30 Ind. 452; Reed *v.* Beazley, 1 Blackf. 97.

Iowa.— McKee *v.* Reynolds, 26 Iowa 578; Robertson *v.* Robertson, 25 Iowa 350.

Kentucky.— Loud *v.* Loud, 4 Bush 453; Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Maine.— Carey *v.* Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113.

Maryland.—McCubbin *v.* Patterson, 16 Md. 179; Brown *v.* Brown, 5 Gill 249; Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402.

Massachusetts.—Grime *v.* Borden, 166 Mass. 198, 44 N. E. 216; Fox *v.* Davis, 113 Mass. 255, 18 Am. Rep. 476.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Minnesota.—Adams *v.* Adams, 25 Minn. 72.

New York.— Duryea *v.* Bliven, 122 N. Y. 567, 25 N. E. 908, 34 N. Y. St. 205; Clark *v.* Fosdick, 118 N. Y. 7, 22 N. E. 1111, 27 N. Y. St. 750, 16 Am. St. Rep. 733, 6 L. R. A. 132; Galusha *v.* Galusha, 116 N. Y. 635, 22 N. E. 1114, 27 N. Y. St. 738, 15 Am. St. Rep. 453, 6 L. R. A. 487; Tallinger *v.* Mandeville, 113 N. Y. 427, 21 N. E. 125, 22 N. Y. St. 708; Pettit *v.* Pettit, 107 N. Y. 677, 14 N. E. 500; Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823; Griffin *v.* Banks, 37 N. Y. 621; Magee *v.* Magee, 67 Barb. 487; Dupre *v.* Rein, 56 How. Pr. 228; Beach *v.* Beach, 2 Hill 260, 38 Am. Dec. 584.

North Carolina.— Barnes *v.* Barnes, 104 N. C. 613, 10 S. E. 304; Sparks *v.* Sparks, 94 N. C. 527.

Ohio.— Bettle *v.* Wilson, 14 Ohio 257.

Oregon.— Jenkins *v.* Hall, 26 Oreg. 79, 37 Pac. 62; Phillips *v.* Thorp, 10 Oreg. 494.

Pennsylvania.— Com. *v.* Richards, 131 Pa. St. 209, 18 Atl. 1007; Agnew's Appeal, (1888) 12 Atl. 160; Hitner's Appeal, 54 Pa. St. 110.

Tennessee.— Goodrich *v.* Bryant, 5 Sneed 325.

Texas.— Rains *v.* Wheeler, 76 Tex. 390, 13 S. W. 324; Walker *v.* Stringfellow, 30 Tex. 570.

Wisconsin.— Baum *v.* Baum, 109 Wis. 47, 85 N. W. 122, 83 Am. St. Rep. 854, 53 L. R. A. 650; Rolette *v.* Rolette, 1 Pinn. 370, 40 Am. Dec. 782.

United States.— Walker *v.* Beal, 9 Wall. 743, 19 L. ed. 814 [*modifying* 3 Cliff. 155, 29 Fed. Cas. No. 17,065].

See HUSBAND AND WIFE.

21. In some of the later American cases the rule is stated thus: While an agreement between husband and wife for immediate separation, immediately followed by separation, is not void at common law, the relations between them at the time it is entered into must be of such a character as that a judicial separation would be decreed for the conduct of one of them or that the separation is reasonably necessary for the health or happiness of one or the other; and that there was a moving cause for it in addition to the mere volition of the parties must be shown by the complaint in an action to enforce provisions therein for division of property. Scherer *v.* Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437; Stebbins *v.* Morris, 19 Mont. 115, 47 Pac. 642, 44 Centr. L. J. 209; Poillon *v.* Poillon, 29 Misc. (N. Y.) 666, 61 N. Y. Suppl. 582.

Equitableness of provision.— In a recent case in New York it is said that it must be borne in mind that a contract between husband and wife is void at law and upheld solely in equity, and then not in every case, but only when the provision for the maintenance of the wife or children is suitable and equitable. Hungerford *v.* Hungerford, 161 N. Y. 550, 56 N. E. 117. And see Poillon *v.* Poillon, 49 N. Y. App. Div. 341, 63 N. Y. Suppl. 301; Whitney *v.* Whitney, 4 N. Y. App. Div. 597, 36 N. Y. Suppl. 891, 72 N. Y. St. 113, 39 N. Y. Suppl. 1136, 73 N. Y. St. 881; Friedman *v.* Bierman, 43 Hun (N. Y.) 387; Dower *v.* Dower, 36 Misc. (N. Y.) 559, 73 N. Y. Suppl. 1080.

Agreements for separate maintenance of the wife are universally held valid in this country.

Arkansas.— Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

Georgia.— McLaren *v.* Bradford, 52 Ga. 648; Chapman *v.* Gray, 8 Ga. 341.

Illinois.— Luttrell *v.* Boggs, 168 Ill. 361, 48 N. E. 171; Phillips *v.* Meyers, 82 Ill. 67, 25 Am. Rep. 295.

Indiana.— Dutton *v.* Dutton, 30 Ind. 452.

Iowa.— Robertson *v.* Robertson, 25 Iowa 350.

Kentucky.— Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Maine.— Carey *v.* Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113.

An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. 'It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.' Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves."[22]

(E) *Agreements to Resume Marital Relations.* An agreement that if a wife will dismiss her suit against the husband for divorce and return and live with him as his wife he will convey to her a certain part of his property is not illegal.[23] And it has been held that where a wife living separate from her husband refuses to return to him except upon the payment of a certain sum, a bond given by the husband for such sum is not void as against public policy.[24]

(F) *Frauds Upon Marital Rights.* Secret and voluntary conveyances made by either man or woman during an engagement of marriage are treated as a fraud on the marital right of the other.[25]

Maryland.— Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402.

Massachusetts.— Fox *v.* Davis, 113 Mass. 255, 18 Am. Rep. 476; Holbrook *v.* Comstock, 16 Gray 109; Page *v.* Trufant, 2 Mass. 159, 3 Am. Dec. 41.

Michigan.— Randall *v.* Randall, 37 Mich. 563.

Minnesota.— Roll *v.* Roll, 51 Minn. 353, 53 N. W. 716.

New Jersey.— Emery *v.* Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541; Aspinwall *v.* Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926.

Ohio.— Garver *v.* Miller, 16 Ohio St. 527.

Oregon.—Henderson *v.* Henderson, 37 Oreg. 141, 60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766.

Pennsylvania.— Hutton *v.* Hutton, 3 Pa. St. 100.

South Carolina.— Buckner *v.* Ruth, 13 Rich. 157.

Tennessee.— Goodrich *v.* Bryant, 5 Sneed 325.

Vermont.— Squires *v.* Squires, 53 Vt. 208, 38 Am. Rep. 668.

United States.— Walker *v.* Beal, 9 Wall. 743, 19 L. ed. 814.

See HUSBAND AND WIFE.

In many of the cases the courts have not distinguished between an agreement for separate maintenance and one in which it is also agreed that the parties shall continue to live apart. See the cases cited *supra*, this note.

22. Pollock Contr. 269 [*citing* H. *v.* W., 3 Kay & J. 382].

23. Adams *v.* Adams, 91 N. Y. 381, 384, 43 Am. Rep. 675, where it was said: "Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." See also Barbour *v.* Barbour, 49 N. J. Eq. 429, 42 Atl. 227; Smith *v.* Smith, 35 Hun (N. Y.) 378; Burkholder's Appeal, 105 Pa. St. 31. *Contra*, Merrill *v.* Peaslee, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334, where such an agreement was held by a divided court to be illegal, Holmes, J., filing a strong dissenting opinion.

24. Kennedy *v.* Howell, 20 Conn. 349. But see *contra*, Copeland *v.* Boaz, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89.

An agreement by a husband to support his wife is not void as against public policy. O'Connell *v.* Noonan, 1 App. Cas. (D. C.) 332; Barnes *v.* Barnes, 104 N. C. 613, 10 S. E. 304; Reamy *v.* Bayley, (Pa. 1887) 11 Atl. 438.

Other agreements.— Where a bond was given to the father of a female, reciting that she had borne an illegitimate child to the obligor, who consented to marry her, and binding the obligor to treat her as a loving and affectionate husband ought, and not to maltreat, abuse, or desert her, it was held that it was not void as against public policy. Wyant *v.* Lesher, 23 Pa. St. 338. But a contract between husband and wife, whereby it was agreed to drop all matters of dispute, to refrain from scolding, fault-finding, and anger, and live together as husband and wife; that the wife should keep her home in a comfortable condition, and that the husband should provide all the necessary expenses of the family and pay the wife in addition a certain sum per month, was held contrary to public policy. Miller *v.* Miller, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431. So where a wife left her husband under the enticement of her mother and lived in the house of another, who stipulated with her husband that he should retain his wife and child and support them, it was held that such a contract was against public policy. Barbee *v.* Armstead, 32 N. C. 530, 51 Am. Dec. 404.

25. See HUSBAND AND WIFE.

(VII) *AGREEMENTS IN RESTRAINT OF TRADE*—(A) *In General.* An agreement in unreasonable restraint of trade is illegal and void,[26] but an agreement in reasonable restraint of trade is valid.[27] The ground upon which agreements and combinations in restraint of trade are held illegal at common law is that they are contrary to public policy.[28] The principal agreements which are discussed in the following sections may be classed under three heads: (1) Agreements by the

26. *California.*— More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186.

Georgia.— Goodman *v.* Henderson, 58 Ga. 567; Holmes *v.* Martin, 10 Ga. 503.

Indiana.— Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Kentucky.— Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 410, 9 Am. St. Rep. 274.

Maryland.— Warfield *v.* Booth, 33 Md. 63; Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164; Davis *v.* Barney, 2 Gill & J. 382.

Massachusetts.— Bishop *v.* Pulmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Alger *v.* Thacher, 19 Pick. 51, 31 Am. Dec. 119.

Missouri.— Peltz *v.* Eichele, 62 Mo. 171; Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355.

New Jersey.— Mandeville *v.* Harman, 42 N. J. Eq. 185, 7 Atl. 37.

New York.— Curtis *v.* Gokey, 68 N. Y. 300; Chappel *v.* Brockway, 21 Wend. 157.

Ohio.— Grassvilli *v.* Lowden, 11 Ohio St. 349; Thomas *v.* Miles, 3 Ohio St. 274; Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.— Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251.

Rhode Island.—Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469.

Wisconsin.— Berlin Mach. Works *v.* Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236.

United States.— Oregon Steam Nav. Co. *v.* Windsor, 20 Wall. 64, 22 L. ed. 315; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15.

England.— Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86; Rousillon *v.* Rousillon, 14 Ch. D. 351, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

27. *Alabama.*— Morris *v.* Tuskaloosa Mfg. Co., 83 Ala. 565, 3 So. 689.

Arkansas.— Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

California.— Lightner *v.* Menzel, 35 Cal. 452.

Connecticut.— Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64.

Georgia.— Jenkins *v.* Temples, 39 Ga. 655, 99 Am. Dec. 482.

Illinois.— Linn *v.* Sigsbee, 67 Ill. 75; Hursen *v.* Gavin, 59 Ill. App. 66 [*affirmed* in 162 Ill. 377, 44 N. E. 735].

Indiana.— McAlister *v.* Howell, 42 Ind. 15; Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348; Bowser *v.* Bliss, 7 Blackf. 344, 43 Am. Dec. 93.

Iowa.—Arnold *v.* Kreutzer, 67 Iowa 214, 25 N. W. 138; Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267; Hedge *v.* Lowe, 47 Iowa 137.

Kansas.— Roller *v.* Ott, 14 Kan. 609.

Kentucky.— Sutton *v.* Jead, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274; Turner *v.* Johnson, 7 Dana 435.

Louisiana.— Wintz *v.* Vogt, 3 La. Ann. 16.

Massachusetts.— Hanforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Dwight *v.* Hamilton, 113 Mass. 175; Angier *v.* Webber, 14 Allen 211.

Michigan.— Timmerman *v.* Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

Minnesota.— National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437.

Missouri.— Skrainka *v.* Scharringhausen, 8 Mo. App. 522.

Montana.— Newell *v.* Meyendorff, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738, 8 L. R. A. 440.

New Hampshire.—Perkins *v.* Clay, 54 N. H. 518.

New Jersey.— Hoagland *v.* Segur, 38 N. J. L. 230; Carll *v.* Snyder, (1893) 26 Atl. 977; Finger *v.* Hahn, 42 N. J. Eq. 606, 8 Atl. 654.

New York.— Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 [*affirming* 35 Hun 421]; Davies *v.* Racer, 72 Hun 43, 25 N. Y. Suppl. 293, 55 N. Y. St. 191.

North Carolina.— Baumgarten *v.* Broadaway, 77 N. C. 8.

Pennsylvania.— Fuller *v.* Hope, 163 Pa. St. 62, 29 Atl. 779; Gompers *v.* Rochester, 56 Pa. St. 194.

Rhode Island.—Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 23 Am. St. Rep. 850, 8 L. R. A. 469; French *v.* Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

Wisconsin.— Washburne *v.* Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873.

United States.— Carter *v.* Alling, 43 Fed. 208.

England.— Horner *v.* Graves, 7 Bing. 735, 9 L. J. C. P. O. S. 192, 20 E. C. L. 326; Badische Anilin *v.* Schott, [1892] 3 Ch. 447, 61 L. J. Ch. 698, 67 L. T. Rep. N. S. 281; Rousillon *v.* Rousillon, 14 Ch. D. 351, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623.

See 11 Cent. Dig. tit. "Contracts," § 555 *et seq.*

28. Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15; and other cases above cited. It was said in a leading

seller of a calling, whether a business, a profession, or a trade, not to compete with the buyer;[29] (2) agreements by a partner or retiring partner not to compete with the firm;[30] (3) agreements by a servant, agent, or employee not to compete with his master, principal, or employer after his term of service or employment is over.[31] Still an agreement in restraint of trade need not fall within these divisions to be valid; for a contract not to engage in a certain business, although unaccompanied by the sale of any business plant or stock, is not necessarily void as being in restraint of trade.[32] Combinations among manufacturers, traders, and others engaged in various callings for the purpose of fixing prices or regulating or restricting sales or the output of factories, etc., are elsewhere treated.[33]

Massachusetts case: "The unreasonableness of contracts in restraint of trade and business, is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such person to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly." Alger *v.* Thacher, 19 Pick. (Mass.) 51, 54, 31 Am. Dec. 119. The second and fifth of these reasons, it is said by Pollock, are the really efficient ones, both in themselves and as a matter of history. Pollock Contr. 312.

29. No restraint of trade is implied by the mere sale of the good-will of a business. Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

30. A partner may bind himself absolutely not to compete with the firm during the partnership or after. Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 354; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385; Dolph *v.* Troy Laundry Machinery Co., 28 Fed. 553.

Where the inventor of a patent agrees with another that the latter shall become part owner of the patent, and agrees to conduct exclusively the business of manufacturing the patented machines for part of the profits, the agreement is valid. Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385.

31. Where a contract is made for the employment of a person in a certain trade or business, it may be accompanied with an absolute and unlimited restraint against his carrying on the same trade or business for another person or in any other way during the employment or for a reasonable time after the term of service has elapsed. Sternberg *v.* O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; Kellogg *v.* Larkin, 3 Chandl. (Wis.) 133; Carter *v.* Alling, 43 Fed. 208; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657. Where the employment is for life the restraint may be for life. Wallis *v.* Day, 1 Jur. 73, 6 L. J. Exch. 92, M. & H. 222, 2 M. & W. 273; Stiff *v.* Cassell, 2 Jur. N. S. 348; Morris *v.* Colman, 18 Ves. Jr. 437, 11 Rev. Rep. 230. In an English case, where a person, in consideration of obtaining employment from another, agreed that he would not for twelve months after leaving his employment sell similar goods within eight miles of the London post-office, the master of the rolls said: "I think it is of the utmost importance to state that it is far more beneficial to men in the position of the defendant, in my opinion, that the order should be made than that it should be refused. Men of this class obtain employment on certain terms which prevent them, on leaving that employment, from making use of the knowledge which they have acquired during the employment to set up in business against their master and destroy his business. Now, if we said that no such agreement as this would be binding on the men who entered into it, the result might be that no such business would be carried on and that the men would get no employment at all, and therefore, if we are to consider the consequences of what we are doing, I think the balance of convenience or inconvenience would shew that we ought strictly to enforce such contracts." Middleton *v.* Brown, 47 L. J. Ch. 411, 412, 38 L. T. Rep. N. S. 334. And see *infra*, VII, C, D.

32. Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357. But a contract between manufacturers, whereby, without any sale of the business of one to the other, one party was prohibited from manufacturing of pressed metal any parts of a diamond car truck frame, was held void as an unreasonable restraint of trade. Fox Solid Pressed Steel Co. *v.* Schoen, 77 Fed. 29.

Restraint upon sale of intoxicating liquors. — Where a person agreed not to carry on the liquor business, the contract was held valid on the ground that the business was not a trade to be encouraged. Harrison *v.* Lockhart, 25 Ind. 112. So it has been held that a combination of persons and firms in a city for the control of the sale of beer and the cessation of competition *inter se* was not void at common law as against public policy, although in restraint of trade, on the ground that beer was not an article of prime necessity and its sale was closely restricted by public policy. Anheuser-Busch Brewing Assoc. *v.* Houck, (Tex. Civ. App. 1894) 27 S. W. 692.

33. See CONSPIRACY, 8 Cyc. 615; MONOPOLIES.

(B) *The Early English Law.* According to the early common law of England, an agreement which placed any restriction upon a man's right to exercise his trade or calling was void as against public policy.[34] But it is to be remembered that at the time when this doctrine was held a man could not lawfully exercise any trade to which he had not been duly apprenticed and admitted, and one who was so admitted was obliged by statute to follow and exercise his trade under a penalty.[35] Hence an agreement by such a person not to exercise his trade was an agreement not to earn a living at all, and likewise an agreement to omit a legal duty, the latter a clearly illegal agreement, and the former one likely to injure the public and society.[36]

(C) *The Later Doctrine With Its Divisions* — (1) IN GENERAL. In course of time, the strict doctrine of the early common law was relaxed in the English courts and agreements in restraint of trade were classified under three heads, viz.: (1) Where the restraint was unlimited as to both time and space; (2) where it was limited as to time but unlimited as to space; and (3) where it was limited as to space but unlimited as to time. In the first and second cases the agreement was void; while in the third it was valid.[37] These fixed rules were followed by both English and American courts until within the past few years when a new view was introduced making the validity of the agreement dependent upon the reasonableness of the restraint.[38]

(2) RESTRAINT UNLIMITED AS TO BOTH TIME AND SPACE. An agrement unlimited as to both time and space is regarded as a total restraint of trade and void by the rules stated in the last section.[39] It has been so held of an agreement that a person will not carry on a certain business at any place where the other party may carry it on;[40] that he will never carry on or be concerned in the business of an iron founder;[41] that he will cease the trade of cabinet-maker;[42] that he will never be interested in any part of the United States in the business of manufacturing daguerreotype materials or candles;[43] that he will never carry on the business of manufacturing boots and shoes within the state;[44] that he will never engage in the manufacture of matches in the city of St. Louis or elsewhere;[45] that a patentee will not "manufacture, sell, or cause to be sold any sand-papering machines of any description";[46] and of a contract by an inventor restraining him-

34. Ipswich Tailors' Case, 11 Coke 53*a*; Anonymous, F. Moore 242; Dutton *v.* Poole, 2 Lev. 210; Dyers' Case, Y. B. 2 Hen. V, p. 5, pl. 26.

35. Pollock Contr. 313.

36. See Alger *v.* Thacher, 19 Pick. (Mass.) 51, 31 Am. Rep. 119.

37. See the cases cited in the notes following.

In measuring the distance, the rule was to measure in a straight line as upon a map, and not according to the usual or practicable routes. Mouflet *v.* Cole, L. R. 8 Exch. 32, 42 L. J. Exch. 8, 27 L. T. Rep. N. S. 678, 21 Wkly. Rep. 175; Duignan *v.* Walker, Johns. 446, 5 Jur. N. S. 976, 28 L. J. Ch. 867, 7 Wkly. Rep. 562.

38. Badische Anilin *v.* Schott, [1892] 3 Ch. 447, 61 L. J. Ch. 698, 67 L. T. Rep. N. S. 281; and *infra*, VII, B, 3, f, (VII), (D).

39. *California.*— More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186.

Georgia.— Jenkins *v.* Temples, 39 Ga. 655, 99 Am. Dec. 482; Holmes *v.* Martin, 10 Ga. 503.

Indiana.— Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Massachusetts.—Alger *v.* Thacher, 19 Pick. 51, 31 Am. Dec. 119.

Missouri.— Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355.

New York.— Lawrence *v.* Kidder, 10 Barb. 641; Chappel *v.* Brockway, 21 Wend. 157.

Ohio.— Lange *v.* Werk, 2 Ohio St. 519; Lufklin Rule Co. *v.* Fringeli, 4 Ohio S. & C. Pl. Dec. 209.

Pennsylvania.— Keeler *v.* Taylor, 53 Pa. St. 467, 91 Am. Dec. 221; Pittsburgh Brass Co. *v.* Adler, 2 Mona. 235.

Wisconsin.— Berlin Mach. Works *v.* Parry, 71 Wis. 495, 38 N. W. 32, 5 Am. St. Rep. 236.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

40. Thomas *v.* Miles, 3 Ohio St. 274.

41. Alger *v.* Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119.

42. Maier *v.* Homan, 4 Daly (N. Y.) 168.

43. Dean *v.* Emerson, 102 Mass. 480; Lange *v.* Werk, 2 Ohio St. 519.

44. Taylor *v.* Blanchard, 13 Allen (Mass.) 370, 90 Am. Dec. 203.

45. Peltz *v.* Eichele, 62 Mo. 171.

46. Berlin Mach. Works *v.* Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236.

self absolutely, without limitation as to time or place, from exercising his skill in making certain articles.[47]

(3) Restraint Limited as to Time but Unlimited as to Space. So also according to the early doctrine where the restraint, although limited as to time, is unlimited as to space, it is void,[48] as for example an agreement that a person will not run a boat on any of the waters of a state for the term of ten years from date;[49] that he will not carry on the trade of a coal merchant for twenty years,[50] of an innkeeper for ten years,[51] or the manufacturing of dies for thirty years;[52] or will not engage in the dry-goods business for five years, with no limitation as to place;[53] an agreement without limitation as to space that for and during the period of five years the covenantor will not, directly or indirectly, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form a part;[54] and an agreement not to carry on a retail trade in boots and shoes while another person remains in said trade, and unrestricted as to locality.[55]

47. Albright *v.* Teas, 37 N. J. Eq. 171.

48. *California.*— Callahan *v.* Donnolly, 45 Cal. 152, 13 Am. Rep. 172.

Georgia.— Goodman *v.* Henderson, 58 Ga. 567; Holmes *v.* Martin, 10 Ga. 503.

Kentucky.— Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274.

Maryland.— Warfield *v.* Booth, 33 Md. 63; Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164; Davis *v.* Barney, 2 Gill & J. 382.

Massachusetts.— Gamewell F. Alarm Tel. Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98, 39 Am. St. Rep. 458, 22 L. R. A. 673; Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 314; Dean *v.* Emerson, 102 Mass. 480; Taylor *v.* Blanchard, 13 Allen 370, 90 Am. Dec. 263.

New Jersey.—Albright *v.* Teas, 37 N. J. Eq. 171.

New York.— Curtis *v.* Gokey, 68 N. Y. 300.

Ohio.— Thomas *v.* Miles, 3 Ohio St. 274; Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.— Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251.

Wisconsin.— Berlin Mach. Works *v.* Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236.

United States.— Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64, 22 L. ed. 315; Oliver *v.* Gilmore, 52 Fed. 562.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

49. Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186; California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

50. Ward *v.* Byrne, 3 Jur. 1175, 9 L. J. Exch. 14, 5 M. & W. 548.

51. Mossop *v.* Mason, 18 Grant Ch. (U. C.) 453.

52. Saratoga County Bank *v.* King, 44 N. Y. 87.

53. Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427.

54. Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339.

55. Curtis *v.* Gokey, 5 Hun (N. Y.) 555.

Boundaries of state.—It was for some time the rule in this country that an agreement not to carry on a business anywhere within a state, like an agreement not to carry it on anywhere within the United States, was unlimited as to space and was invalid. More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186; Taylor *v.* Blanchard, 13 Allen (Mass.) 370, 90 Am. Dec. 203; Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Chappel *v.* Brockway, 21 Wend. (N. Y.) 157; Nobles *v.* Bates, 7 Cow. (N. Y.) 307; Thomas *v.* Miles, 3 Ohio St. 274. But in the recent cases this doctrine is rejected. They proceed on the ground that this country is substantially one country, especially in all matters of trade and business; and cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose two persons associated in business as partners and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Such an agreement should certainly be sustained. And so it has been held. In Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64, 22 L. ed. 315, an agreement restraining one of the parties from running a steamboat on any of the waters of the state of California was held valid. So in Michigan an agreement was held good not to carry on the printing business in that state. Beal *v.* Chase, 31 Mich. 490. In Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469, an agreement was held good not to teach the French or German language for one year in the state of Rhode Island. And in New York an agreement not to engage in the match business for ninety-nine years in any state or territory of the United States except Nevada and Montana was sustained. Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 [*affirming* 35 Hun (N. Y.) 421]. See also National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11

(4) Restraint Limited as to Space but Unlimited as to Time. Even according to the early rule, it is no objection to an agreement reasonably limited in point of space that it is unlimited in point of time and may therefore continue during the whole life of the party restrained.[56] Thus the courts have repeatedly sustained as valid agreements by the vendor of a business, trade, or profession, or by employees, etc., without limitation as to time, not to carry on the business, trade, or profession in a certain town, village, city, or county,[57] even though it be

L. R. A. 437; Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829. But see Lanzit *v.* J. W. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171.

56. *Alabama.*— Moore, etc., Hardware Co. *v.* Towers Hardware Co., 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23.

Connecticut.— Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64.

Indiana.— O'Neal *v.* Hines, 145 Ind. 32, 43 N. E. 946; Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348; Bowser *v.* Bliss, 7 Blackf. 344, 43 Am. Dec. 93.

Kentucky.— Pyke *v.* Thomas, 4 Bibb. 486, 7 Am. Dec. 741.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Massachusetts.— Dean *v.* Emerson, 102 Mass. 480; Angier *v.* Webber, 14 Allen 211, 92 Am. Dec. 748; Worthy *v.* Jones, 11 Gray 168, 71 Am. Dec. 696.

Michigan.— Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480.

New Jersey.— Carll *v.* Snyder, (1893) 26 Atl. 977.

New York.— Sander *v.* Hoffman, 39 N. Y. Super. Ct. 307.

North Carolina.— Kramer *v.* Old, 119 N. C. 1, 25 S. E. 813, 56 Am. St. Rep. 650, 34 L. R. A. 389.

Ohio.— Grasselli *v.* Lowden, 11 Ohio St. 349 [*affirming* 2 Disn. 323]; Gordon *v.* Deckebach, 9 Ohio Dec. (Reprint) 324, 12 Cinc. L. Bul. 169; Empson *v.* Bissinger, 8 Ohio Dec. (Reprint) 629, 9 Cinc. L. Bul. 86.

Pennsylvania.— Gompers *v.* Rochester, 56 Pa. St. 194.

Tennessee.— George *v.* East Tennessee Coal Co., 15 Lea 455, 54 Am. Rep. 425.

Vermont.— Butler *v.* Burleson, 16 Vt. 176.

Wisconsin.— Washburn *v.* Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; Fairbank *v.* Leary, 40 Wis. 637.

England.— Hitchcock *v.* Coker, 6 A. & E. 438, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

Conflicting cases.— In Hitchcock *v.* Coker, 6 A. & E. 438, 453, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241, the defendant had agreed that he would not, at any time after leaving the plaintiff's service, in which he was employed as a druggist's assistant, engage in the business of a druggist and chemist in the particular town. At the trial the agreement was held void by Lord Denman, on the ground that the restraint attached to the defendant as long as he should live, although the plaintiff might leave, part with his business, or be dead; and that it was only necessary as a reasonable protection to the plaintiff that it should extend to such time as the plaintiff should be in business in the town. But on appeal this ruling was reversed, the higher court saying that "If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative." In Mandeville *v.* Harman, 42 N. J. Eq. 185, 194, 7 Atl. 37, it was held that a covenant by a physician that he should not "at any time thereafter" engage in practice in a certain city was void, as it would prevent him from practising after the death of the other party. "The practice of a physician," the court said, "is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value." This reasoning, however, is expressly repudiated in a Rhode Island case which is almost on all fours with the New Jersey case, where it is said that the reasoning in Hitchcock *v.* Coker, 6 A. & E. 438, 453, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241, "is as valid in the case of a profession as of a trade, for whether, technically speaking, there be any goodwill attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more, if he could secure the purchaser from competition with the defendant forever, than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could for the same reason make better terms with him." French *v.* Parker, 16 R. I. 219, 221, 14 Atl. 870, 27 Am. St. Rep. 733.

57. *Georgia.*— Goodman *v.* Henderson, 58 Ga. 567; Ellis *v.* Jones, 56 Ga. 504.

Illinois.— Smith *v.* Leady, 47 Ill. App. 441; Cobbs *v.* Niblo, 6 Ill. App. 60; Talcott *v.* Brackett, 5 Ill. App. 60.

a large city;[58] within certain limits in a city;[59] within a certain distance of a town, village, or city;[60] in a town or city, and vicinity;[61] or at any place which

Indiana.— Studabaker *v.* White, 31 Ind. 211, 99 Am. Dec. 628.

Kentucky.— Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428; Western Dist. Warehouse Co. *v.* Hobson, 96 Ky. 550, 29 S. W. 308, 16 Ky. L. Rep. 869.

Massachusetts.—Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101; Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634.

New Hampshire.— Webster *v.* Buss, 61 N. H. 40, 60 Am. Rep. 317.

New Jersey.— Carll *v.* Snyder, (1893) 26 Atl. 977.

Pennsylvania.— Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

Illustrations.— The following agreements for example have been held valid: An agreement never to practise dentistry in a certain city, town, or village (Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64) or law (Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267); not to carry on in a certain town the grocery business (Jenkins *v.* Temples, 39 Ga. 655, 99 Am. Dec. 482), the well-driving business (Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153), the business of a shoe-dealer (Curtis *v.* Gokey, 68 N. Y. 300) or dealer in agricultural implements (Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380) or hardware (Stewart *v.* Challacombe, 11 Ill. App. 379); not to erect a tan-yard in a particular town (Grundy *v.* Edwards, 7 J. J. Marsh. (Ky.) 367, 23 Am. Dec. 409); to discontinue a tavern in a town within half a mile of land sold (Heichew *v.* Hamilton, 3 Greene, (Iowa) 596); and not to maintain a mill-dam at a certain place (Ulrich *v.* Hull, 17 Wis. 424). And the courts have often held valid agreements not to practise medicine in a certain town or county.

Alabama.— McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Arkansas.— Webster *v.* Williams, 62 Ark. 101, 34 S. W. 537.

Connecticut.— Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64.

Illinois.— Linn *v.* Sigsbee, 67 Ill. 75.

Indiana.— Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118; Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475.

Iowa.— Cole *v.* Edwards, 93 Iowa 477, 61 N. W. 940; Haldeman *v.* Simonton, 55 Iowa 144, 7 N. W. 493.

Kentucky.— Hill *v.* Gudgell, 9 Ky. L. Rep. 436.

Maryland.— Warfield *v.* Booth, 33 Md. 63.

Massachusetts.— Dwight *v.* Hamilton, 113 Mass. 175; Gilman *v.* Dwight, 13 Gray 356, 74 Am. Dec. 634.

Michigan.— Doty *v.* Martin, 32 Mich. 462.

New York.— Niver *v.* Rossman, 18 Barb. 50; Mott *v.* Mott, 11 Barb. 127; Holbrook *v.* Waters, 9 How. Pr. 335.

Pennsylvania.— Betts' Appeal, 10 Wkly. Notes Cas. 431.

Rhode Island.— French *v.* Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

58. It has been so held for example of an agreement not to solicit business as an attorney in London, England (Bunn *v.* Guy, 4 East 190, 1 Smith K. B. 1, 7 Rev. Rep. 560); not to deal in fancy goods in Cincinnati, Ohio (Thomas *v.* Miles, 3 Ohio St. 274) or in cabinet-ware in Buffalo, New York (Weller *v.* Hersee, 10 Hun (N. Y.) 431); the clothing business in Newark or Jersey City, New Jersey (Sternberg *v.* O'Brien, 48 N. J. Eq. 370, 22 Atl. 348, 33 Centr. L. J. 224) or in the match business in St. Louis, Missouri (Peltz *v.* Echele, 62 Mo. 171).

59. Pierce *v.* Woodward, 6 Pick. (Mass.) 206, sustaining an agreement not to engage in the grocery business within certain limits in Boston, Massachusetts.

60. As for example agreements by a miller not to carry on the same business within thirty miles of a city or town (Bowser *v.* Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93); of an apothecary not to set up business within twenty miles of a place (Hayward *v.* Young, 2 Chit. 407, 18 E. C. L. 709); of a butcher not to engage in the butcher business within eleven miles of a town (Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119) or within five miles of the business sold (Elves *v.* Crofts, 10 C. B. 241, 14 Jur. 855, 19 L. J. C. P. 385, 70 E. C. L. 241); of a physician or surgeon not to practise within six miles of a town (Linn *v.* Sigsbee, 67 Ill. 75), ten miles (Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64; Betts' Appeal, 10 Wkly. Notes Cas. (Pa.) 431), twelve miles (McClurg's Appeal, 58 Pa. St. 51), fifteen miles (Miller *v.* Elliott, 1 Ind. 484, 50 Am. Dec. 475), or within twenty miles of the residence of the covenantee (Butler *v.* Burleson, 16 Vt. 176); of an attorney not to solicit business or practise law within twenty-one miles of a town (Dendy *v.* Henderson, 11 Exch. 194, 24 L. J. Exch. 324), or in London or within one hundred and fifty miles around (Bunn *v.* Guy, 4 East 190, 1 Smith K. B. 1, 7 Rev. Rep. 560); of a saddler not to carry on business within ten miles of a place (Jones *v.* Heavens, 4 Ch. D. 636, 25 Wkly. Rep. 460); of a tanner, within twenty miles of a place (Nobles *v.* Bates, 7 Cow. (N. Y.) 307); not to sell liquors within one mile of a town (Harrison *v.* Lockhart, 25 Ind. 112); and not to trade as merchant within ten miles of a town (Gompers *v.* Rochester, 56 Pa. St. 194), act as surgeon or apothecary within seven miles (Sainter *v.* Ferguson, 7 C. B. 716, 13 Jur. 828, 18 L. J. C. P. 217, 62 E. C. L. 716), work at the blacksmith trade within four miles of a town (Stafford *v.* Shortreed, 62 Iowa 524, 17 N. W. 756), or engage in the iron casting business within sixty miles of a town (Whitney *v.* Slayton, 40 Me. 224).

61. As for example not to trade in agricultural implements in a certain town and

will interfere with the business sold.[62] The courts have also sustained an agreement not to run a stage on a specified road[63] and an agreement by a vendor of a milk route not to serve milk over the same route.[64] An agreement not to engage in a certain business in a certain town while another carries on the same business there is valid.[65]

(5) Restraint Limited as to Both Time and Space. Of course where the restraint is limited as to both time and space the agreement is valid,[66] as for example not to engage in the livery business in a certain city for the space of five years,[67] not to practise medicine in a certain town for four years,[68] or an agreement between one about to enter into a contract to furnish paving materials to a city for use on a certain street and another, whereby the latter is to pay the former a certain amount per cubic yard for material used in the street, on condition that the former will not enter into such contract nor sell any such material in that city for a certain period.[69]

(d) *The Modern Doctrine of Reasonableness of Restraint* — (1) In General. A doctrine has been introduced in some of the later cases, both English and American, which may be called the doctrine of the reasonableness of the restraint. This rejects entirely the fixed rules stated in the last sections and decides each case according to its particular circumstances. It makes the validity of the restraint depend upon the question whether it is such as to afford a fair and reasonable protection to the party in favor of whom it is imposed. If it is, it is upheld; but if it goes beyond this and imposes a restraint longer than is necessary for the protection of the party it is declared void.[70] This doctrine is founded

vicinity (Hedge *v.* Lowe, 47 Iowa 137); not to practise as physician in a city of vicinity (Timmerman *v.* Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240); and not to carry on a business thereafter "in the vicinity" of a city (Webster *v.* Buss, 61 N. H. 40, 60 Am. Rep. 317).

62. As an agreement of a milliner not to carry on the same business in the future at any place which would interfere with the business sold. Morgan *v.* Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607.

63. Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102.

64. Reece *v.* Hendricks, 1 Leg. Gaz. (Pa.) 79.

65. O'Neil *v.* Hines, 145 Ind. 32, 43 N. E. 946; Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119; Gill *v.* Ferris, 82 Mo. 156.

66. *Georgia.*— Jenkins *v.* Temples, 39 Ga. 655, 99 Am. Dec. 482.

Illinois.— Boyce *v.* Watson, 52 Ill. App. 361.

Indiana.— McAlister *v.* Howell, 42 Ind. 15.

Iowa.— Arnold *v.* Kruetzer, 67 Iowa 214, 25 N. W. 178; Hedge *v.* Lowe, 47 Iowa 137.

Kentucky.— Pyke *v.* Thomas, 4 Bibb 486, 7 Am. Dec. 741.

Louisiana.— Wintz *v.* Vogt, 3 La. Ann. 16.

Massachusetts.— Pierce *v.* Woodward, 6 Pick. 206.

Missouri.—Skrainka *v.* Scharringhausen, 8 Mo. App. 522.

New York.— Van Marter *v.* Babcock, 23 Barb. 633; Daly *v.* Smith, 38 N. Y. Super. Ct. 159, 49 How. Pr. 150; Nobles *v.* Bates, 7 Cow. 307; Noah *v.* Webb, 1 Edw. 604.

North Carolina.— Baumgarten *v.* Broadaway, 77 N. C. 8.

Ohio.— Paragon Oil Co. *v.* Hall, 7 Ohio Cir. Ct. 240.

See 11 Cent. Dig. tit. "Contracts," § 554 *et seq.*

67. Haursen *v.* Gavin, 162 Ill. 377, 44 N. E. 735 [*affirming* 59 Ill. App. 66].

68. Gilman *v.* Dwight, 13 Gray (Mass.) 356, 74 Am. Dec. 634; Mott *v.* Mott, 11 Barb. (N. Y.) 127.

69. Marshalltown Stone Co. *v.* Des Moines Brick Co., 114 Iowa 574, 87 N. W. 496.

70. English cases supporting this doctrine. — In Maxim Nordenfelt Guns, etc., Co. *v.* Nordenfelt, [1893] 1 Ch. 630, 62 L. J. Ch. 273, 68 L. T. Rep. N. S. 833, 41 Wkly. Rep. 604 [*affirmed* [1894] A. C. 535, 63 L. J. Ch. 908, 71 L. T. Rep. N. S. 489, 11 Reports 1], Nordenfelt, who was a maker and inventor of guns and ammunition, sold his business to a company for a very large sum and agreed that for twenty-five years he would cease to carry on the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any business liable to compete with such business as the company was carrying on for the time being, retaining the right to deal in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings. After some years he entered into business with another company dealing with guns and ammunition, and plaintiffs sought an injunction to restrain him from so doing. The court of appeals held that a general restraint of trade was void, but that the sale of a business accompanied by an agreement by the seller to retire from the business is not a general restraint of trade, provided it is reasonable between the parties, and not injurious to the

on the idea that public policy requires that when a man has by his skill or by any other means obtained something which he wants to sell he should be at liberty to

public. This restraint, it was held, was reasonable between the parties because Nordenfelt not only received a very large sum of money, but retained considerable scope for the exercise of his inventive and manufacturing skill, while the wide area over which the business extended necessitated a restraint coextensive with that area for the protection of the plaintiffs. Nor could the agreement be said to be injurious to the public interest, since it transferred to an English company the making of guns and ammunition for foreign lands. On appeal the house of lords went further and demolished the old doctrine of general restraint, Lord Herschell saying: "Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule itself is to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law." Maxim Nordenfelt Guns, etc., Co. *v.* Nordenfelt, [1894] A. C. 535, 548, 63 L. J. Ch. 908, 71 L. T. Rep. N. S. 489, 11 Reports 1. For other English cases holding that the question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee, and that if it does not the covenant will be enforced even though it is a general restraint and unlimited as to space, see Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. Rep. N. S. 661, 18 Wkly. Rep. 572; Badische Anilin *v.* Schott, [1892] 3 Ch. 447, 61 L. J. Ch. 698, 67 L. T. Rep. N. S. 281; Rousillon *v.* Rousillon, 14 Ch. D. 351, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623. See Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86.

American cases supporting this doctrine.— There are a number of American cases repudiating the old doctrine and approving the doctrine of the reasonableness of the restraint, although in some of them the restraint was partial only and in others it was considered unreasonable as beyond what was necessary to the protection of the party.

Alabama.— McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Georgia.— Holmes *v.* Martin, 10 Ga. 503.

Illinois.— Talcott *v.* Brackett, 5 Ill. App. 60.

Indiana.— Duffy *v.* Stockey, 11 Ind. 70, 71 Am. Dec. 348; Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Maine.— Warren *v.* Jones, 51 Me. 146.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Michigan.— Beal *v.* Chase, 31 Mich. 490; Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

Minnesota.— National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437.

New Jersey.— Althen *v.* Vreeland, (1897) 36 Atl. 479; Hoagland *v.* Segur, 38 N. J. L. 230; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 39 Atl. 923; Ellerman *v.* Chicago Junction R., etc., Co., 49 N. J. Eq. 217, 23 Atl. 287.

New York.—Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, where defendant sold his match-manufacturing business with the good-will to a corporation then engaged in the same business, and covenanted with the purchaser and its assigns not to engage within ninety-nine years in the like business, except for the purchaser, in any of the United States or territories except Nevada and Montana. The covenant was held valid. This case was followed in Leslie *v.* Lorillard, 110 N. Y. 519, 534, 18 N. E. 363, 1 L. R. A. 456, and the effect of its reasoning summed up as follows: "Under the authority of that case, it may be said that no contracts are void as being in general restraint of trade, where they operate simply to prevent a party from engaging or competing in the same business." In Watertown Thermometer Co. *v.* Pool, 51 Hun 157, 163, 4 N. Y. Suppl. 861, 20 N. Y. St. 592, the covenant embraced the entire United States, and it was held valid, the court saying: "The cases cited seem to sustain the doctrine that a restriction which is no greater than the interest of the vendee requires, and by giving which the vendor has obtained an increased price for what he sold, is valid, though it extended through the whole kingdom or country." This case was cited with approval by the court of appeals in Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544. The same doctrine was enunciated in U. S. Cordage Co. *v.* William Wall's Sons' Rope Co., 90 Hun 429, 434, 35 N. Y. Suppl. 978, 70 N. Y. St. 602, where an agreement that a firm or company would not engage in the manufacture or sale of cordage within the limits of the United States except as an employee of the National Cordage Company was held to be valid, the court saying: "Since the Diamond Match Company Case it has been the law of the State that a covenant not to engage in business made by a vendor, in connection with a sale of his business and goodwill, is valid and enforcible." See also Wood *v.* Whitehead Bros. Co., 165 N. Y. 385, 59 N. E. 357, 80 Am. St. Rep. 730; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525; Greenfield *v.* Gilman, 140 N. Y.

sell it in the most advantageous way in the market, and in order to enable him to do so it is necessary that he should be able to preclude himself from entering into competition with the purchaser; and therefore the same public policy which enables him to do that should not forbid him from alienating what he wants to alienate, but should permit him to enter into any stipulation, however restrictive it may be, provided such restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract.[71] Hence a stipulation by a vendee of any trade, business, or profession that he will not exercise the same trade or business, so as to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged that it shall not be used so as to interfere with his said business or trade is also valid and binding under this doctrine.[72]

(2) AGREEMENTS HELD VALID. Among the agreements, in addition to those already mentioned,[73] which have been sustained as imposing no greater restraint than necessary or reasonable are: An agreement on the sale of a magazine not to

168, 35 N. E. 435, 55 N. Y. St. 427; Matthews *v.* State Associated Press, 136 N. Y. 333, 32 N. E. 981, 50 N. Y. St. 9, 32 Am. St. Rep. 741; Underwood *v.* Smith, 135 N. Y. 661, 32 N. E. 648, 48 N. Y. St. 933; Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 40 N. Y. St. 300, 24 Am. St. Rep. 475, 13 L. R. A. 652; Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Ru Ton *v.* Everett, 35 N. Y. App. Div. 412, 54 N. Y. Suppl. 896; Brett *v.* Ebel, 29 N. Y. App. Div. 256, 51 N. Y. Suppl. 573; Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442; Booth *v.* Seibold, 37 Misc. 101, 74 N. Y. Suppl. 776.

Ohio.— Grasselli *v.* Lowden, 11 Ohio St. 349; Lange *v.* Werk, 2 Ohio St. 519.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Keeler *v.* Taylor, 53 Pa. St. 467, 91 Am. Dec. 203.

Rhode Island.— Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639; Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469.

Texas.— Watkins *v.* Morley, 2 Tex. App. Civ. Cas. § 723.

Wisconsin.— Richards *v.* American Desk, etc., Co., 87 Wis. 503, 58 N. W. 787.

United States.— Gibbs *v.* Consolidated Gas Co., 130 U. S. 369, 9 S. Ct. 553, 32 L. ed. 979; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64, 22 L. ed. 315; U. S. Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946; Carter *v.* Alling, 43 Fed. 208.

See 11 Cent. Dig. tit. "Contracts," § 542 *et seq.*

Contrary doctrine.— In Massachusetts and Indiana the late cases still adhere to the old rule. Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; Meyer *v.* Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; Gamewell Fire Alarm Tel. Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98, 39 Am. St. Rep. 458, 22 L. R. A. 673; Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339. But see Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509, 68 Am. St. Rep. 403, 41 L. R. A. 189.

71. Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. Rep. N. S. 661, 18 Wkly. Rep. 572. And see Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 551, 59 N. E. 357, where the court said: "In the present practically unlimited field of human enterprise, there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that, in some way, the public interests were endangered. But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected. To say, at the present day, that such a contract as was made in this case was affected by a public interest and was a matter of public concern would be, in my opinion, unreasonable. Such a contract not only does not obstruct trade, but it may be for the advantage of the public as well as of the individual."

72. Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442, and other cases above cited. In Rakestraw *v.* Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154, it is laid down that a distinction exists between that class of contracts binding one to desist from the practice of a learned profession, and those which bind one who has sold out a mercantile or other kind of business, and the good-will therewith connected, not to again engage in that business. In the former case there should be a reasonable limit as to time, so as to prevent the contract from operating with unnecessary harshness against the person who is to abstain from practising his profession at a time when his so doing could in no way benefit the other contracting party. In the latter class such limit is not essential to the validity of the contract, but the restraint may be indefinite.

73. See *supra*, VII, B, 3, f, (VII), (D), (1), note 70.

publish a similar magazine;[74] an agreement on the sale of the business of an attorney, whose clientage extends throughout England, that he will not practise in England for twenty years;[75] an agreement not to carry on the business of a soap manufacturer within forty miles of Lockport, New York, for ten years,[76] not to establish a newspaper in a certain city or within eight miles thereof for eight years,[77] and not to do business as a banker in a certain place for ten years;[78] a covenant not to carry on the tobacco business on a certain route, embracing the cities of Albany and Schenectady, New York, and surrounding towns;[79] a covenant not to run carts over a butcher route sold by the covenantor;[80] a covenant by a person on getting employment to travel for a house over a route that if he quits traveling for the house and travels over the same route for another house he will pay the former fifty pounds;[81] a covenant by the owner of an exclusive ferry franchise between two points, on the sale of it to another, never to establish a rival ferry on his own lands while the other shall maintain the one sold;[82] a covenant by the purchaser of a steamboat that it should never be run on the upper Hudson river;[83] a covenant not to be concerned in the stage business on the Washington and Baltimore road;[84] a covenant by the seller of a bakery never to solicit any trade from the customers who have traded on the sold premises;[85]

74. Armstrong *v.* Bentley, 14 Wkly. Rep. 630.

75. Whittaker *v.* Howe, 3 Beav. 383, 43 Eng. Ch. 383. See also Clarkson *v.* Edge, 33 Beav. 227, 10 Jur. N. S. 871, 33 L. J. Ch. 443, 12 Wkly. Rep. 518 (sustaining an agreement not to engage in the business of a gas-fitter within twenty miles of a certain place); Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357 (sustaining an agreement by which one agreed to cease the business of dealing in molding sand); Dolph *v.* Troy Laundry Mach. Co., 28 Fed. 553 (where rival manufacturers of washing-machines made a contract under which one of them discontinued business and became the other's partner for five years, a scale of selling prices being agreed on); Gilman *v.* Dwight, 13 Gray (Mass.) 356, 74 Am. Dec. 634 (sustaining an agreement by a physician transferring his practice and good-will to another physician for a price, and guaranteeing that "no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless said Gilman should commit some act which shall forfeit to him the confidence of the community;" and that if any such competitor do so establish himself, the former will repay the sum paid); Hitchcock *v.* Anthony, 83 Fed. 779, 28 C. C. A. 80 (holding that where the lessee of a dock, upon which he conducted the business of dealing in coal and fish, sold and conveyed certain real estate near by, on which was situated another dock, to a dealer in lumber, the purchaser might enter into an agreement, at the same time binding himself in general terms not to engage in the coal or fish business for a term of years, or to do anything that would conflict with the coal or fish business of the grantor); Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509, 68 Am. St. Rep. 403, 41 L. R. A. 189 (sustaining an agreement by officers of three separate corporations engaged in manufacturing and dealing in electric goods, who became officers of a new corporation, which purchased the interest and good-will of the others, not to engage in a like business or compete in any manner for a period of five years, unless upon withdrawing from such corporation if put at a disadvantage in reference to salary).

76. Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166.

77. Noah *v.* Webb, 1 Edw. (N. Y.) 604. And see Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829, where a husband and his wife sold a newspaper owned by them in a certain county, and agreed that the husband would not edit, print, or conduct a newspaper, nor be in anywise connected with one printed anywhere in the state, and that for a like period the wife should not edit, print, or conduct a newspaper or magazine, nor be in anywise connected with one anywhere in the said county without the consent of the purchaser or his assignees.

78. Hoagland *v.* Segur, 38 N. J. L. 230. And see also Whitfield *v.* Levy, 35 N. J. L. 149.

79. Ewing *v.* Johnson, 34 How. Pr. (N. Y.) 202.

80. Perkins *v.* Clay, 54 N. H. 518.

81. Mumford *v.* Gething, 7 C. B. N. S. 305, 6 Jur. N. S. 428, 29 L. J. C. P. 105, 1 L. T. Rep. N. S. 64, 8 Wkly. Rep. 187, 97 E. C. L. 305.

82. Westfall *v.* Mapes, 3 Grant (Pa.) 198.

83. Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746. See also Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204, sustaining a condition in a bond that the obligor should cease to have any concern in the business of boating on the Connecticut river, should give the obligees all the freighting of his goods at customary price, etc., and should not directly or indirectly aid, countenance, or promote any other boatman.

84. Davis *v.* Barney, 2 Gill & J. (Md.) 382.

85. Rannie *v.* Irvine, 8 Jur. 1051, 14 L. J. C. P. 10, 7 M. & G. 969, 8 Scott N. R. 674,

and an agreement by a clerk on entering the employment of custom-house brokers and forwarding agents, as a solicitor of business, that for twelve months after the termination of their relations he would not engage in a similar business in the same city, or within fifty miles thereof, or interfere with his employers' customers.[86]

(3) Agreements Held Void. Among the agreements which have been held void because wider and more onerous than necessary for the protection of the other party are: An agreement or covenant not to practise dentistry in any part of a district two hundred miles in diameter;[87] not to carry on the perfumery business within six hundred miles of London;[88] not to become a coal merchant for nine months;[89] not to engage for eight years in the manufacture of a certain yeast-powder nor in any branch of the yeast-powder business;[90] a covenant by a corporation of one state with a citizen of another not to run a steamboat or allow its machinery to be used on any other boat in any of the waters of certain states;[91] an agreement by the seller of a manufacturing business not to engage in a similar business within one thousand miles of the place in which it was located;[92] a conveyance in fee containing a provision that the grantee shall not sell or dispose of the land in any way whatever;[93] a stipulation in a contract of employment that the employee would not, within three years after leaving the employer's service, engage in a similar business in any of sixteen specified states;[94] an agreement by one formerly a dealer in oil in a certain city to refrain from following such occupation for five years within the state of Indiana, the city of Indianapolis excepted;[95] and an agreement not to exercise the trade of making printer's rollers and composition in New York city or within two hundred and fifty miles thereof.[96]

(4) The Question of Public Interest in Such Cases. The reasonableness

49 E. C. L. 969. See Boutelle *v.* Smith, 116 Mass. 111. See also Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164, sustaining a covenant by a dyer and scourer, who sold his establishment to the covenantee, that he would at no time thereafter directly or indirectly compete with the latter for the goodwill and custom sold. And see Warren *v.* Jones, 51 Me. 146.

86. Davies *v.* Racer, 72 Hun (N. Y.) 43, 25 N. Y. Suppl. 293, 55 N. Y. St. 191.

87. Horner *v.* Graves, 7 Bing. 735, 9 L. J. C. P. O. S. 192, 5 M. & P. 768, 20 E. C. L. 326. See also Rakestraw *v.* Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154, holding void an agreement for the formation of a medical partnership to continue for twelve months, but which might be dissolved by either of its two members on thirty days' notice to the other, whereby one of them stipulated that in consideration of the advantages and benefits that would flow to him by reason of the formation of such partnership, he agreed that in the event said firm should at any time thereafter be dissolved he would not locate or engage in the practice of medicine, surgery, or obstetrics at a town named, or at any place within a fifteen-mile radius of a specified drug store therein, unless he should first obtain the written consent of the other party to the contract.

88. Green *v.* Price, 9 Jur. 880, 16 L. J. Exch. 108, 16 M. & W. 346.

89. Ward *v.* Byrne, 3 Jur. 1175, 9 L. J. Exch. 14, 5 M. & W. 548.

90. Callahan *v.* Donnolly, 45 Cal. 152, 13 Am. Rep. 172.

91. Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Terr. 283, 34 Am. Rep. 803.

92. Althen *v.* Vreeland, (N. J. 1897) 36 Atl. 479. And see Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641, holding void an agreement by the vendors of a manufacturing business that they would desist from and discontinue the manufacturing, trading, selling, or in any manner or form interfering in or with the manufacturing of palm-leaf beds or mattresses or in the materials out of which such beds are made, directly or indirectly, in all the territory of the state of New York west of the city of Albany, and that they would not sell beds or twist for beds to the agent or agents of the plaintiffs in the city of Columbus, Ohio.

93. Munroe *v.* Hall, 97 N. C. 206, 1 S. E. 651.

94. Oppenheimer *v.* Hirsch, 5 N. Y. App. Div. 232, 38 N. Y. Suppl. 311. See also Carroll *v.* Giles, 30 S. C. 412, 9 S. E. 422, 4 L. R. A. 154, holding void a contract by which plaintiff agreed to furnish for defendant everything necessary to run a barber shop in a certain town, and defendant agreed not to do any work as a barber for any one else or to open a shop for himself in such town at any time, and to convey to plaintiff the patronage which had been extended to him, the proceeds of the business to be equally divided between them.

95. Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193.

96. Bingham *v.* Maigne, 52 N. Y. Super. Ct. 90.

of contracts in restraint of trade as between the parties is the sole test in those cases only where the public interests are not also involved. Although the contract may be fair and reasonable as between the parties, yet if it is so injurious to the public interest that public policy requires that it should not be enforced it will be held void.[97] Cases of this kind arise where the covenantor is exercising a public franchise or is engaged in a business impressed with a public trust,[98] as in the case of pooling contracts and other agreements or combinations between railroad companies or other common carriers to stifle competition and raise freight or passenger rates,[99] and under some circumstances of grants of exclusive rights or privileges by cities or villages,[1] by railroad companies and other common carriers by land or water,[2] and even by private individuals or purely private corpora-

97. Fowle *v.* Park, 131 U. S. 88, 9 S. Ct. 658, 33 L. ed. 67; Nordenfelt *v.* Maxim Nordenfelt Guns, etc., Co., [1894] A. C. 535, 63 L. J. Ch. 908, 71 L. T. Rep. N. S. 489, 11 Reports 1.

98. Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979. And see Central R. Co. *v.* Collins, 40 Ga. 582.

99. *Kentucky.*— Anderson *v.* Jett, 89 Ky. 375, 12 S. W. 670, 11 Ky. L. Rep. 570, 6 L. R. A. 390 (an agreement between owners of rival steamboats); Sayre *v.* Louisville Union Benev. Assoc., 1 Duv. 143, 85 Am. Dec. 613.

Lousiana.— Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445, holding that an arrangement whereby two competing systems of railroad agree to divide their earnings is against public policy.

New Hampshire.— Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689, holding, however, that a contract between rival and competing railroad companies for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy.

New York.— Stanton *v.* Allen, 5 Den. 434, 49 Am. Dec. 282; Hooker *v.* Vandewater, 4 Den. 349, 47 Am. Dec. 258, both of which were agreements between proprietors of several lines of boats. *Compare* Ives *v.* Smith, 3 N. Y. Suppl. 645, 19 N. Y. St. 556 [*affirmed* in 55 Hun 606, 8 N. Y. Suppl. 46, 28 N. Y. St. 917].

United States.— Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659.

See 11 Cent. Dig. tit. "Contracts," § 549; and, generally, COMMERCE, 7 Cyc. 407; RAILROADS.

1. Contract for maintenance of market.— Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80, holding that a contract between the president and trustees of a village and a private citizen, under which the latter was to erect a market house for the village, the authorities undertaking as a compensation to him to confine the marketing of the citizens during market hours to the building and its vicinity, to appoint a proper officer for the enforcement of all ordinances relative to the market and the vending of market articles, and to control and rent the stalls for the benefit of the person erecting the building was void, as creating a monopoly.

City's grant of exclusive license to sell liquors.— In Jackson *v.* Bowman, 39 Miss. 671, it was held that a contract by which a city agreed, in consideration of the erection of a commodious hotel within the corporate limits, to grant to the builder the exclusive right to retail vinous and spirituous liquors in the corporate limits for five years at the lowest rate of license allowed by law, to renew the same to him and his assigns, to give to him the sum paid for such license for five years, and in case the city grant a license to another to give him five thousand dollars in aid of the erection of the hotel, was contrary to law and public policy, which forbids the grant of monopolies and exclusive privileges.

2. Contract between railroad and sleeping-car company.— Pullman Palace-Car Co. *v.* Texas, etc., R. Co., 4 Woods (U. S.) 317, 11 Fed. 625, holding void a contract whereby a sleeping-car company was given the exclusive right to furnish sleeping-car accommodations on a certain line of railroad. But see Chicago, etc., R. Co. *v.* Pullman Southern Car Co., 139 U. S. 79, 11 S. Ct. 490, 35 L. ed. 97, where it was held that a stipulation in a contract that a sleeping-car company should have the exclusive right for fifteen years to furnish drawing-room and sleeping-cars for a railroad company's use did not render the contract void as being in restraint of trade or against public policy, as such stipulation did not disable the sleeping-car company from furnishing cars to a rival railroad, and the law would imply from the terms of the contract that it must furnish the railroad company in question, not only adequate and safe cars, but sufficient in number for the use of the public traveling on the latter's road.

Contracts between railroad company and telegraph company.—In Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781, it was held that a contract by a railroad company granting to a telegraph company the exclusive use and occupancy of its right of way for telegraph purposes was void as in restraint of trade and against public policy. See also Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; Baltimore & Ohio Tel. Co. *v.* Western Union Tel. Co., 24 Fed. 319 (hold-

tions.[3] The principle also applies where the effect or tendency of the agreement between the parties is to lessen competition or raise the prices of goods,[4] and in

ing that a contract between a telegraph company and a railroad company, by which it was attempted to give an exclusive right to the former to build and operate a telegraph line over the lines and right of way of the railroad company, and by which the railroad company further agreed to discriminate in the carriage and rates of freight against competing telegraph companies, was against public policy and void); Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 23 Fed. 12; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1. *Contra*, Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28 (holding that a contract whereby a telegraph company was to put up its lines along a railroad and be given the exclusive right of way for telegraphic purposes was not contrary to public policy, and the railroad company could be enjoined from permitting another telegraph company to place and maintain a wire on the same poles); Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201 (holding that an agreement between a railroad company and a telegraph company for the construction of a line of telegraph, by which the railroad company granted the exclusive right of way and bound itself to transport and deliver wherever along the road materials were needed in such construction, operation, or repair, of the telegraph line, but not to deliver, except at regular stations, for any competing line, was illegal and void as to discriminations, but not as to the grant of an exclusive right to use of the right of way); Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 5 Ohio Dec. (Reprint) 407, 5 Am. L. Rec. 429 (holding that a contract between a telegraph company and a railway company, founded upon sufficient consideration, stipulating that the former should have the exclusive right to construct a line over the latter's right of way for twenty-five years, was not void as against public policy); Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Biss. (U. S.) 367, 29 Fed. Cas. No. 17,445.

Contract between railroad company and ferry company.—In Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519, it was held that a contract between a ferry company and a railroad company, whereby the railroad company was to construct its depot on lands belonging to the ferry company and give the ferry company the transportation of all goods across the river, was not in restraint of trade.

Contract between railroad company and elevator company.—In Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422, it was held that a contract between an elevator company and a railroad company by which the railroad company agreed that the elevator should have the handling of all through grain at a specified price for a period of fifteen years was not invalid as being in contravention of public policy, on the ground that it gave the elevator a monopoly of the handling of all the through grain transported over defendant's road.

Contract between canal company and coal company.—In Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295, it was held that an agreement between a canal company and a coal company, granting to the coal company all the facilities of navigation which the canal would afford, not exceeding one half of its whole capacity, was not invalid as being a monopoly of that half to the exclusion of the public, as against other carriers of coal, where it did not appear that the public was injured, or that either company had thereby exercised any function that was exclusive of the public right.

Contract between railroad company and hackman.—In Brown *v.* New York Cent., etc., R. Co., 75 Hun (N. Y.) 355, 27 N. Y. Suppl. 69, 56 N. Y. St. 748, it was held that a contract between a railroad company and a hackman, by which the company granted an exclusive privilege to the hackman to come into its depot yards with his hacks for the purpose of soliciting business from persons arriving at the depot, was not against public policy.

Contracts between railroad company and shippers.—In Union Locomotive, etc., Co. *v.* Erie R. Co., 37 N. J. L. 23, it was held that a contract between a railroad company operating a railroad in New Jersey under acts of the legislature of that state and certain individuals, the effect of which was to give the latter the exclusive right of transporting certain kinds of freight over the railroad, was void from considerations of public policy. In Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 37 Wkly. Notes Cas. (Pa.) 89, 50 Am. St. Rep. 807, 29 L. R. A. 423, it was held that a contract by a railroad company with an iron company by which the former furnished funds to develop the latter and give it facilities for transportation, in consideration of which the iron company contracted to give it all its traffic, was not in restraint of trade, against public policy, or *ultra vires*, but that the further agreement that the coal company should give no aid to the construction of competitive lines would not be enforced, as it was against public policy.

3. Grant of exclusive privilege to pipe-line company.—In West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527, it was held that a grant of the exclusive right of way and privilege to construct and maintain tubing for the transportation of oil through a tract of two thousand acres of land amounted to a covenant by the grantor not to use or grant similar privileges to others, and as such was in unreasonable restraint of trade and void.

4. *California.*—Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep.

other cases where there is injury or where there is threatened injury to the public.[5]

(E) *Restrictions on Use of Patents.* The grant by the government of a patent, that is, a right to make, use, and sell a machine or other invention, is the grant of a monopoly, and gives the patentee legal authority to make and sell the invention, and to restrict its use in respect of territory, time, business, or purposes as he shall deem fit.[6] Hence a license to use a patent "at the licensee's own

102; Santa Clara Valley, etc., Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211. See also San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839; California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

Florida.— See Jones *v.* Fell, 5 Fla. 510.

Illinois.— More *v.* Bennett, 140 Ill. 69, 29 N. E. 888, 33 Am. St. Rep. 216, 15 L. R. A. 361; Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Griffin *v.* Piper, 55 Ill. App. 213; Schubart *v.* Chicago Gas Light, etc., Co., 41 Ill. App. 181; Cummings *v.* Foss, 40 Ill. App. 523.

Iowa.— Chapin *v.* Burnes, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428.

Kentucky.— Anderson *v.* Jett, 89 Ky. 375, 12 S. W. 670, 11 Ky. L. Rep. 570, 6 L. R. A. 390.

Louisiana.— Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 670, 6 So. 888, 17 Am. St. Rep. 445; India Bagging Assoc. *v.* Kock, 14 La. Ann. 168.

Massachusetts.— Central Shade Roller Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629; Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327.

Michigan.— Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

Missouri.— See Haarstick *v.* Shields, 11 Mo. App. 602.

Nebraska.— State *v.* Nebraska Distilling Co., 29 Nebr. 700, 46 N. W. 155.

New York.—Cohen *v.* Berlin, etc., Envelope Co., 166 N. Y. 292, 59 N. E. 906; Arnot *v.* Pittston, etc., Coal Case Co., 68 N. Y. 558, 23 Am. Rep. 190. See also Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 62 N. Y. St. 445, 26 L. R. A. 544.

Ohio.— Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 63 Am. St. Rep. 736, 41 L. R. A. 185; Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159.

United States.— U. S. *v.* Addyston Pipe, etc., Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Oliver *v.* Gilmore, 52 Fed. 562. See also U. S. Chemical Co. *v.* Providence Chemical Co., 64 Fed. 946.

See 11 Cent. Dig. tit. "Contracts," § 548; and, generally, MONOPOLIES.

5. In Western Wooden-ware Assoc. *v.* Starkey, 84 Mich. 76, 83, 47 N. W. 604, 22 Am. St. Rep. 686, 11 L. R. A. 503, 32 Centr. L. J. 186, a firm in Michigan engaged in the wooden-ware manufacturing business sold out its business and agreed not to engage therein in that and neighboring states for five years, and not to allow its real estate whereon its factory was situated to be used for such business for the same period. The agreement was held void as contemplating the cessation of the business conducted by that firm in Michigan, to the injury of the citizens. The court said: "Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the State. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great north-west, teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris and Olmsted, and shut the doors of that shop, and prohibit their again opening them for five years in any of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the State, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period." See also Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186; Lanzit *v.* Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171. So it has been held of an agreement by one steamship company to pay money to another steamship company for ceasing to exercise its franchise. Leslie *v.* Lorillard, 40 Hun (N. Y.) 392. But see Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363, 18 N. Y. St. 520, 1 L. R. A. 456. So of an agreement between common carriers importing that the shipper shall be denied the advantage of improvements or new facilities adapted to the needs of transportation. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App. 347, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430. In an Ohio case a lease for a term of years by a manufacturing company of the machinery in the mill of another like company, together with the latter's good-will, which did not provide for the operation of the machinery where situated or for its removal, was held void as in restraint of trade. Field Cordage Co. *v.* National Cordage Co., 6 Ohio Cir. Ct. 615.

6. Heaton-Peninsula Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 25

establishment, but not to be disposed of to others, and not to convey any right to make any contract with the government of the United States" has been held valid.[7] So it has been held of a license to use two machines "in the city of Newark, and there only," and "by one manufacturing concern," and "to be used only for hats manufactured by them, and not in manufacturing hat bodies for any other persons, or for sale in an unfinished state,"[8] and of a license to use one machine "in their quarries at West Rutland, and in no other place or places."[9] On the sale of a patent-right the restraint may be unlimited during the life of the patent.[10] Thus the courts have held valid a covenant by the vendor on the sale of a patent that he will at no time "aid, assist or encourage in any manner any competition" against the patent;[11] a covenant by the vendor of a patent that he

C. C. A. 267, 35 L. R. A. 728; Bowling *v.* Taylor, 10 Fed. 404; Pope Mfg. Co. *v.* Ousley, 27 Fed. 100; Dorsey Revolving Harvester Rake Co. *v.* Bradley Mfg. Co., 12 Blatchf. (U. S.) 202, 7 Fed. Cas. No. 4,015, where it is said: "The right to make and vend, and the right to use, are completely severable; and, while a grant of the right to make and sell to others might be deemed to imply the right in the purchasers to use the thing purchased, a patentee may restrict the use. The patent as effectually secures to him a monopoly of the right to use as it does of the right to make. The patentee, or his assignee, may, therefore, give the exclusive right to make and sell for use within certain territory; and such a restriction would be entitled to enforcement. . . . The right of the patentee to confer upon others such qualified privilege, whether of making, of selling to others, or of using as he sees fit, whether within special limits or under limitations of quantity, or number, or restricted uses, does not seem deniable." See PATENTS. But this right is subject to the limitations of public policy. Thus where the patentees of instruments essential to the operation of telephone lines had licensed telephone companies to use their patents for the purpose of operating public telephone lines within a given district, but prohibited such companies from serving within such district any telegraph company, the court by mandamus compelled the extension of service to any one within the district demanding connection and paying established charges, upon the solid ground that a public telephone company is a common carrier, and as such subject to the regulations imposed on all corporations of a quasi-public character, among which was the duty of dealing equally with all, and discriminating against none, tendering equal pay for equal service; and that when a patentee authorizes the use of his invention by one charged with public duties and subject to regulation by law it is not competent by a restriction on the use to deprive the licensee of the power of rendering an equal service to all who apply and tender the compensation fixed by law or regulation for the same service to others. Missouri *v.* Bell Telephone Co., 23 Fed. 539. And see Delaware *v.* Delaware, etc., Tel., etc., Co., 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; State *v.* Bell Telephone Co., 36 Ohio St. 296, 38 Am. Rep. 583; Commercial Union Tel. Co. *v.* New England Telephone, etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

7. Provident Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

8. Burr *v.* Duryee, 4 Fed. Cas. No. 2,190.

9. Steam Cutter Co. *v.* Sheldon, 10 Blatchf. (U. S.) 1, 22 Fed. Cas. No. 13,331. And it has been recently held that it is competent for the owner of a patent for a machine for fastening buttons to shoes with metallic fasteners to sell such machines subject to a condition that they shall be used only with fasteners manufactured by the seller, title to revert on breach of the condition. Even though the fasteners are not patented, and the result of the restriction is to give the owners of the machine patent a monopoly of their manufacture and sale, this does not make the condition void as in restraint of trade or against public policy. Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288.

10. Stearns *v.* Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Billings *v.* Ames, 32 Mo. 265; Jones *v.* Lees, 1 H. & N. 189, 2 Jur. N. S. 645, 26 L. J. Exch. 9.

An agreement between the joint inventors of a machine that one shall have the exclusive sale of the article in two of the United States and the other in the rest, and that neither shall sell within the other's territory, is not void as in restraint of trade. Stearns *v.* Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223.

Void agreement.— But in Gamewell Fire Alarm Tel. Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98, 39 Am. St. Rep. 458, 22 L. R. A. 673, it was held that a stipulation by a manufacturer of fire-alarm and telegraph apparatus, on a sale of all his machinery, stock, letters patent, and inventions, that he would not for ten years engage in the manufacture and sale of such apparatus or enter into competition with the purchaser, while valid in so far as the patents and inventions agreed to be sold were concerned, was void as against public policy in so far as it prohibited or prevented the seller from engaging in the manufacture and sale of fire-alarm and telegraph apparatus under other patents or under no patents at all.

11. Morse Twist Drill, etc., Co. *v.* Morse, 103 Mass. 73, 4 Am. Rep. 513.

will not engage in business in opposition to the vendee;[12] an agreement between two joint owners of a patent for the manufacture and sale of an article, which provides for the continuance of the manufacture by one of them, and that the other after a certain time shall abstain therefrom;[13] an agreement between part owners of a patent that the patented device shall not be sold for less than a certain profit;[14] and other similar agreements.[15] Where the manufacturer of a patent medicine sells it under a contract whereby the purchaser agrees not to resell the medicine for less than a certain price, the restriction is only binding on the purchaser from the manufacturer, and the latter cannot enjoin a purchaser from such purchaser from selling for a less price.[16]

(F) *Restrictions on Sale of Trade-Marks or Trade-Names.* The same principle applies to the sale of trade-marks. The seller of a trade-mark may lawfully bind himself not to use it on any preparation afterward made by him;[17] and a person may, by assigning the right to use his name in the manufacture of a certain article, bar himself forever from such use.[18]

(G) *Restrictions on Sale of Secret Process.* Upon the sale of a secret process of manufacture of an article in general demand, which it is agreed shall be communicated for the exclusive benefit of the buyer, it becomes a reasonable and necessary stipulation that the seller shall not communicate the secret to any one or carry on the manufacture in the future.[19] Equity will not permit one who has

12. Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442.

13. Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385.

14. Parkhurst *v.* Kinsman, 1 Blatchf. (U. S.) 488, 18 Fed. Cas. No. 10,757.

15. Billings *v.* Ames, 32 Mo. 265 (an agreement by one who has been sued for the breach of a patent that in consideration of the dismissal of the suit and of a right to the partial use of the patent for a year, he will not manufacture nor put up the patented article during the existence of the patent); Good *v.* Deland, 121 N. Y. 1, 24 N. E. 15, 30 N. Y. St. 636 (an agreement by a patentee to allow an association and its members the exclusive use and sale of inventions patented by him); Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180 (a contract of employment between a company using patented machines and a mechanic, which required that any improvements in the machines made by such mechanic should belong to the company). But see Tecktonius *v.* Scott, 110 Wis. 441, 86 N. W. 672, holding that a provision in a contract, not limited as to duration, by which a party bound himself and his heirs not to manufacture or sell any band-fastening device of any kind or character, except that covered by a certain patent, was void.

16. Garst *v.* Hall, etc., Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631.

17. Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Rep. 766; Ponds Extract Co. *v.* Humphreys Specific Homœopathic Co., 50 How. Pr. (N. Y.) 358; Gillis *v.* Hall, 7 Phila. (Pa.) 422. See TRADE-MARKS AND TRADE-NAMES.

18. But he cannot bar himself from again engaging in the same business without limit as to time or territory. Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450; Gillis *v.* Hall, 7 Phila. (Pa.) 422. See TRADE-MARKS AND TRADE-NAMES.

19. *Georgia.*— Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Dec. 766.

Indiana.— Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427.

Massachusetts.— Vickery *v.* Welch, 19 Pick. 523, 96 Am. Dec. 668.

New York.— Hard *v.* Seeley, 47 Barb. 428; Alcock *v.* Giberton, 5 Duer 76; Jarvis *v.* Peck, 10 Paige 118, Hoff. Ch. 479.

United States.— Fowle *v.* Park, 131 U. S. 88, 9 S. Ct. 658, 33 L. ed. 67.

England.— Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. Rep. N. S. 661, 18 Wkly. Rep. 572; Bryson *v.* Whitehead, 1 L. J. Ch. O. S. 42, 1 Sim. & St. 74, 1 Eng. Ch. 74.

See 11 Cent. Dig. tit. "Contracts," § 553.

Illustrations.— Thus where a person, in selling "Brewer's Lung Restorer," a patent medicine, covenanted "never to use or permit my name to be used on any preparation which could be recommended and sold for the same purposes" as the medicine in question was used and sold for, or to impart the receipt thereof to any one, the covenant was held valid. Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Rep. 766. And so it was held where, on the sale of a process for porcelain teeth, the seller covenanted not to carry on or be interested in the conduct of the business of manufacturing porcelain teeth or impart the secret to any one (Alcock *v.* Giberton, 5 Duer (N. Y.) 76), and where the owner of a factory for the manufacture of a certain kind of cheese designated by a certain name sold it, together with the secret of the manufacture, to plaintiffs, and covenanted that neither she nor her husband, father, or brother-in-law, who had all assisted her in running the factory, would impart the secret to any other person than plaintiffs, nor engage in the business of manufacturing or selling such cheese (Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 40 N. Y. St. 300, 24 Am. St. Rep. 475, 13

sold for a valuable consideration the absolute and exclusive property in a medicine compounded by a secret process to reveal such secret to a third person, either by himself or through a member of his family, and will restrain by injunction the use of a secret so revealed.[20] The assignment by the proprietor of a secret medicinal compound of the exclusive right to manufacture and sell it in certain states and territories, with a covenant by the assignor not to manufacture or sell the article in such territory, and a covenant by the assignees not to manufacture or sell it in other territory, is not contrary to public policy.[21]

(H) *Other Agreements Restricting Liberty of Doing Business.* An agreement that one person will trade or do business only with another person, or in a certain way for a definite or indefinite period is valid.[22] And the same is true of

L. R. A. 652 [*affirming* 4 N. Y. Suppl. 402, 22 N. Y. St. 818]).

20. Simmons Medicine Co. *v.* Simmons, 81 Fed. 163. And see National Gum, etc., Co. *v.* Braendly, 27 N. Y. App. Div. 219, 224, 51 N. Y. Suppl. 93, where the court said: "There is no doubt that so much of the contract as provided that the defendant would disclose to the plaintiff the secret processes used in the manufacture of its goods, and would not disclose those secrets to anybody else, nor use them in the business of any other person, was valid and could be enforced. (Jarvis *v.* Peck, 10 Paige (N. Y.) 118; Alcock *v.* Giberton, 5 Duer (N. Y.) 76). It is said that the court cannot compel the disclosure of these secret processes. In one sense that may be very true, but, as a step toward compelling the defendant to perform that part of its agreement, it certainly has the power to restrain him from disclosing those processes to anybody else and to punish him if he violates an injunction imposing that restraint. It may do this not only in performance of the contract by which he agreed not to disclose these secrets, but also, in the absence of that negative stipulation, by way of compelling him to perform the contract which he made to disclose those processes to the plaintiff. (Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466; Catt *v.* Tourle, L. R. 4 Ch. 654, 38 L. J. Ch. 665, 21 L. T. Rep. N. S. 188; Peabody *v.* Norfolk, 98 Mass. 452)".

21. Fowle *v.* Park, 131 U. S. 88, 9 S. Ct. 658, 33 L. ed. 67.

22. *California.*— Schwalm *v.* Holmes, 49 Cal. 665.

Illinois.— Brown *v.* Rounsavell, 78 Ill. 589.

Massachusetts.— Palmer *v.* Stebbins, 3 Pick. 188, 15 Am. Dec. 204.

Missouri.— Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355.

New York.— Matthews *v.* Associated Press, 136 N. Y. 333, 32 N. E. 981, 50 N. Y. St. 9, 32 Am. St. Rep. 741; Bleistein *v.* Associated Press, 61 Hun 199, 15 N. Y. Suppl. 887, 40 N. Y. St. 593; Van Marter *v.* Babcock, 23 Barb. 633.

Pennsylvania.— Fuller *v.* Hope, 163 Pa. St. 62, 29 Atl. 779.

Texas.— Fuqua *v.* Pabst Brewing Co., (Civ. App. 1896) 36 S. W. 479.

Wisconsin.— Lenz *v.* Brown, 41 Wis. 172.

England.— Jones *v.* Edney, 3 Campb. 285, 13 Rev. Rep. 803.

Agreements held valid.— Thus the courts have sustained an agreement by a physician on selling his drug store to send all his prescriptions to be filled by one druggist (Ward *v.* Hogan, 11 Abb. N. Cas. (N. Y.) 478); a contract to sell to no person but one any lime for six months (Schwalm *v.* Holmes, 49 Cal. 665); an agreement to sell to another all ore purchased after a certain date (Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355); an agreement not to write plays for any other than a particular theater (Morris *v.* Coleman, 18 Ves. Jr. 438, 11 Rev. Rep. 230); a contract to write for a periodical, and for no other publication sold at less than a certain price, for one year (Stiff *v.* Cassell, 2 Jur. N. S. 348); an agreement by a publican, in making settlement with his creditors, to buy all beer of them (Thornton *v.* Sherratt, 8 Taunt. 529, 20 Rev. Rep. 543, 4 E. C. L. 262); a contract by a person to furnish another with sewing machines at a discount and upon credit, provided the latter will deal exclusively with the former (Brown *v.* Rounsavell, 78 Ill. 589); an agreement by a dentist to purchase artificial teeth of a manufacturer on condition that the latter will not sell such teeth to any person in the town where the dentist resides (Clark *v.* Crosby, 37 Vt. 188); an agreement by a hotel-keeper to buy no ice except of a certain ice company (Twomey *v.* People's Ice Co., 66 Cal. 233, 5 Pac. 158); an agreement by a lessor of a portion of a certain warehouse in a city for a specified term for the storage of wheat, that during the term he will not purchase, store, or handle any wheat in the market of that city, except under the direction of the lessee (Kellogg *v.* Larkin, 3 Chandl. (Wis.) 133); an agreement by a manufacturer of printing presses not to sell any presses which can be used for a certain kind of printing (New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 83 Hun (N. Y.) 593, 31 N. Y. Suppl. 1060, 63 N. Y. St. 873); an agreement to sell part of one's land on the vendee's agreeing not to sell sand from it (Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. 355, 1 Am. St. Rep. 816); an agreement by a vendor not to sell other lots in the same plat at a less price for one year than that paid by the vendee for his lot (Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427); an agreement that a purchaser of goods shall not sell them for less than a certain price (Clark *v.* Frank, 17 Mo. App. 602; John D. Park,

agreements restraining a person from carrying on business in certain premises[23] or agreements restricting the use to be made of premises.[24] Many other agree-

etc., Co. *v.* National Wholesale Druggists' Assoc., 50 N. Y. Suppl. 1064; New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302); a contract by which one is given the exclusive right to vend a certain article in a city (Ewing *v.* Wilcox, etc., Sewing Mach. Co., 9 Wkly. Notes Cas. (Pa.) 272); where electrotype plates are sold so that the absolute title passes to the buyers, a clause in the contract of sale providing that the buyers will not sell the plates to other parties or multiply them for the purpose of sale (Meyer *v.* Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283); a contract between an ice manufacturer and a brewer whereby the former agrees to sell the latter all the ice he needs, the brewer not to retail ice nor sell to retailers (Crystal Ice Mfg. Co. *v.* San Antonio Brewing Assoc., 8 Tex. Civ. App. 1, 27 S. W. 210); a contract to buy meat at a fixed price and for a time certain, in consideration of the seller's refraining from selling meat during such time at the buyer's place of business (Lightner *v.* Menzel, 35 Cal. 452); an agreement by a seller of goods with a purchaser not to sell a certain kind of goods to any one else in the same town (Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777; Roller *v.* Ott, 14 Kan. 609; Anheuser-Busch Brewing Assoc. *v.* Houck, (Tex. Civ. App. 1894) 27 S. W. 692; Watkins *v.* Morley, Tex. App. Civ. Cas. § 723); a contract to sell a brand of cigars to no one in the state but defendant, and to give him the exclusive agency for such sale (Newell *v.* Meyendorff, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738, 8 L. R. A. 440); an agreement between two traders in live stock that the first will sell the other all his commodities, and that the second will buy from the first alone (New York Live-Stock Assoc. *v.* Levy, 54 N. Y. Super. Ct. 32); and an agreement that defendant shall for a certain number of years consign exclusively to plaintiffs all the blankets of his manufacture (Hadden *v.* Dimick, 31 How. Pr. (N. Y.) 196).

Agreements held illegal.— The following agreements, however, have been held invalid: An agreement between the lessor and lessee of a coal mine that the lessee should not give or accept any order for goods and merchandise on any other store than the lessor's (Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103); an agreement between the president and trustees of a village and a private citizen, under which the latter was to erect a market house for the village, the authorities undertaking, as a compensation to him, to confine the marketing of the citizens during market hours to the building and its vicinity, to appoint a proper officer for the enforcement of all ordinances relative to the market and the vending of market articles, and to control and rent the stalls for the benefit of the person erecting the building (Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80); an agreement between partners to keep their partnership a secret and maintain a fictitious competition for the purpose of deceiving the public (Fairbank *v.* Leary, 40 Wis. 637); a contract by which the owners of several water rights in a stream agreed with each other, under a penalty of ten thousand dollars liquidated damages, not to sell to certain parties, or any other persons who might endeavor to obtain said water rights, and not to make any compromise with such parties, except by the written consent of the others (Ford *v.* Gregson, 7 Mont. 89, 14 Pac. 659); and a lease conditioned that the demised premises should only be used as a beer saloon, and that no beer except that of the lessor's firm should be sold there, but containing no promise on the part of the lessor to furnish beer (Muller *v.* Bobringer, 3 Pa. Co. Ct. 144).

23. Johnson *v.* Gwinn, 100 Ind. 466; Heichew *v.* Hamilton, 3 Greene (Iowa) 596. As for example an agreement not to run boats on certain waters or on certain lines of travel. California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511; Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363, 18 N. Y. St. 520, 1 L. R. A. 456; Dunlap *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64, 22 L. ed. 315. But see Wright *v.* Ryder, 36 Cal. 346, 95 Am. Dec. 186; Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Terr. 283, 34 Am. Rep. 803.

24. An express covenant in a conveyance that no trading or mercantile business shall be carried on on the premises is not contrary to public policy, and may be enforced by injunction by the vendor or his assignees of the dominant estate against a subpurchaser of the servient estate with notice. Morris *v.* Tuscaloosa Mfg. Co., 83 Ala. 565, 3 So. 689. It has been so held for example of an agreement not to permit a warehouse or place of shipping or receiving goods upon the conveyed premises (Robbins *v.* Webb, 68 Ala. 393); an agreement that a lot sold shall not be used for a tavern (Holmes *v.* Martin, 10 Ga. 503) or hotel (Mollyneaux *v.* Wittenberg, 39 Nebr. 547, 58 N. W. 205); an agreement that intoxicating liquors shall not be sold on the land (Hatcher *v.* Andrews, 5 Bush (Ky.) 561; Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363) or that they shall not be sold in less quantities than five gallons or half a barrel (Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274; Laubenheimer *v.* Mann, 17 Wis. 542); and an agreement by the vendor in consideration of the sale of a lot not to build a flat in the immediate neighborhood (Lewis *v.* Gollner, 129 N. Y. 227, 29 N. E. 81, 41 N. Y. St. 173, 26 Am. St. Rep. 516 [*reversing* 14 N. Y. Suppl. 362, 37 N. Y. St. 613]). But see to the contrary Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, holding void as in restraint of trade a covenant by the vendor of marl land that neither he nor his assigns will sell marl from the ad-

ments of similar character have been sustained by the courts as legal and binding obligations.[25]

(I) *Consideration For Contract.* A contract in restraint of trade must like every other contract be supported by a valuable consideration.[26] It was formerly held that the restraint must be supported by an adequate consideration, that is, a consideration equivalent in value to the restraint imposed; but this doctrine has been repudiated and it is now held that as in the case of other contracts the adequacy of the consideration is a matter to be determined by the parties, and that it cannot be inquired into by the courts.[27]

(J) *Proof.* Valid agreements in restraint of trade must be established by clear and satisfactory proof in order to justify a court in restraining their breach by injunction. There must be no doubt or uncertainty in regard to their terms or the consideration upon which they are founded.[28]

(K) *Statutory Provisions.* In California a statute provides that every contract by which one is restrained from exercising a business or calling is void to that extent, except that one who has sold the good-will of a business may agree not to carry on a similar business within a specified county or town, so long as the buyer or any one deriving title to the good-will from him carries on the busi-

joining land. And see Tardy *v.* Creasy, 81 Va. 553, 59 Am. Rep. 676.

25. For example the following have stood the test: An agreement between a board of trade and a person who represents himself as having control over certain industries which he is about to establish in another town, whereby such person agrees to withdraw from that deal, and use his influence to have those industries established in the town represented by the board (Lord *v.* Board of Trade, 163 Ill. 45, 45 N. E. 205); an agreement that neither of two persons shall thereafter publish a counterfeit detector (Presbury *v.* Fisher, 18 Mo. 50); an agreement to pay commissions on all sales to customers introduced by another (Boyden *v.* Baldwin, 15 Misc. (N. Y.) 103, 36 N. Y. Suppl. 478, 71 N. Y. St. 430); a contract by a manufacturer that a storekeeper shall have the trade of his workmen, in consideration of the storekeeper paying the manufacturer a percentage on the sales (George *v.* East Tennessee Coal Co., 15 Lea (Tenn.) 455, 54 Am. Rep. 425); a contract by a railroad company to patronize a hotel in consideration of its being built at an embryo town, and to dissuade others from building hotels there (Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. Dec. 268); an agreement by a company which carries on the business of warehouseman as an adjunct to its main business of compressing cotton, by which it charges an increased rate for cotton which is removed uncompressed (Seeligson *v.* Taylor Compress Co., 56 Tex. 219); an agreement by one employed to sell and operate another's machine that if the former shall at any time make any improvement on such machine it shall be for the exclusive use of the latter (Bonsack Mach. Co. *v.* Hulse, 65 Fed. 864, 13 C. C. A. 180); an agreement between proprietors of parks that neither shall pay any bonus to parties enjoying his park (Koehler *v.* Feuerbacher, 2 Mo. App. 11); and an agreement signed by merchants of a town, obligating themselves to close their places of business at six-thirty o'clock from May 15 until September 1 (Stovall *v.* McCutchen, 107 Ky. 577, 54 S. W. 969, 21 Ky. L. Rep. 1317, 47 L. R. A. 287).

Agreements not to sell stock in corporation.— An agreement between several stockholders of a corporation not to sell their stock nor to give powers to vote is in restraint of trade and against public policy. Fisher *v.* Bush, 35 Hun (N. Y.) 641; White *v.* Ryan, 15 Pa. Co. Ct. 170. But public policy does not preclude a majority of the stockholders of a corporation from agreeing to unite in efforts to sell their stock to a proposed purchaser, and that neither one will sell without the other. Havemeyer *v.* Havemeyer, 86 N. Y. 618 [*affirming* 43 N. Y. Super. Ct. 506]. And an agreement that stock issued to joint owners of an invention in consideration for its transfer to the corporation shall be held jointly and be inalienable for ten years without their joint consent is not an agreement against public policy and therefore void. Hey *v.* Dolphin, 92 Hun (N. Y.) 230, 36 N. Y. Suppl. 627, 71 N. Y. St. 794. See CORPORATIONS.

26. Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074, 32 Am. St. Rep. 297, 12 L. R. A. 428. See also Urmston *v.* Whitelegg, 63 L. T. Rep. N. S. 455. And see, generally, *supra*, IV.

27. *Indiana.*— Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Massachusetts.— Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102.

New York.—Lawrence *v.* Kidder, 10 Barb. 641.

England.— Hitchcock *v.* Coker, 6 A. & E. 438, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241.

Adequacy of consideration generally see *supra*, IV, E.

28. Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584.

ness, and that in anticipation of dissolution of a partnership a partner may agree not to carry on a similar business in the town or city where the partnership was located.[29]

(VIII) *Other Agreements Injuring Personal Rights.* Any agreement which would deprive a person completely of his liberty would be void as against public policy,[30] as for example an indefinite contract of service amounting to a form of servitude.[31] But one may legally bind himself to work for another for a term of years.[32] And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights.[33]

(IX) *Agreements Affecting Duties Toward Third Persons* — (A) *In General.* An agreement may be contrary to public policy and illegal because it affects a duty which one person owes to another.[34] As we have seen, agreements to defraud, to commit any other civil wrong against third persons, or to commit a breach of trust are illegal.[35] It is said that agreements which tend to discourage performance of moral duties toward a third person are void as against public policy, as for example a covenant by a landowner to let all his cultivated land lie waste or a clause in a charter-party prohibiting deviation even to save life.[36]

(B) *Agreements Affecting Duties of Parents.* A class of agreements of this character are those in which a father surrenders the custody of his infant child. Such agreements are not binding if they are contrary to the child's interests, for a parent "cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own."[37] Such agreements, however, may be valid and

29. Cal. Code, §§ 1673–1675. For cases construing those provisions see Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 876, 52 Am. St. Rep. 70; Ragsdale *v.* Nagle, 106 Cal. 332, 39 Pac. 628; City Carpet Beating, etc., Works *v.* Jones, 102 Cal. 506, 36 Pac. 841; Brown *v.* Kling, 101 Cal. 295, 35 Pac. 995; Vulcan Powder Co. *v.* California Vigorit Powder Co., (Cal. 1892) 31 Pac. 583; Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242.

30. *In re* Baker, 29 How. Pr. (N. Y.) 485. See Dettrich *v.* Gobey, 119 Cal. 599, 51 Pac. 962, holding that a stipulation in a contract by a divorced husband to restore the daughter to the mother, *nolens volens*, when she should be eighteen years old, was as much a contract to infringe her personal liberty as if the age fixed had been thirty-six or fifty-four years and was unlawful.

Restriction on right to borrow money.— In Union Cent. L. Ins. Co. *v.* Champlin, 11 Okla. 184, 65 Pac. 836, 55 L. R. A. 109, a stipulation in a note forbidding the maker from discharging his obligation by borrowing money from any one except the payee was held contrary to public policy and void. But see Sheneberger *v.* Union Cent. L. Ins. Co., 114 Iowa 578, 87 N. W. 493, 55 L. R. A. 269, where a somewhat similar provision was sustained.

31. Parsons *v.* Trask, 7 Gray (Mass.) 473, 66 Am. Dec. 502. See Pitts *v.* Allen, 72 Ga. 69. Pollock says: "It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy. It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction, or over the servant's property. By the French law indefinite contracts of service are not allowed." Pollock Contr. 316.

32. Walker *v.* Chambers, 5 Harr. (Del.) 311; Hoyt *v.* Fuller, 19 N. Y. Suppl. 962, 47 N. Y. St. 504; Phillips *v.* Murphy, 49 N. C. 45. See MASTER AND SERVANT.

33. Waite *v.* Merrill, 4 Me. 102, 16 Am. Dec. 238; Com. *v.* Schultz, Brightly (Pa.) 29.

34. Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; Andrews *v.* Salt, L. R. 8 Ch. 622, 28 L. T. Rep. N. S. 686, 21 Wkly. Rep. 431, 616; and other cases cited in the notes following.

35. See *supra*, VII, B, 2, b, (III)–(VIII).

36. Pollock Contr. 306; Scaramanga *v.* Stamp, 4 Aspin. 295, 5 C. P. D. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691.

37. Andrews *v.* Salt, L. R. 8 Ch. 622, 28 L. T. Rep. N. S. 686, 21 Wkly. Rep. 431, 616, where it was held that an agreement before marriage between husband and wife of different religions that boys should be educated in the religion of their father and girls in the religion of their mother could not be enforced. See also Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220. In a recent case in one of the nisi prius courts of Pennsylvania it is held that a contract with an institution called a "Children's Home Society," by which a mother surrendered her child to the society, consenting that it might

binding if they are clearly for the benefit and for the best interests of the child.[38]

(c) *Agreements of Quasi-Public Corporations.* As we have seen, agreements by railroad companies, water and gas companies, and other quasi-public corporations not to perform duties which they owe to the public, or which prevent them from performing such duties, are contrary to public policy and void.[39]

(d) *Agreements Exempting From Liability For Negligence.* Other agreements falling within this class are agreements by which it is sought to exempt one from liability for negligence. By the weight of authority, a master cannot by agreement with his servant exempt himself from liability for injuries to the servant caused by his negligence or by the negligence of those who, although engaged in the same service, are superior in authority and control.[40] But an

be adopted without notice to her by any person to whom the society might give it, and agreeing that she would not visit or seek to find it, was void as being against public policy, on the ground that it tended to encourage illegitimacy. *In re* Sleep, 6 Pa. Dist. 256.

38. In Enders *v.* Enders, 164 Pa. St. 266, 30 Atl. 129, 44 Am. St. Rep. 598, 27 L. R. A. 56, an agreement by a grandfather to pay his daughter twenty thousand dollars and her son ten thousand dollars, when he should come of age if the daughter would permit the boy to live with and be educated by him, she to see him whenever she should desire, was held not against public policy. The court said that the authorities establish that the contract of a parent, by which he bargains away for a consideration the custody of his child to a stranger, he attempting to relieve himself from all paternal obligation and place the burden on another, who is to shoulder it, without natural affection or moral obligation to prompt to the performance of parental duty, but only because of a bargain, is void as against public policy, as such a contract would be the mere sale of the child for money. But it was clearly of the opinion that the tendency of such contracts between grandparents of good character and ample estate and parents in reduced circumstances, where parental solicitude and affection are not to be extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor contrary to good morals. In Van Dyne *v.* Vreeland, 11 N. J. Eq. 370, and Hill *v.* Gomme, 1 Beav. 540, 17 Eng. Ch. 540, the contract of the parents was decided not to be against public policy, although made with strangers to the blood, because of the special facts, and on the ground that the contract was for the welfare of the child. And in Neal *v.* Gilmore, 79 Pa. St. 421, where a contract was made by the father, who was intemperate, relinquishing the custody of his two boys, respectively two and six years of age, to a childless couple, relatives of his, until the children should become of age, it was held that if the contract had been proven there was sufficient consideration to support and enforce it. See also PARENT AND CHILD.

39. See *supra*, VII, B, 3, f, (II), (G).

40. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776.

Arkansas.— Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 50, 3 Am. St. Rep. 230; Perry *v.* Little Rock, etc., R. Co., 44 Ark. 383.

Kansas.— Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630.

Louisiana.— Hayes *v.* Hayes, 8 La. Ann. 468.

Maine.— Willis *v.* Grand Trunk R. Co., 62 Me. 488.

Missouri.— Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149.

New York.— Runt *v.* Herring, 2 Misc. 105, 21 N. Y. Suppl. 244, 49 N. Y. St. 126. See Purdy *v.* Rome, etc., R. Co., 125 N. Y. 209, 26 N. E. 255, 34 N. Y. St. 737, 21 Am. St. Rep. 736.

Ohio.—Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471, 479, 8 N. E. 467, 58 Am. Rep. 833, where it was said in speaking of the liability of a railroad company for injuries to its employees caused by its negligence: "Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests or agreements."

Tennessee.— Memphis, etc., R. Co. *v.* Jones, 2 Head 517.

Vermont.— Tarbell *v.* Rutland R. Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656.

Virginia.— Johnson *v.* Richmond, etc., R. Co., 86 Va. 975, 11 S. E. 829.

United States.— Roesner *v.* Hermann, 10 Biss. 486, 8 Fed. 782.

See MASTER AND SERVANT.

Contra, Western, etc., R. Co. *v.* Bishop, 50 Ga. 465, holding that such a contract is valid except in so far as it may waive criminal negligence of the company or its principal officers. And see Galloway *v.* Western, etc., R. Co., 57 Ga. 512; Western, etc., R. Co. *v.* Strong, 52 Ga. 461. But see Cook *v.* Western, etc., R. Co., 72 Ga. 48.

In England such contracts are sustained. Griffiths *v.* Dudley, 9 Q. B. D. 357, 46 J. P. 711, 51 L. J. Q. B. 543, 47 L. T. Rep. N. S. 10, 30 Wkly. Rep. 797.

Want of consideration.—In Purdy *v.* Rome, etc., R. Co., 125 N. Y. 209, 26 N. E. 255, 34

agreement by an employee of a railroad company that if he accepts the benefit of insurance in a company to which the railroad company contributes, his right of action against the railroad company for damages for an injury shall be discharged, is held binding in some of the courts, not because the agreement bars the right of action, but because the acceptance of the insurance discharges it.[41] By the weight of authority, a railroad company, ship-owner, or other common carrier, cannot by stipulation in contracts of carriage exempt itself from liability or limit its liability for injury to passengers or goods caused by its own negligence or the

N. Y. St. 737, 21 Am. St. Rep. 736, an agreement of this kind signed by the servant after he had entered the employment of a railroad was held void for want of consideration.

A father who has consented to the employment of a minor son by a railway company and has also specially agreed never to trouble the company if the son was injured, can nevertheless recover for injuries received by the son, resulting from the negligence of the company, and not contemplated by or naturally arising out of the employment. Texas, etc., R. Co. *v.* Putnam, (Tex. Civ. App. 1900) 63 S. W. 910. The earlier cases of Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20; Texas, etc., R. Co. *v.* Carlton, 60 Tex. 397, go no further than to hold that consent of the father will prevent a recovery for injury to a minor child where the ground of the recovery alleged consists alone in the fact that the minor had been employed in a dangerous employment. The court in the Putnam case holds that a parent may consent to the assumption of the ordinary risks of the minor's employment, but to give effect to an agreement on the part of the parent exempting the company from the consequences of negligence would be contrary to public policy.

Statute.— In Indiana a statute (Rev. Stat. (1894), § 7087) annuls contracts made by railroad companies releasing them from liability to their employees for personal injuries. Pitts, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301.

41. *Indiana.*— Leas *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

Iowa.— Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492.

Maryland.— Fuller *v.* Baltimore, etc., Assoc., 67 Md. 433, 10 Atl. 237.

Nebraska.— Chicago, etc., R. Co. *v.* Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Chicago, etc., R. Co. *v.* Bell, 44 Nebr. 44, 62 N. W. 314.

Ohio.— Pittsburgh, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507.

Pennsylvania.— Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854; Graft *v.* Baltimore, etc., R. Co., (1887) 8 Atl. 206.

United States.— Shaver *v.* Pennsylvania Co., 71 Fed. 931; Vickers *v.* Chicago, etc., R. Co., 71 Fed. 139; Maryland *v.* Baltimore, etc., R. Co., 36 Fed. 655; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75.

In some cases the agreement is with the railroad company that if the employee accepts benefits under the policy it will release the railroad; in others it is with the insurance company and makes the release of the railroad a requisite to the obtaining of the insurance. In Shaver *v.* Pennsylvania Co., 71 Fed. 931, Ricks, J., not only held such an agreement binding, but also held that the statute of Ohio expressly declaring such agreements illegal and void was unconstitutional. This ruling has been criticized in a leading law review; and commenting in another issue on the decision in Vickers *v.* Chicago, etc., R. Co., 71 Fed. 139, the writer says that in these decisions there is a tendency to get the law into this condition: "Where a man ships goods over a railroad and accepts from the railway company a bill of lading in which the company endeavors to exonerate itself from the consequences of its own negligence, the clause by which the company endeavors to exonerate itself is void; but where a railroad company assumes the bailment of human lives and is negligent in taking proper care of them — and no matter how gross its negligence may be — it may contract that if it provides a hospital, kept up chiefly by the funds of the very men whose lives are in its charge, it may kill and maim them with impunity." 31 Am. L. Rev. 460. These federal decisions are those of district judges. But in Miller *v.* Chicago, etc., R. Co., 65 Fed. 305, the circuit court decided to the contrary. In the application for membership in the relief department, and in the contracts of insurance, a clause was inserted providing that in consideration of the payments by the company the acceptance of benefits by a member should operate as a release of all claims for damages against the company. The plaintiff, who was a member of the relief department, received injuries in consequence of the negligence of the defendant railway company and thereafter accepted benefits as a member of the relief department. It was nevertheless held that his right of action against the company was not barred by the acceptance of such benefits. On appeal to the federal court of appeals the decision was affirmed, Caldwell, J., saying: "Such contracts, in so far as they attempt to release a railroad company from liability for injuries inflicted on its employes through its negligence, are without sufficient consideration, against public policy, and void, and must ultimately be so declared by all courts." Chicago, etc., R. Co. *v.* Miller, 76 Fed. 439, 443, 22 C. C. A. 264.

negligence of its servants,[42] although it may exempt itself from losses or injuries occurring from other causes than negligence, as from accident, for which it would be liable as an insurer.[43] It is settled on high authority that common carriers of goods may insure themselves by a contract with a third person against losses caused by the negligence of their servants or agents,[44] and following this ruling it has been held in New Jersey that a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy because it covers losses resulting from its negligence or the negligence of its servants.[45] Some of the courts also hold that a telegraph company cannot stipulate for exemption from liability for negligence in sending messages.[46] A provision in a lease of land from a railroad near its right of way that the lessor shall not be responsible for any damage caused by fire, whether from railroad engines, from the buildings of the lessor, or by fires caused from any other means, but the risk and damage from whatever source shall be alone sustained by the lessee, is not illegal.[47]

(E) *Agreements to Make Will.* A promise founded on a sufficient considera

42. *Alabama.*— Louisville, etc., R. Co. *v.* Grant, 99 Ala. 325, 13 So. 599.

Colorado.— Union Pac. R. Co. *v.* Rainey, 19 Colo. 225, 34 Pac. 986.

Mississippi.— Johnson *v.* Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

Nebraska.—Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968; St. Joseph, etc., R. Co. *v.* Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335.

Pennsylvania.—Armstrong *v.* U. S. Express Co., 159 Pa. St. 640, 28 Atl. 448.

Tennessee.— Louisville, etc., R. Co. *v.* Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871.

Texas.— Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

Wisconsin.—Abrams *v.* Milwaukee, etc., R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55.

United States.— New York Cent. R. Co. *v.* Lockwood, 17 Wall. 357, 21 L. ed. 627; Schulze-Berge *v.* Guildhall, 58 Fed. 796; The Hugo, 57 Fed. 403; Monroe *v.* The Iowa, 50 Fed. 561.

See CARRIERS, 6 Cyc. 392 *et seq.*

43. *Illinois.*— Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607.

Indiana.— Indianapolis, etc., R. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. 1138.

Michigan.— McEacheran *v.* Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612.

Missouri.— McCann *v.* Eddy, (App. 1894) 27 S. W. 541.

South Carolina.— Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

Texas.— Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302; Galveston, etc., R. Co. *v.* Short, (Civ. App. 1894) 25 S. W. 142; Texas, etc., R. Co. *v.* Smith, (Civ. App. 1893) 24 S. W. 565.

Vermont.— Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

United States.— Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

See CARRIERS, 6 Cyc. 393 *et seq.*

44. California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. ed. 873.

45. Trenton Pass. R. Co. *v.* Guarantors Liability Indemnity Co., 60 N. J. L. 246, 37 Atl. 609, 44 L. R. A. 213. A similar decision had been previously made in Maryland (American Casualty Ins. Co.'s Case, 82 Md. 535, 578, 34 Atl. 778, 38 L. R. A. 97), the court saying: "Unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods is to afford him a fund out of which he may be reimbursed." The only other case in the books in which this question has been raised is an English one (Delanoy *v.* Robson, 5 Taunt. 605, 606, 1 E. C. L. 309) where the reporter queries as to whether an insurance against damages that a shipowner might be liable to pay in consequence of his ship running down another be not illegal; and it is said per curiam: "It would be an illegal insurance to insure against what might be the consequence of the wrongful acts of the assured."

46. See TELEGRAPH AND TELEPHONES.

47. Stephens *v.* Southern Pac. R. Co., 109 Cal. 86, 41 Pac. 783, 50 Am. St. Rep. 17, 29 L. R. A. 751; Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647 (two judges dissenting); Greenwich Ins. Co. *v.* Louisville, etc., R. Co., 66 S. W. 411, 67 S. W. 16, 23 Ky. L. Rep. 2014, 56 L. R. A. 477; Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193 [*affirming* 62 Fed. 904].

tion to leave another the whole or a definite portion of one's estate is legal and will be specifically enforced in equity.[48]

C. Effect of Illegality — 1. In General. No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim. The rule is expressed in the maxims, *Ex dolo malo non oritur actio*, and *In pari delicto potior est conditio defendentis*. The law in short will not aid either party to an illegal agreement; it leaves the parties where it finds them.[49] Therefore neither

48. *California.*— Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Georgia.— Maddox *v.* Rowe, 23 Ga. 431, 68 Am. Dec. 535.

Michigan.— Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; Faxton *v.* Faxon, 28 Mich. 159.

Missouri.— Gupton *v.* Gupton, 47 Mo. 37.

Nebraska.— Kofka *v.* Rosicky, 41 Nebr. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207.

New Jersey.— Johnson *v.* Hubbell, 10 N. J. Eq. 332, 335, 64 Am. Dec. 773, where the court said: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing it."

New York.— Parsell *v.* Stryker, 41 N. Y. 480; Gall *v.* Gall, 64 Hun 600, 19 N. Y. Suppl. 332, 46 N. Y. St. 806.

Ohio.— Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

South Carolina.— Rivers *v.* Rivers, 3 Desauss. 190, 4 Am. Dec. 609.

Utah.— Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218.

United States.— Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383; Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352.

See Wills.

49. *Alabama.*— Thornhill *v.* O'Rear, 108 Ala. 299, 19 So. 382, 31 L. R. A. 792; Hill *v.* Freeman, 73 Ala. 200, 49 Am. Rep. 48; Clark *v.* Colbert, 67 Ala. 92; Dunkin *v.* Hodge, 46 Ala. 523; Ingersoll *v.* Campbell, 46 Ala. 282; Patten *v.* Gilmer, 42 Ala. 548, 94 Am. Dec. 655; Gunter *v.* Leckey, 30 Ala. 591; Black *v.* Oliver, 1 Ala. 449, 35 Am. Dec. 38; Boyd *v.* Barclay, 1 Ala. 34, 34 Am. Dec. 762.

Arkansas.— Edwards *v.* Randle, 63 Ark. 318, 38 S. W. 343, 58 Am. St. Rep. 108, 36 L. R. A. 174; Kerr *v.* Birnie, 25 Ark. 225.

California.— Los Angeles *v.* City Bank, 100 Cal. 18, 34 Pac. 510; McGregor *v.* Donelly, 67 Cal. 147, 7 Pac. 422; Ager *v.* Duncan, 50 Cal. 325; Patterson *v.* Donner, 48 Cal. 369; Martin *v.* Wade, 37 Cal. 168; Abbe *v.* Marr, 14 Cal. 210.

Colorado.— Branham *v.* Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213.

Connecticut.— Funk *v.* Gallivan, 49 Conn. 124, 44 Am. Rep. 210; Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253; Merwin *v.* Huntington, 2 Conn. 209.

District of Columbia.— Fletcher *v.* Fletcher, 2 MacArthur 38.

Georgia.— Garrison *v.* Burns, 98 Ga. 762, 26 S. E. 471; Tompkins *v.* Compton, 93 Ga. 520, 21 S. E. 79; Heineman *v.* Newman, 55 Ga. 262, 21 Am. Rep. 279; Bugg *v.* Towner, 41 Ga. 315; Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385; Baily *v.* Milner, 35 Ga. 330, 1 Fed. Cas. No. 740; Ingram *v.* Mitchell, 30 Ga. 547; Alford *v.* Burke, 21 Ga. 46, 68 Am. Dec. 449; White *v.* Crew, 16 Ga. 416; Adams *v.* Barrett, 5 Ga. 404; Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Illinois.— Critchfield *v.* Bermudez Asphalt Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; St. Louis, etc., R. Co. *v.* Mathers, 104 Ill. 257; Tobey *v.* Robinson, 99 Ill. 222; Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Paton *v.* Stewart, 78 Ill. 481; Skeels *v.* Phillips, 54 Ill. 309; Arter *v.* Byington, 44 Ill. 468; Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153; Winston *v.* McFarland, 22 Ill. 38; Miller *v.* Marckle, 21 Ill. 152; Shenk *v.* Phelps, 6 Ill. App. 612.

Indiana.— Winchester Electric Light Co. *v.* Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; Dumont *v.* Dufore, 27 Ind. 263; Judah *v.* Vincennes University, 16 Ind. 56; Nudd *v.* Burnett, 14 Ind. 25; Morris *v.* Philpot, 11 Ind. 447; Swain *v.* Bussell, 10 Ind. 438.

Iowa.— McIntosh *v.* Wilson, 81 Iowa 339, 46 N. W. 1003; Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077; Gunderson *v.* Richardson, 56 Iowa 56, 8 N. W. 683, 41 Am. Rep. 81; Harvey *v.* Tama County, 53 Iowa 228, 5 N. W. 130; Smalley *v.* Greene, 52 Iowa 241, 3 N. W. 78, 35 Am. Rep. 267; Dillon *v.* Allen, 46 Iowa 299, 26 Am. Rep. 145; Allison *v.* Hess, 28 Iowa 388; Reynolds *v.* Nichols, 12 Iowa 398; Guenther *v.* Dewien, 11 Iowa 133.

Kansas.— Stansfield *v.* Kunz, 62 Kan. 797, 64 Pac. 614; Buchtella *v.* Stepanek, 53 Kan. 373, 36 Pac. 749; Hawley *v.* Kansas, etc., Coal Co., 48 Kan. 593, 30 Pac. 14; Bowman *v.* Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631; Setter *v.* Alvey,

a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the

15 Kan. 157; Ream *v.* Sauvain, 2 Kan. App. 550, 43 Pac. 982.

Kentucky.— Ratcliffe *v.* Smith, 13 Bush 172; Campbell *v.* Anderson, 2 Duv. 384; Laughlin *v.* Dean, 1 Duv. 20; Hocker *v.* Gentry, 3 Metc. 463; Gregory *v.* Shelby College, 2 Metc. 589; Tyler *v.* Smith, 18 B. Mon. 793; Smead *v.* Williamson, 16 B. Mon. 492; Steele *v.* Curle, 4 Dana 381; Kentucky Flour Co. *v.* Smith, 14 Ky. L. Rep. 237; Davezac *v.* Seiler, 12 Ky. L. Rep. 599; Clark *v.* Doke, 6 Ky. L. Rep. 655.

Louisiana.— Delhomme *v.* Duson, 28 La. Ann. 646; Marchand *v.* Loan, etc., Assoc., 26 La. Ann. 389; Thompson *v.* New Orleans Coast, etc., Co., 24 La. Ann. 384; Dean *v.* Martin, 24 La. Ann. 103; Boyd *v.* Chaffe, 21 La. Ann. 476; Foster *v.* New Orleans Bank, 21 La. Ann. 338; Gosselin *v.* Womack, 21 La. Ann. 193; State *v.* Louisiana State Bank, 20 La. Ann. 468; Luzenberg *v.* Cleveland, 19 La. Ann. 473; Bowman *v.* Gonegal, 19 La. Ann. 328, 92 Am. Dec. 537; Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527; State *v.* Lazarre, 12 La. Ann. 166; Bell *v.* Bouney, 7 La. Ann. 170, 56 Am. Dec. 601; Denton *v.* Erwin, 6 La. Ann. 317; Copley *v.* Berry, 12 Rob. 79; Slidell *v.* Pritchard, 5 Rob. 101.

Maine.— Morrill *v.* Goodenow, 65 Me. 178; Andrews *v.* Marshall, 48 Me. 26; Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Low *v.* Hutchinson, 37 Me. 196; Groton *v.* Waldborough, 11 Me. 306, 26 Am. Dec. 530.

Maryland.— Roman *v.* Mali, 42 Md. 513; Shoemaker *v.* National Mechanics' Bank, 31 Md. 396, 100 Am. Dec. 73; Gotwalk *v.* Neal, 25 Md. 434; Wilson *v.* Nutt, 9 Md. 356; Baltimore, etc., R. Co. *v.* Faunce, 6 Gill 68, 46 Am. Dec. 655; Freeman *v.* Sedwick, 6 Gill 28, 46 Am. Dec. 650; Hall *v.* Mullin, 5 Harr. & J. 190.

Massachusetts.—Snell *v.* Dwight, 120 Mass. 9; Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Atwood *v.* Fisk, 101 Mass. 363, 100 Am. Dec. 124; Harvey *v.* Varney, 98 Mass. 118; Worcester *v.* Eaton, 11 Mass. 368; Washington *v.* Eames, 8 Allen 432; King *v.* Green, 6 Allen 139; Frost *v.* Gage, 3 Allen 560; Duffy *v.* Gorham, 10 Cush. 45; Mills *v.* Western Bank, 10 Cush. 22; Babcock *v.* Thompson, 3 Pick. 446, 15 Am. Dec. 235.

Michigan.— Niagara Falls Brewing Co. *v.* Wall, 98 Mich. 158, 57 N. W. 99; Bagg *v.* Jerome, 7 Mich. 145; Smith *v.* Barstow, 2 Dougl. 155.

Minnesota.— Leveroos *v.* Reis, 52 Minn. 259, 53 N. W. 1155; Butler *v.* Bohn, 31 Minn. 325, 17 N. W. 862; Taylor *v.* Blake, 11 Minn. 255; St. Peter Co. *v.* Bunker, 5 Minn. 192.

Mississippi.— McWilliams *v.* Phillips, 51 Miss. 196; Deans *v.* McLendon, 30 Miss. 343; Hoover *v.* Pierce, 26 Miss. 627; Wooten *v.* Miller, 7 Sm. & M. 380.

Missouri.— McDearmott *v.* Sedgwick, 140 Mo. 172, 39 S. W. 776; Roselle *v.* Beckemeir, 134 Mo. 380, 35 S. W. 1132; Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Attaway *v.* St. Louis Third Nat. Bank, 93 Mo. 485, 5 S. W. 16; Atlee *v.* Fink, 75 Mo. 100, 43 Am. Rep. 385; Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460; Parsons *v.* Randolph, 21 Mo. App. 353; Suits *v.* Taylor, 20 Mo. App. 166; Tyler *v.* Larimore, 19 Mo. App. 445; Buckingham *v.* Fitch, 18 Mo. App. 91; Curran *v.* Downs, 3 Mo. App. 468.

Nebraska.— Storz *v.* Finklestein, 46 Nebr. 577, 65 N. W. 195, 30 L. R. A. 644; Clarke *v.* Omaha, etc., R. Co., 5 Nebr. 314.

Nevada.— Drexler *v.* Tyrrell, 15 Nev. 114; McCausland *v.* Ralston, 12 Nev. 195, 28 Am. Rep. 781.

New Hampshire.— Jameson *v.* Carpenter, 68 N. H. 62, 36 Atl. 554; Skiff *v.* Johnson, 57 N. H. 475; Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207; White *v.* Hunter, 23 N. H. 128; Smith *v.* Bean, 15 N. H. 577; Pray *v.* Burbank, 10 N. H. 377.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614; Bishop *v.* Harvey, 3 N. J. L. 225; Gennert *v.* Wuestner, 53 N. J. Eq. 302, 31 Atl. 609; Brindley *v.* Lawton, 53 N. J. Eq. 259, 31 Atl. 394; Cone *v.* Russell, 48 N. J. Eq. 208, 21 Atl. 847; Elliott *v.* Chamberlain, 38 N. J. Eq. 604, 48 Am. Rep. 327.

New York.— Haynes *v.* Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Materne *v.* Horwitz, 101 N. Y. 469, 5 N. E. 331 [*affirming* 50 N. Y. Super. Ct. 41]; Solinger *v.* Earle, 82 N. Y. 393; Clements *v.* Yturria, 81 N. Y. 85; Collins *v.* Lane, 80 N. Y. 627; Knowlton *v.* Compress, etc., Spring Co., 57 N. Y. 518; Richardson *v.* Crandall, 48 N. Y. 348; Levy *v.* Brush, 45 N. Y. 589; Saratoga County Bank *v.* King, 44 N. Y. 87; Staples *v.* Gould, 9 N. Y. 520; Dake *v.* Patterson, 5 Hun 558; Wheeler *v.* Wheeler, 5 Lans. 355; Freelove *v.* Cole, 41 Barb. 318; Sharp *v.* Wright, 35 Barb. 236; Barton *v.* Pt. Jackson, etc., Plank Road Co., 17 Barb. 397; Dainouth *v.* Bennett, 15 Barb. 541; Merchants' Bank *v.* Spalding, 12 Barb. 302; Leavitt *v.* Blatchford, 5 Barb. 9; Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 125; Solinger *v.* Earle, 45 N. Y. Super. Ct. 604; Pease *v.* Walsh, 39 N. Y. Super. Ct. 514; Kountze *v.* Flannagan, 19 N. Y. Suppl. 33; Ball *v.* Davis, 1 N. Y. St. 517; Swords *v.* Owen, 43 How. Pr. 176; Crocker *v.* Crocker, 17 How. Pr. 504; Nellis *v.* Clark, 20 Wend. 24; Perkins *v.* Savage, 15 Wend. 412; Hatch *v.* Mann, 15 Wend. 44; Tappan *v.* Brown, 9 Wend. 175; Burt *v.* Place, 6 Cow. 431; Harrington *v.* Bigelow, 11 Paige 349; Wall *v.* Charlick, 8 N. Y. Leg. Obs. 230.

North Carolina.— Sparks *v.* Sparks, 94 N. C. 527; York *v.* Merritt, 77 N. C. 213; King *v.* Winants, 71 N. C. 469, 17 Am. Rep. 11; Lusk *v.* Patton, 70 N. C. 701; Catawba County *v.* Setzer, 70 N. C. 426; McRae *v.* Atlantic, etc., R. Co., 58 N. C. 395; Powell

agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the

v. Inman, 53 N. C. 436, 82 Am. Dec. 426; Troughton *v.* Johnston, 3 N. C. 328, 2 Am. Dec. 626.

Ohio.— Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; Emery *v.* Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819; Williams *v.* Englebrecht, 37 Ohio St. 383; Hooker *v.* De Palos, 28 Ohio St. 251; Trimble *v.* Doty, 16 Ohio St. 118; Goudy *v.* Gebbart, 1 Ohio St. 262; Cowles *v.* Raguet, 14 Ohio 38; Moore *v.* Adams, 8 Ohio 372, 32 Am. Dec. 723; Carter *v.* Lillie, 3 Ohio Cir. Ct. 364; Cowell *v.* Harris, 2 Ohio Cir. Ct. 404; Shirey *v.* Ulsh, 2 Ohio Cir. Ct. 401.

Oklahoma.— Kelly *v.* Courter, 1 Okla. 277, 30 Pac. 372.

Oregon.— Ah Doon *v.* Smith, 25 Oreg. 89, 34 Pac. 1093.

Pennsylvania.— Battenberger *v.* Holman, 103 Pa. St. 555; Johnson *v.* Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Holt *v.* Green, 73 Pa. St. 198, 13 Am. Rep. 737; Blystone *v.* Blystone, 51 Pa. St. 373; Jenkins *v.* Fowler, 24 Pa. St. 308; Scott *v.* Duffy, 14 Pa. St. 18; Eberman *v.* Reitzel, 1 Watts & S. 181; Duncanson *v.* McLure, 4 Dall. 308, 1 L. ed. 845; Columbia Bridge Co. *v.* Kline, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317; McDonald *v.* Campbell, 3 Pittsb. 554; Lutz *v.* Weidner, 1 Woolw. 428.

Rhode Island.— Sullivan *v.* Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110.

South Carolina.— McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Denton *v.* English, 2 Nott & M. 581, 10 Am. Dec. 638; Bostick *v.* McClaren, 2 Brev. 275.

Tennessee.— Shaw *v.* Carlile, 9 Heisk. 594; Kirk *v.* Morrow, 6 Heisk. 445; Cate *v.* Blair, 6 Coldw. 639; Walker *v.* Walker, 4 Coldw. 300; Henly *v.* Franklin, 3 Coldw. 472, 91 Am. Dec. 296; Thompson *v.* Collins, 2 Head 441; Yerger *v.* Rains, 4 Humphr. 259; Hale *v.* Henderson, 4 Humphr. 199; Carter *v.* Montgomery, 2 Tenn. Ch. 216.

Texas.— Robertson *v.* Marsh, 42 Tex. 149; Grant *v.* Ryan, 37 Tex. 37; Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234; Olcott *v.* International, etc., R. Co., (Civ. App. 1894) 28 S. W. 728; Seiffer *v.* McLean, 7 Tex. Civ. App. 158, 26 S. W. 315.

Utah.— Haddock *v.* Salt Lake City, 23 Utah 521, 65 Pac. 491.

Vermont.— McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661; Ring *v.* Windsor County Mut. F. Ins. Co., 51 Vt. 563; Buck *v.* Albee, 26 Vt. 184, 62 Am. Dec. 564; Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68; Foote *v.* Emerson, 10 Vt. 338, 33 Am. Dec. 205; Dixon *v.* Olmstead, 9 Vt. 310, 31 Am. Dec. 629; Barnard *v.* Crane, 1 Tyler 457.

Virginia.—Harris *v.* Harris, 23 Gratt. 737; Kemper *v.* Kemper, 3 Rand. 8; Wilson *v.* Spencer, 1 Rand. 76, 10 Am. Dec. 491.

Washington.— Connoly *v.* Cunningham, 2 Wash. Terr. 242, 251, 5 Pac. 473, 477.

West Virginia.—Horn *v.* Star Foundry Co., 23 W. Va. 522; Washington *v.* Burnett, 4 W. Va. 84; Capehart *v.* Rankin, 3 W. Va. 571, 100 Am. Dec. 779.

Wisconsin.— Cohn *v.* Heimbauch, 86 Wis. 176, 56 N. W. 638; De Wit *v.* Lander, 72 Wis. 120, 39 N. W. 349; Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769; Clarke *v.* Lincoln Lumber Co., 59 Wis. 655, 18 N. W. 492; Troewert *v.* Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28; Wight *v.* Rindskopf, 43 Wis. 344; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605; Miller *v.* Lawson, 19 Wis. 463; Hill *v.* Sherwood, 3 Wis. 343; Swartzer *v.* Gillett, 2 Pinn. 238; Moore *v.* Kendall, 2 Pinn. 99, 52 Am. Dec. 145.

United States.— Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Higgins *v.* McCrea, 116 U. S. 671, 6 S. Ct. 557, 29 L. ed. 764; Thomas *v.* Richmond, 12 Wall. 349, 20 L. ed. 453; Coppell *v.* Hall, 7 Wall. 542, 19 L. ed. 244; Brown *v.* Tarkington, 3 Wall. 377, 18 L. ed. 255; Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732; Creath *v.* Sims, 5 How. 192, 12 L. ed. 110; Bartle *v.* Nutt, 4 Pet. 184, 7 L. ed. 825; U. S. Bank *v.* Owens, 2 Pet. 527, 7 L. ed. 508; Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468 [*affirming* 4 Wash. 297, 24 Fed. Cas. No. 14,078]; Hannay *v.* Eve, 3 Cranch 242, 2 L. ed. 427; Hanover Nat. Bank *v.* Burlingame Nat. Bank, 109 Fed. 421, 48 C. C. A. 482; Dennehy *v.* McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; Chicago, etc., R. Co. *v.* Wabash, etc., R. Co., 61 Fed. 993, 9 C. C. A. 659; Oliver *v.* Gilmore, 52 Fed. 562; St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 33 Fed. 440; Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. 306; Branch *v.* Haas, 4 Woods 587, 16 Fed. 53.

England.— Scott *v.* Brown, [1892] 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. N. S. 782, 4 Reports 42, 41 Wkly. Rep. 116; Begbie *v.* Phosphate Sewage Co., L. R. 10 Q. B. 491, 44 L. J. Q. B. 233, 33 L. T. Rep. N. S. 470, 24 Wkly. Rep. 115; Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74; Holman *v.* Johnson, Cowp. 341; Howson *v.* Hancock, 8 T. R. 575.

See 11 Cent. Dig. tit. "Contracts," § 681 *et seq.*

Submission to arbitration.— A claim arising out of an illegal transaction is not a legitimate subject-matter for submission to arbitrators, and an award founded thereon is a mere nullity. Benton *v.* Singleton, 114 Ga. 548, 40 S. E. 811. See ARBITRATION AND AWARD, 3 Cyc. 595.

Retention of benefits.— There are cases to the effect that so long as a party retains the benefit of an agreement he will not be allowed to avail himself of its illegality. Rowlan *v.* Adams, Sm. & M. Ch. (Miss.) 45; Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582,

rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement.[50] While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense even though it may be alleging his own turpitude.[51] Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back, where the parties are *in pari delicto*.[52] And goods delivered

9 L. R. A. 689; National Wall Paper Co. *v.* Hobbs, 90 Hun (N. Y.) 288, 35 N. Y. Suppl. 932, 70 N. Y. St. 599; Noble *v.* McGuirk, 16 Misc. (N. Y.) 461, 39 N. Y. Suppl. 921; Hunt *v.* Turner, 9 Tex. 385, 60 Am. Dec. 167. But these cases are clearly opposed to the general rule stated in the text, and contrary to the overwhelming weight of authority. See cases cited *supra*, this note.

Payment into court.— Where a suit is on an illegal contract, the payment of money into court gives the contract no validity. Scribner *v.* Hollis, 48 N. H. 30.

50. See cases cited in the preceding note. In the leading case of Holman *v.* Johnson, 1 Cowp. 341, 343, Lord Mansfield stated the ground on which courts refuse relief as follows: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, there the court says he has no right to be assisted."

Illustration.—A striking illustration of the principle that the law will leave the guilty parties where it finds them is found in Jameson *v.* Carpenter, 68 N. H. 62, 63, 36 Atl. 554, where a person who owed another twenty dollars for services rendered paid him the money on Sunday, where the payment of the debt on Sunday was illegal under the statute of the state. In an action by the employee for the twenty dollars it was held that there could be no recovery, the court saying: "The contract of payment was fully executed before the parties appealed to the law by this action; and the law will leave them in this situation. It will no more aid the plaintiff in recovering the debt by setting aside his discharge, than it will aid the defendant in recovering back his money by setting aside his act in transferring it to the plaintiff as a payment." See also Cohn *v.* Heimbauch, 86 Wis. 176, 56 N. W. 638.

In equity the effect of illegality is the same as in a court of law. "A contract or instrument which fails in a Court of Law by reason of its illegality, can, nevertheless, be enforced in equity, because money has been paid and received in respect of that contract. Equitable terms can be imposed on a Plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defense of illegality is as available in a Court of Equity as it is in a Court of Law." *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 762, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26. And see the other cases cited in the preceding note.

Membership in unlawful association.— A court of equity will not lend its aid to a member of an unlawful association to enable him to retain his membership therein, and to restrain the association from suspending or expelling him therefrom for a violation of its illegal rules and by-laws. Greer *v.* Payne, 4 Kan. App. 153, 46 Pac. 190. And see CORPORATIONS.

51. *Louisiana.*— Gil *v.* Williams, 12 La. Ann. 219, 68 Am. Dec. 767; New Orleans First Cong. Church *v.* Henderson, 4 Rob. 209; Eastman *v.* Beiller, 3 Rob. 220; Puckett *v.* Clarke, 3 Rob. 81; Davis *v.* Caldwell, 2 Rob. 271; Gravier *v.* Carraby, 17 La. 132; Mulhollan *v.* Voorhies, 3 Mart. N. S. 46. But see Rogers *v.* Gibbs, 25 La. Ann. 563; Neilson *v.* Neilson, 25 La. Ann. 528; Ross *v.* Garlick, 10 Rob. 365.

Massachusetts.— Wheeler *v.* Russell, 17 Mass. 258; Farrar *v.* Barton, 5 Mass. 395; Bayley *v.* Taber, 5 Mass. 286, 4 Am. Dec. 57.

Minnesota.— Adams *v.* Adams, 25 Minn. 72.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614; Ellicott *v.* Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327.

Pennsylvania.— Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L. R. A. 292.

52. *Colorado.*— Branham *v.* Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213.

Illinois.— Neustadt *v.* Hall, 58 Ill. 172; Liness *v.* Hesing, 44 Ill. 113, 92 Am. Dec. 153.

Maine.— Waite *v.* Merrill, 4 Me. 102, 16 Am. Dec. 238.

Massachusetts.— Atwood *v.* Fisk, 100 Mass. 363, 100 Am. Dec. 124; Wyman *v.* Fiske, 3 Allen 238, 80 Am. Dec. 66; Worcester *v.* Eaton, 11 Mass. 368.

New Hampshire.— Boutelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152.

New York.— Duval *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964; Staples *v.* Gould, 5 Sandf. 411; Wheaton *v.* Hibbard,

or lands conveyed under an illegal agreement are subject to the same rule.[53] Courts will not even with the consent of the parties enforce an illegal contract.[54] And it would seem to follow that an illegal agreement cannot be rendered legal by ratification.[55] An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel.[56]

2. Exceptions to the General Rule — a. In General. There are certain exceptions to the rule stated in the preceding section. These exceptions may be grouped under five heads, viz.: (1) Where public policy requires the intervention of the court; (2) where the parties are not *in pari delicto;* (3) where the law which makes the agreement unlawful was intended for the special protection of the party seeking relief; (4) where the illegal purpose has not been consummated; and (5) where the party complaining can exhibit his case without relying upon the illegal transaction.[57]

b. Where Public Policy Requires Intervention of Court. Although the parties are *in pari delicto,* yet the court may interfere and grant relief at the suit of one of them where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with the defendant. But here the guilt of the parties is not considered as equal to the higher right of the public; and the guilty party to whom the relief is granted is simply the instrument by which the public is served.[58] But "courts are and should be cautious in affording relief to a fraudulent debtor or other

20 Johns. 290, 11 Am. Dec. 284; Mount *v.* Waite, 7 Johns. 434.

See 11 Cent. Dig. tit. "Contracts," § 688; and Payment.

Money paid on an illegal contract of sale cannot be recovered back on the refusal of the seller to perform. Edwards *v.* Randle, 63 Ark. 318, 38 S. W. 343, 58 Am. St. Rep. 108, 36 L. R. A. 174.

53. Hill *v.* Freeman, 73 Ala. 200, 49 Am. Rep. 48; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Brower *v.* Fass, 60 Nebr. 590, 83 N. W. 832.

54. Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724; Fowler *v.* Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Isler *v.* Brunson, 6 Humphr. (Tenn.) 277.

55. *Louisiana.*— New Orleans Bank *v.* Frantom, 22 La. Ann. 462.

New Hampshire.— Boutelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152.

Pennsylvania.— Lancaster County *v.* Fulton, 128 Pa. St. 48, 18 Atl. 384, 5 L. R. A. 436; Columbia Bridge Co. *v.* Kline, Brightly 320, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

Tennessee.— Carnes *v.* Polk, 4 Coldw. 87.

Texas.— Dittmar *v.* Myers, 39 Tex. 295.

Washington.— Reed *v.* Johnson, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404.

West Virginia.— Davis *v.* Henry, 4 W. Va. 571.

United States.— U. S. *v.* Grossmayer, 9 Wall. 72, 19 L. ed. 627.

But see the following cases:

Illinois.— Eberstein *v.* Willets, 134 Ill. 101, 24 N. E. 967.

Indiana.— Judah *v.* Vincennes University, 16 Ind. 56.

Michigan.— Lyon *v.* Waldo, 36 Mich. 345.

New Hampshire.— Ham *v.* Boody, 20 N. H. 411, 51 Am. Dec. 235.

New York.— Merritt *v.* Millard, 3 Abb. Dec. 291, 4 Keyes 208; Pepper *v.* Haight, 20 Barb. 429.

Ohio.— State *v.* Buttles, 3 Ohio St. 309.

United States.— St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 33 Fed. 440.

56. Robinson *v.* Patterson, 71 Mich. 141, 39 N. W. 21; Solomons *v.* Chesley, 58 N. H. 238.

57. See the cases in the notes following.

58. *Maryland.*—Lester *v.* Howard Bank, 33 Md. 558, 3 Am. Rep. 211.

New York.— Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

Pennsylvania.— Hendrickson *v.* Evans, 25 Pa. St. 441.

Tennessee.— Rhea *v.* White, 7 Lea 628; Johnson *v.* Cooper, 2 Yerg. 524, 24 Am. Dec. 502.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

United States.— Western Union Tel. Co. *v.* Burlington, etc., R. Co., 1 McCrary 130, 11 Fed. 1.

England.— Holman *v.* Johnson, Cowp. 341; Osborne *v.* Williams, 18 Ves. Jr. 379, 11 Rev. Rep. 218.

Illustrations.— Thus it has been held that a grantor who has executed a deed pursuant to a lottery transaction may, in ejectment brought by him, set up the illegality of the conveyance, notwithstanding he is *in pari delicto,* as the statute for the suppression of lotteries, which declares such a conveyance void, can only be enforced by permitting the grantor to claim the invalidity of the transfer and obtain an annulment of the conveyance. Wooden *v.* Shotwell, 24 N. J. L. 789. And it was held that since public policy demanded that contracts founded on Confederate treasury notes be discouraged and de-

violator of the law under this exception, and should act only where it is evident that some greater public good can be subserved by action than by inaction." [59]

c. Where Parties Are Not In Pari Delicto. Where the parties to a contract against public policy or otherwise illegal are not *in pari delicto*, or equally guilty, which they may not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him.[60] The cases of this character are generally where the party asking to be relieved from the effect of an illegal agreement was induced to enter into the same by means of fraud. Here he is not regarded as being *in pari delicto* with the other party, and the court may relieve him.[61] The same is held where the complaining party has entered into

clared void, parties to such agreements would be relieved therefrom, although they were *in pari delicto*. Hale *v.* Sharp, 4 Coldw. (Tenn.) 275.

59. O'Conner *v.* Ward, 60 Miss. 1025; Renfrew *v.* McDonald, 11 Hun (N. Y.) 254.

60. *California.*— San Diego County Sav. Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

Indiana.— Scotten *v.* State, 51 Ind. 52.

Iowa.— Davidson *v.* Carter, 55 Iowa 117, 7 N. W. 466.

Kansas.— Stansfield *v.* Kunz, 62 Kan. 797, 64 Pac. 614; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548.

Kentucky.—Gray *v.* Roberts, 2 A. K. Marsh. 208, 12 Am. Dec. 383.

Maine.— Concord *v.* Delaney, 58 Me. 309.

Maryland.— Roman *v.* Mali, 42 Md. 513; Maryland Hospital *v.* Foreman, 29 Md. 524.

Massachusetts.— Belding *v.* Smythe, 138 Mass. 530; Atlas Bank *v.* Nahant Bank, 3 Metc. 581; Lowell *v.* Boston, etc., R. Corp., 23 Pick. 24, 34 Am. Dec. 33; White *v.* Franklin Bank, 22 Pick. 181; Worcester *v.* Eaton, 11 Mass. 368.

Michigan.— Barnes *v.* Brown, 32 Mich. 146.

Mississippi.— Prewett *v.* Coopwood, 30 Miss. 369.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Green *v.* Corrigan, 87 Mo. 359; Poston *v.* Balch, 69 Mo. 115; Skinner *v.* Henderson, 10 Mo. 205; Turley *v.* Edwards, 18 Mo. App. 676.

Nebraska.— Bateman *v.* Robinson, 12 Nebr. 568, 11 N. W. 736.

New Hampshire.— Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; Ladd *v.* Barton, 64 N. H. 613, 6 Atl. 483.

New York.— Duval *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964 [*reversing* 14 Daly 515, 1 N. Y. Suppl. 70, 18 N. Y. St. 607]; Richardson *v.* Crandall, 48 N. Y. 348 [*affirming* 47 Barb. 335, and *reversing* 30 How. Pr. 134]; Ford *v.* Harrington, 16 N. Y. 285; Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Freelove *v.* Cole, 41 Barb. 318; Mount *v.* Waite, 7 Johns. 434.

North Carolina.— Webb *v.* Fulchire, 25 N. C. 485, 40 Am. Dec. 419. And see Grimes *v.* Hoyt, 55 N. C. 271.

Ohio.—Hooker *v.* De Palos, 28 Ohio St. 251; Shanklin *v.* Madison County, 21 Ohio St. 575.

Oregon.— Bernard *v.* Taylor, 23 Oreg. 416, 31 Pac. 968, 37 Am. St. Rep. 693, 18 L. R. A. 859. And see Miller *v.* Hirschberg, (1894) 37 Pac. 85.

Pennsylvania.— Burkholder *v.* Beetem, 65 Pa. St. 496.

Vermont.— Harrington *v.* Grant, 54 Vt. 236; Hinsdill *v.* White, 34 Vt. 558.

Virginia.— Wilson *v.* Spencer, 1 Rand. 76, 10 Am. Dec. 471; Wise *v.* Craig, 1 Hen. & M. 578.

United States.— Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132.

England.— Williams *v.* Bayley, L. R. 1 H. L. 200, 12 Jur. N. S. 875, 35 L. J. Ch. 717, 14 L. T. Rep. N. S. 802; Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510.

See 11 Cent. Dig. tit. "Contracts," § 685.

61. *Illinois.*— Baehr *v.* Wolf, 59 Ill. 470.

Kentucky.— Anderson *v.* Merideth, 82 Ky. 564.

Maine.— Concord *v.* Delaney, 58 Me. 309.

Maryland.— Roman *v.* Mali, 42 Md. 513.

Massachusetts.— Belding *v.* Smythe, 138 Mass. 530; White *v.* Franklin Bank, 22 Pick. 181; Worcester *v.* Eaton, 11 Mass. 368.

Michigan.— Barnes *v.* Brown, 32 Mich. 146.

Mississippi.— O'Conner *v.* Ward, 60 Miss. 1025.

Missouri.— Green *v.* Corrigan, 87 Mo. 359; Holliway *v.* Holliway, 77 Mo. 392; Kitchen *v.* Greenabaum, 61 Mo. 110.

New Jersey.—Crossley *v.* Moore, 40 N. J. L. 27.

New York.— Richardson *v.* Crandall, 48 N. Y. 348; Curtis *v.* Levett, 15 N. Y. 9; Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Freelove *v.* Cole, 41 Barb. 318; Wheaton *v.* Hibbard, 20 Johns. 290, 11 Am. Dec. 284; Mount *v.* Waite, 7 Johns. 434.

North Carolina.— Pinckston *v.* Brown, 56 N. C. 494; Webb *v.* Fulchire, 25 N. C. 485, 40 Am. Dec. 419.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Vermont.— Harrington *v.* Grant, 54 Vt. 236.

United States.— Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132.

England.— Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510; Atkinson *v.* Denby, 6 H. & N. 778; Osborne

the illegal contract through the duress or undue influence of the other.[62] If one party is but an instrument in the hands of the other, then they are not *in pari delicto*. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threat upon the one side and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if, through trusting confidence, the other has led him into the illegal act, such relief will not be refused.[63] Where money or property is exacted by a public officer by color of his office, the parties are not *in pari delicto*, but the one from whom it is exacted may maintain an action to recover the same.[64] In all such cases the action, it may be said, is not based on the agreement, but on the promise created by law to repay money of the plaintiff improperly obtained.[65]

d. Where One Party Is Protected by the Law. The complaining party is especially protected by the law where the agreement is not illegal *per se*, but is merely prohibited, and the prohibition was intended for his protection, and in such case, not being *in pari delicto*, he is entitled to relief.[66] The fact that the

v. Williams, 18 Ves. Jr. 379, 11 Rev. Rep. 218.

See 11 Cent. Dig. tit. "Contracts," § 685.

Illustrations.— This rule has been applied for example, where a person was induced by the fraud of another to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty, and sought to get the conveyance set aside in chancery. It was held that as the grantor had been induced to enter into the agreement by the fraud of the grantee, he was entitled to relief. Reynell *v.* Sprye, 1 De G. M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510. So where a debtor offered his creditors a composition of five shillings on the pound, and one of the creditors refused to assent unless the debtor would pay him £50 additional in fraud of the other creditors, and the debtor paid him the money and he assented to the composition agreement, it was held that the debtor could recover the money. The parties were regarded as not in equal guilt, because the one had the power to dictate and the other no alternative but to submit. Atkinson *v.* Denby, 6 H. & N. 778. So where a husband falsely represented to his wife that she was liable for certain debts, and that the creditors would take her property, and influenced by this, and intending to defraud such creditors, she transferred her property to him, it was held that the deed would be set aside. Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197.

62. *Michigan.*— Peek *v.* Peek, 101 Mich. 304, 59 N. W. 604.

Missouri.—Turley *v.* Edwards, 18 Mo. App. 676.

New York.— Duvall *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964 [*reversing* 14 Daly 515, 1 N. Y. Suppl. 70, 16 N. Y. St. 607]; Freelove *v.* Cole, 41 Barb. 318.

Rhode Island.— Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Vermont.— Harrington *v.* Grant, 54 Vt. 236; Hinsdill *v.* White, 34 Vt. 558.

England.— Jones *v.* Merionetshire Permanent Ben. Bldg. Soc., [1892] 1 Ch. 173, 17 Cox C. C. 389, 61 L. J. Ch. 138, 65 L. T. Rep. N. S. 685, 40 Wkly. Rep. 273; McClatchie *v.* Haslam, 17 Cox C. C. 402, 65 L. T. Rep. N. S. 691.

See 11 Cent. Dig. tit. "Contracts," § 685.

Illustrations.— Thus where a son falsely represented to his mother that a suit was about to be brought against her for slander which would result in her losing all her property, and thereby induced her to convey all her property to him, it was held that the conveyance would be set aside at her suit. Harper *v.* Harper, 85 Ky. 160, 3 S. W. 5, 8 Ky. L. Rep. 820, 7 Am. St. Rep. 583. And see Kleenan *v.* Peltzer, 17 Nebr. 381; Harrington *v.* Grant, 54 Vt. 236. So where a woman seventy years of age and illiterate was induced by her son-in-law and the sureties on his bond to execute a mortgage to the sureties to indemnify them on a defalcation by the son-in-law, by holding out to her the anticipated punishment of the latter, without allowing her a chance to consult any disinterested friend, it was held that the mortgage would be set aside, the court saying: "The fact that she executed the mortgage with the purpose of shielding her son-in-law from punishment will not bar her from relief, for she was not *in pari delicto*." Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505. See, however, Haynes *v.* Rudd, 102 N. Y. 372, 377, 7 N. E. 287, 55 Am. Rep. 815, where it is said: "We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect."

63. See the cases in the preceding notes.

64. Richardson *v.* Crandall, 48 N. Y. 348 [*affirming* 47 Barb. (N. Y.) 335, and *reversing* 30 How. Pr. (N. Y.) 134]. And see Carey *v.* Prentice, 1 Root (Conn.) 91.

65. Northwestern Mut. Ins. Co. *v.* Elliott, 7 Sawy. (U. S.) 17, 5 Fed. 225.

66. *Illinois.*— Ferguson *v.* Sutphen, 8 Ill. 547.

penalty is imposed on one of the parties alone shows clearly that the law does not consider them *in pari delicto*.[67] Thus by the statutes of usury taking more than a certain interest is declared illegal; but as these statutes were made to protect needy persons from the oppression of usurers, the party injured may bring an action for the excess of interest.[68] So money paid for lottery tickets, where the sale of such tickets is prohibited under a penalty, is held recoverable by action, for the law is designed to punish and restrain lottery keepers, and to protect their credulous and often needy patrons.[69] So where a statute prohibits attorneys from taking more than a certain sum for services in obtaining a pension, an applicant who pays more may recover the amount from the attorney.[70] The principle has also been applied under statutes prohibiting banks or other corporations from issuing bills or other securities;[71] statutes prohibiting banks from taking a

Indiana.— Scotten *v.* State, 51 Ind. 52.

Kansas.— Tootle *v.* Berkley, 57 Kan. 111, 45 Pac. 77.

Massachusetts.—Atlas Bank *v.* Nahant, Bank, 3 Metc. 581; White *v.* Franklin Bank, 22 Pick. 181.

Nebraska.— Bateman *v.* Robinson, 12 Nebr. 508, 11 N. W. 736.

United States.—Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; *Re* Burt, 12 Blatchf. 252, 4 Fed. Cas. No. 2,209.

England.— Browning *v.* Morris, Cowp. 790, 792, where Lord Mansfield said: "But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another . . . , the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action." And see Smith *v.* Bromley, Dougl. 670 note.

See 11 Cent. Dig. tit. "Contracts," § 685.

67. *Kansas.*— Stansfield *v.* Kunz, 62 Kan. 797, 64 Pac. 614; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548.

Kentucky.— Gray *v.* Roberts, 2 A. K. Marsh. 208, 12 Am. Dec. 383.

Massachusetts.—Atlas Bank *v.* Nahant Bank, 3 Metc. 581.

New Hampshire.— Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

New York.— Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

England.— Browning *v.* Morris, Cowp. 790.

See 11 Cent. Dig. tit. "Contracts," § 685.

Effect of imposing penalty.— Where a statute commands certain parties to do, or prohibits them from doing, certain acts, and prescribes the penalty for their violation of its commands, courts may not inflict other penalties for its violation upon other parties not named in the law by the avoidance of their contracts. Hanover Nat. Bank *v.* Burlingame First Nat. Bank, 109 Fed. 421, 426, 48 C. C. A. 482, where the court said: "Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, it is valid, but the penalty attaches to the officer who performed the prohibited ceremony. Milford *v.* Worcester, 7 Mass. 48. Section 5136 of the Revised Statutes impliedly forbids a national bank to loan money upon real-estate security. But a mortgage upon real estate given to a bank to secure a contemporaneous loan or future advances is valid between the parties, and may be enforced. Genesee Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188. Section 5201 expressly prohibits a loan by a national bank upon a pledge of its own shares. But such a pledge was enforced in Xenia First Nat. Bank *v.* Stewart, 107 U. S. 676, 2 S. Ct. 778, 27 L. ed. 592. Section 5200 forbids any bank to loan to one person or firm an amount in excess of one tenth of its actually paid capital stock. But it is no defense to an action for the recovery of money loaned by a bank that the amount of the loan exceeded the limit prescribed by this section. Pangborn *v.* Westlake, 36 Iowa 546; O'Hare *v.* Titusville Second Nat. Bank, 77 Pa. St. 96; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648. Section 5202 provides that no national bank shall 'be indebted or in any way liable to an amount exceeding the amount of its capital stock . . . paid in . . . except on' circulation, deposits, special funds, or declared dividends. But it is no defense to an action for a debt of the bank that its indebtedness exceeded the limitation fixed by this provision of the banking act. Weber *v.* Spokane Nat. Bank, 64 Fed. 208, 12 C. C. A. 93." The court also cited Westheimer *v.* Weisman, 60 Kan. 753, 57 Pac. 969; Parton *v.* Hervey, 1 Gray (Mass.) 119; Speer *v.* Kearney County, 88 Fed. 749, 33 C. C. A. 101; Rex *v.* Birmingham, 8 B. & C. 29, 2 M. & R. 230, 15 E. C. L. 24.

68. See USURY.

69. Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383; Mount *v.* Waite, 7 Johns. (N. Y.) 434; Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74; Browning *v.* Morris, Cowp. 790; Clarke *v.* Shee, Cowp. 197, Dougl. 698 note; Jaques *v.* Golightly, 2 W. Bl. 1073. See LOTTERIES.

70. Smart *v.* White, 73 Me. 332, 40 Am. Rep. 356; Ladd *v.* Barton, 64 N. H. 613, 6 Atl. 483.

71. Where banks or other corporations are prohibited under penalties from issuing bills

deposit payable at a future day;[72] statutes prohibiting contracts or other dealings between a corporation and its directors or other officers;[73] statutes prohibiting or regulating the loaning of public funds;[74] and statutes for the protection of laborers.[75] And where a statute expressly authorizes one of the parties to an illegal agreement to sue, the right is of course clear; as in the case of statutes permitting the recovery of money lost at certain kinds of play or the like.[76] Only the party whom the law was designed to protect can take advantage of it.[77]

e. Where Illegal Purpose Is Not Consummated. By the weight of authority, where money has been paid in consideration of an executory contract or purpose which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed, and reclaim the money, for there is a *locus pœnitentiæ*. And on the same principle goods that have been delivered under an illegal agreement or for an illegal purpose may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted.[78] Where a person has paid money

or other securities, but no penalty is imposed on persons who receive them, it is held that the law creating the illegality is to protect the public against the prohibited securities, that the corporation issuing them is the only offender, and that persons who receive them may recover the money paid for them. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Thomas *v.* Richmond, 12 Wall. (U. S.) 349, 20 L. ed. 453. See, generally, BANKS AND BANKING; CORPORATIONS.

72. A person who has deposited money in a bank repayable at a future day, in violation of a statute, may recover back the deposit, for to decide otherwise would be to reward the offender (the bank) for an offense which the statute was intended to prevent. Atlas Bank *v.* Nahant Bank, 3 Metc. (Mass.) 581; White *v.* Franklin Bank, 22 Pick. (Mass.) 181. See Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

73. An insurance company has been permitted to recover a loan made to one of its officers, although a statute provided that no member of a committee or officer of a domestic insurance company charged with the duty of investing its funds should borrow the same, on the ground that the statute was intended to protect the company and policyholders from the dishonesty or self-interest of the officers. Bowditch *v.* New England Mut. Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474. So where the president of a savings bank induced the bank to loan money and take as security a mortgage on land, in order that a mortgage belonging to him might be paid, it was held that the mortgagor could not, in defense to an action by the bank to foreclose, claim that its mortgage was invalid under a statute prohibiting any officer of a savings corporation from directly or indirectly borrowing its funds, as such statute was for the protection of the bank and its depositors. San Diego County Sav. Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102. See CORPORATIONS.

74. Where a statute prohibited the loaning of public funds, except on mortgage on unencumbered lands, it was held that one who borrowed such funds and gave a mortgage on encumbered lands was liable on his contract. Scotten *v.* State, 51 Ind. 52; Deming *v.* State, 23 Ind. 416 [*overruling* State *v.* State Bank, 5 Ind. 353].

75. Where the statute required contracts for labor made by the state or a municipal corporation to contain a stipulation that eight hours should be a day's work, a contract made with a county containing no such provision was held binding on it, because the law was made for the protection of the laborer. Babcock *v.* Goodrich, 47 Cal. 488.

76. Mitchell *v.* Orr, 107 Tenn. 534, 64 S. W. 476. And see Connor *v.* Black, 119 Mo. 126, 24 S. W. 184. See GAMING.

77. Babcock *v.* Goodrich, 47 Cal. 488; Deming *v.* State, 23 Ind. 416.

78. *Alabama.*— Lewis *v.* Burton, 74 Ala. 317, 49 Am. Rep. 816.

California.— Johnston *v.* Russell, 37 Cal. 670.

Connecticut.—Wheeler *v.* Spencer, 15 Conn. 28.

Georgia.— Clarke *v.* Brown, 77 Ga. 606, 4 Am. St. Rep. 98.

Iowa.— Shannon *v.* Banmer, 10 Iowa 210.

Maine.— Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; McDonough *v.* Webster, 68 Me. 530; House *v.* McKenney, 46 Me. 94; Stacy *v.* Foss, 19 Me. 335, 36 Am. Dec. 755.

Massachusetts.— Fisher *v.* Hildreth, 117 Mass. 558; Love *v.* Harvey, 114 Mass. 80.

Missouri.— Adams Express Co. *v.* Reno, 48 Mo. 264; Gowan *v.* Gowan, 30 Mo. 472; Skinner *v.* Henderson, 10 Mo. 205; Weaver *v.* Harlan, 48 Mo. App. 319.

New Hampshire.— Souhegan Nat. Bank *v.* Wallace, 61 N. H. 24.

New York.— Morgan *v.* Groff, 4 Barb. 524. *Contra*, Knowlton *v.* Congress, etc., Spring Co., 57 N. Y. 518.

Ohio.— Hooker *v.* De Palos, 28 Ohio St. 251.

Oregon.— Bernard *v.* Taylor, 23 Oreg. 416, 31 Pac. 968, 37 Am. St. Rep. 693, 18 L. R. A. 859.

Pennsylvania.—Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599; McAllister *v.* Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556.

United States.— Congress, etc., Spring Co. *v.* Knowlton, 103 U. S. 49, 26 L. ed. 347.

England.— Taylor *v.* Bowers, 1 Q. B. D.

to another upon the illegal consideration of procuring him a public office or stifling a prosecution, he may repudiate the agreement while it remains executory and recover back the money.[79] So where one deposited a sum of money in a bank, to be paid to a sheriff when he should secure the pardon of the owner's brother, who was then in the penitentiary, it was held that he could recover the money so long as it remained in the possession of the bank.[80] The rule seems to be that it is only where there has been no part performance that the action will lie. It is not necessary that the agreement shall have been completely performed to bar it.[81] But there are rulings to the contrary which enable the party to sue if

291, 46 L. J. Q. B. 39, 34 L. T. Rep. N. S. 938, 24 Wkly. Rep. 499; Hampden *v.* Walsh, 1 Q. B. D. 189, 45 L. J. Q. B. 238, 33 L. T. Rep. N. S. 852, 24 Wkly. Rep. 607; Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74.

The reason is that "it best comports with public policy, to arrest the illegal proceeding, before it is consummated." Stacy *v.* Foss, 19 Me. 335, 338, 36 Am. Dec. 755.

Where goods are delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounds with his creditors, he may repudiate the transaction before the composition has been carried out and recover the goods from the pretended buyer or from a subvendee to whom they have been delivered with notice of the illegal transaction. Taylor *v.* Bowers, 1 Q. B. D. 291, 46 L. J. Q. B. 39, 34 L. T. Rep. N. S. 938, 24 Wkly. Rep. 499. The authority of this case is much shaken by the opinion expressed by the court of appeals in Kearley *v.* Thomson, 24 Q. B. D. 742, 54 J. P. 804, 59 L. J. Q. B. 288, 63 L. T. Rep. N. S. 150, 38 Wkly. Rep. 614, that the application of the principle laid down in Taylor *v.* Bowers, 1 Q. B. D. 291, 46 L. J. Q. B. 39, 34 L. T. Rep. N. S. 938, 24 Wkly. Rep. 499, and even the principle itself, may at some time hereafter require consideration, if not in this court, yet in a higher tribunal. And see a criticism in Knowlton *v.* Congress, etc., Spring Co., 57 N. Y. 518.

Stock transferred to be used for corruption. —Where a stock-holder of a corporation transferred to its president shares of stock to be used in corrupting certain persons in connection with the renewal of leases held by the corporation, it was held that the stock-holder was entitled to a return of the stock on demand at any time before it was so used, and that on the failure of the president to return it he could maintain an action to recover it. Wasserman *v.* Sloss, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209, 38 L. R. A. 176.

Money placed in the hands of a stakeholder to abide the result of an illegal wager may be reclaimed before the event happens or before it is paid over to the winner.

Alabama.— Lewis *v.* Bruton, 74 Ala. 317, 49 Am. Rep. 816.

Connecticut.—Wheeler *v.* Spencer, 15 Conn. 28.

Iowa.— Shannon *v.* Baumer, 10 Iowa 210.

Maine.— Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; McDonough *v.* Webster, 68 Me. 530; House *v.* McKenney, 46 Me. 94; Stacy *v.* Foss, 19 Me. 335, 36 Am. Dec. 755.

Missouri.— Weaver *v.* Harlan, 48 Mo. App. 319.

England.— Hastelow *v.* Jackson, 8 B. & C. 221, 6 L. J. K. B. O. S. 318, 2 M. & R. 209, 15 E. C. L. 117; Hodson *v.* Terrill, 1 Cromp. & M. 797, 1 Dowl. P. C. 264, 2 L. J. Exch. 282, 3 Tyrw. 393; Martin *v.* Hewson, 10 Exch. 737, 1 Jur. N. S. 214, 24 L. J. Exch. 174.

See GAMING.

79. Walker *v.* Chapman [*cited* in Lowry *v.* Bordieu, Dougl. 451, 454]. And see Taylor *v.* Lendsey, 9 East 49, where the court said that the case is simply that of a countermand of an agent's authority before he has executed it.

80. Adams Express Co. *v.* Rens, 48 Mo. 264.

81. Hooker *v.* De Palos, 28 Ohio St. 251; Miller *v.* Larson, 19 Wis. 463.

Illustrations.— Thus where a firm of solicitors acting for the petitioning creditor of a bankrupt agreed with a friend of the bankrupt, that in consideration of the payment of their costs they would not appear at his public examination, nor oppose the order for his discharge, and they carried out the first part of the agreement, but before any application was made for the bankrupt's discharge the friend sought to recover the money which he had paid on the ground that it was the consideration for a promise to pervert the court of justice, and that the contract was not wholly carried out, it was held that he could not recover. Kearley *v.* Thomson, 24 Q. B. D. 742, 54 J. P. 804, 59 L. J. Q. B. 288, 63 L. T. Rep. N. S. 150, 38 Wkly. Rep. 614. So where a person procured another to go bail for him and deposited the amount of the bail in the hands of his surety as an indemnity against his possible default, and afterward sued his surety for the money on the ground that the contract was illegal, that no illegal purpose had been carried out, and that the money was still intact, it was held that the illegal object was carried out when by reason of the deposit the surety lost all interest in seeing that the conditions of the recognizance were performed. Herman *v.* Jenchner, 15 Q. B. D. 561, 49 J. P. 502, 54 L. J. Q. B. 340, 53 L. T. Rep. N. S. 94, 33 Wkly. Rep. 606 [*overruling* Wilson *v.* Strugnell, 7 Q. B. D. 548, 14 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep.

the agreement is not completely executed.[82] It has been said that a better test than whether or not the illegal purpose has been wholly or partially carried out is the actual effect of the retention of the money, and it is pointed out that if money were paid to induce one to commit a crime, to allow its recovery before the crime is committed would tend to induce the recipient of the money to commit the crime and thereby insure the retention of the money.[83]

f. Where Party Complaining Can Establish Case Without Relying Upon Illegal Transaction. An agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, or if the plaintiff will not require the aid of the illegal transaction to make out his case.[84] Thus it has been held that a vendor could enforce his lien, although he conveyed the land to the purchaser to enable him to execute an illegal contract for the manufacture of iron for the Confederate government;[85] that one could recover for coal ordered and delivered, although prior to the order he had given an option prohibited by statute to buy not exceeding a certain quantity in the future;[86] that it was no defense to an action for goods sold and delivered that plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce, since the illegality of the combination was collateral to the contract of sale, and could not taint it with illegality or make it contrary to public policy;[87] that the want of a license to

N. S. 218]. So where a person placed money to the credit of a corporation to give it a fictitious credit in case of inquiries, the money to be returned to him at a specified time, and sued to recover the same after the company had gone into liquidation, it was held that he was not entitled to recover as "the object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding up." *In re* Great Berlin Steamboat Co., 26 Ch. D. 616, 620, 54 L. J. Ch. 68, 51 L. T. Rep. N. S. 445. And where a contract for the sale of betting privileges at a race track had been executed to the extent of the partial payment of the purchase-money and partial enjoyment of the illegal privileges sold, it was held that the rule that money paid in advance for illegal purposes may be recovered back where the contract is wholly executory did not apply, and that the purchaser could not recover what he had paid in the partial execution of the contract. Ullman *v.* St. Louis Fair Assoc., 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606.

82. Stansfield *v.* Kunz, 62 Kan. 797, 64 Pac. 614; Kiewert *v.* Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; Congress, etc., Spring Co. *v.* Knowlton, 103 U. S. 49, 26 L. ed. 347 [*affirming* 14 Blatchf. (U. S.) 364, 14 Fed. Cas. No. 7,903]; Bone *v.* Ekless, 5 H. & N. 925, 29 L. J. Exch. 438.

83. Harriman Contr. 130 [*citing* Anson Contr. 200; Duval *v.* Wellman, 124 N. Y. 156, 26 N. E. 343, 34 N. Y. St. 964].

84. *Alabama.*—Johnston *v.* Smith, 70 Ala. 108; Yarborough *v.* Avant, 66 Ala. 526.

Colorado.— Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

Georgia.— Ingram *v.* Mitchell, 30 Ga. 547.

Illinois.— Goodrich *v.* Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371.

Mississippi.— Gilliam *v.* Brown, 43 Miss. 641.

Missouri.— McDearmott *v.* Sedgwick, 140 Mo. 172, 39 S. W. 776.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614.

New York.— Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Gray *v.* Hook, 4 N. Y. 449.

Pennsylvania.— Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L. R. A. 292; Wright *v.* Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Evans *v.* Dravo, 24 Pa. St. 62, 62 Am. Dec. 359; Swan *v.* Scott, 11 Serg. & R. 155.

Vermont.— Buck *v.* Albee, 26 Vt. 184, 62 Am. Dec. 564.

United States.— Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Miltenberger *v.* Cooke, 18 Wall. 421, 21 L. ed. 864; Orchard *v.* Hughes, 1 Wall. 73, 17 L. ed. 560; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132; Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468; Hanover Nat. Bank *v.* Burlingame First Nat. Bank, 109 Fed. 421, 48 C. C. A. 482; Western Union Tel. Co. *v.* Union Pac. R. Co., 1 McCrary 558, 3 Fed. 423.

England.— Taylor *v.* Chester, L. R. 4 Q. B. 309, 314, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. Rep. N. S. 359, where it is said: "The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party."

85. Ware *v.* Curry, 67 Ala. 274.

86. Minnesota Lumber Co. *v.* Whitebreast Coal Co., 56 Ill. App. 248.

87. National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864,

peddle did not bar a peddler from recovering against an innkeeper for the value of goods lost while in the keeping of the innkeeper, although the goods were intended for sale without license;[88] and that the rule that no *particeps criminis* can maintain an action founded on an illegal or immoral contract does not prohibit the vendor of land, where the sale is illegal and the conveyance void, from recovering the land, as he recovers it by virtue of his prior untainted legal title, against which the defendant cannot set up a title void by law.[89]

g. Person in Possession of Profits of Illegal Transaction — (I) *In General.* There are a number of decisions to the effect that after an illegal agreement has been fully executed, a party in possession of the gains and profits resulting from the illegal traffic or transaction will not be permitted to interpose the objection that the business which produced the fund was in violation of law, in order to defeat a recovery by one who is entitled to the whole or a part of such gains and profits.[90]

(II) *Agents and Partners in Illegal Enterprises.* It results from this doctrine that if money has been actually paid to an agent or to a partner, the illegality of the transaction of which the money was the fruit, or the fact that the firm venture from which the profits have arisen was an illegal one, does not affect

39 Am. St. Rep. 902. And see Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46, 23 N. E. 530, 28 N. Y. St. 807, 7 L. R. A. 46; Dehenny *v.* McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

88. Cohen *v.* Manuel, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491.

89. Wooden *v.* Shotwell, 23 N. J. L. 465.

Other illustrations.— In Martin *v.* Hodge, 47 Ark. 378, 1 S. W. 694, 58 Am. Rep. 763, the owner of horses determined to dispose of them by a lottery, which was illegal, and sold tickets for the drawing. At the drawing it was supposed that A held the lucky tickets, and hearing his name called he went off, took possession of the horses, and drove them home; but it was afterward discovered that another person had won them. The owner thereupon brought suit to recover the horses. It was held that he could recover. As the taking was wrongful and he had never consented to it, and as it was not necessary for him to introduce any evidence in respect to the lottery to establish his right to the horses, his right to recover was not dependent on the illegal transaction. But see Funk *v.* Gallivan, 49 Conn. 124, 44 Am. Rep. 210. In Roselle *v.* Beckemeir, 134 Mo. 380, 35 S. W. 1132, an action was brought against a bank for the proceeds of a draft, in which an interplea was filed, and it appeared that the interpleader and several other holders of lottery tickets agreed to hold them jointly, and divide their winnings equally; that the interpleader, holder of a successful ticket, forwarded it with other successful tickets turned over to him to the lottery company, and received a single draft, payable to himself, for all the money won; that the bank accepted it for collection only, agreeing with the interpleader and another holder to pay the proceeds in specified portions to themselves and one other ticket-holder. It was held that the agreement with the bank was valid, although the transaction in which the draft was obtained was illegal, and that the bank was liable to the interpleader for the part of the proceeds assigned by it to him. And see Roselle *v.* McAuliffe, (Mo. 1896) 35 S. W. 1135. In Bowery Bank *v.* Gerety, 152 N. Y. 411, 47 N. E. 793, a bank made a loan to a person, who at the time held the office of sheriff, upon his note, indorsed for his accommodation and at his request by three persons, at whose request and for whose protection, he also assigned to the bank certain fees coming to him as sheriff. On his failure to pay the note the bank, at the indorsers' request, endeavored to collect such fees, but the assignment was held void as against public policy. The bank then sued the indorsers. It was held that they were not discharged by reason of the illegality of the assignment of the fees. In Allebach *v.* Godshalk, 116 Pa. St. 329, 9 Atl. 444, plaintiff agreed with several parties to convey his land to them, and to execute deeds therefor in accordance with the various portions which should fall to each from a lottery held to determine their shares, and deeds for the several lots were executed but never delivered. In an action by plaintiff against one of the purchasers to recover a lot, it was held that since plaintiff's claim rested upon an untainted legal title, unaffected by the collateral illegal contract, he was entitled to recover.

90. *Michigan.*— Richardson *v.* Welch, 47 Mich. 309, 11 N. W. 172; Willson *v.* Owen, 30 Mich. 474.

Mississippi.— Gilliam *v.* Brown, 43 Miss. 641.

Pennsylvania.— Hipple *v.* Rice, 28 Pa. St. 406; Lestapies *v.* Ingraham, 5 Pa. St. 71.

South Carolina.— Owen *v.* Davis, 1 Bailey 315.

United States.— Union Pac. R. Co. *v.* Durant, 95 U. S. 576, 24 L. ed. 391; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132; Wann *v.* Kelley, 2 McCrary 628, 5 Fed. 584.

England.— Farmer *v.* Russell, 1 B. & P. 295; Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 755; Sharp *v.* Taylor, 2 Phil. 801, 22 Eng. Ch. 801; Thomson *v.* Thomson, 7 Ves. Jr. 470, 6 Rev. Rep. 151.

the right of the principal or partner to recover the money from the agent or copartner in whose hands it is.[91] The ground taken is that, although the law would not have assisted the principal or partnership by enforcing the recovery of it from the party by whom it was paid, because the law will not aid the completion of an illegal contract, yet when that contract is at an end the agent or partner whose liability arises solely from having received the money for another's use can have no right to claim it.[92] Another reason given for this doctrine appears sound: It is that it is contrary to public policy and good morals to permit employees, agents, or public servants to seize or retain the property of their principal, although it may be employed in an illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral

91. *Georgia.*— Clarke *v.* Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Ingram *v.* Mitchell, 30 Ga. 547.

Indiana.— Daniels *v.* Barney, 22 Ind. 207.

Maryland.— Haacke *v.* Knights of Liberty Social, etc., Club, 76 Md. 429, 25 Atl. 422; State *v.* Baltimore, etc., R. Co., 34 Md. 344.

Mississippi.— Andrews *v.* New Orleans Brewing Assoc., 74 Miss. 362, 20 So. 837, 60 Am. St. Rep. 509; Gillian *v.* Brown, 43 Miss. 641.

New Jersey.—Evans *v.* Trenton, 24 N. J. L. 764.

New York.— Woodworth *v.* Bennett, 43 N. Y. 273, 3 Am. Rep. 706; Merritt *v.* Millard, 3 Abb. Dec. 291, 4 Keyes 208 [*affirming* 5 Bosw. 645]; Murray *v.* Vanderbilt, 39 Barb. 140; Hamilton *v.* Canfield, 2 Hall 526.

Pennsylvania.— Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453; McAllister *v.* Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556.

South Carolina.— Tate *v.* Pegues, 28 S. C. 463, 6 S. E. 298; Owen *v.* Davis, 1 Bailey 315; Andersons *v.* Moncrieff, 3 Desauss. 124.

Tennessee.— Pointer *v.* Smith, 7 Heisk. 137; Jones *v.* Davidson, 2 Sneed 447.

Texas.— Pfeuffer *v.* Malthy, 54 Tex. 454, 38 Am. Rep. 631; De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101.

Washington.—McDonald *v.* Lund, 13 Wash. 412, 43 Pac. 348.

United States.— Farley *v.* Hill, 150 U. S. 572, 14 S. Ct. 186, 37 L. ed. 1186; Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Tennessee Planters Bank *v.* Louisiana Union Bank, 16 Wall. 483, 21 L. ed. 473; Brooks *v.* Martin, 2 Wall. 70, 17 L. ed. 732; McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132; McMullen *v.* Hoffman, 75 Fed. 547; Buchanan *v.* Chicago Drovers' Nat. Bank, 55 Fed. 223, 5 C. C. A. 83; Cook *v.* Sherman, 4 McCrary 20, 20 Fed. 167; Wann *v.* Kelley, 2 McCrary 628, 5 Fed. 584; Western Union Tel. Co. *v.* Union Pac. R. Co., 1 McCrary 558, 3 Fed. 423; Burke *v.* Flood, 6 Sawy. 220, 1 Fed. 541; Walker *v.* Kremer, 29 Fed. Cas. No. 17,076.

England.— Farmer *v.* Russell, 1 B. & P. 295; Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 755; French *v.* Styring, 2 C. B. N. S. 357, 3 Jur. N. S. 670, 26 L. J. C. P. 181, 5 Wkly. Rep. 561, 89 E. C. L. 357; Bousfield *v.* Wilson, 17 M. & W. 185; Sharp *v.* Taylor, 2 Phil. 801, 22 Eng. Ch. 801.

See 11 Cent. Dig. tit. "Contracts," § 693 *et seq.*

Illsutrations.— Thus where a broker procured illegal insurance for his principal, and upon a loss the insurance company paid the money to the broker, who refused to pay it over to the insured, setting up the illegality of the insurance, it was held that the principal was entitled to recover; the implied promise of the defendant, arising from the receipt hy him of the money, being a new undertaking, unaffected by the illegality of the insurance. Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 755. So where a person employed another to make sales of candy by a scheme which was violative of the law prohibiting lotteries, and in a suit hy the principal against the agent for the money so received, the agent pleaded the illegality of the transaction hy which he obtained the money, it was held that the action would lie, the court saying: "The defendant (the agent) insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts hy paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat the action brought to enforce a contract on my part to pay the money that I as agent received, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise." Baldwin *v.* Potter, 46 Vt. 402, 408. On the same principle where the treasurer of a horse-fair association received money for entrance fees, stock subscriptions, and commissions on pools sold, which he refused to pay over, and it was conceded that the business in which the money was earned was illegal, it was held that he was liable to the association in an action for money had and received. Willson *v.* Owen, 30 Mich. 474 [*distinguishing* Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441].

92. See the cases cited in the preceding note.

honesty required of persons in these relations.[93] Theoretically, it is said by a recent writer, there is a distinction between enforcing an illegal contract and enforcing a duty not springing from the contract, but arising solely from the receipt of the money or goods. But practically it is impossible to reconcile the actual decisions on this point.[94] A number of courts have refused to allow a recovery by a principal or partner in an illegal enterprise, on the ground that to do so would be to enforce, or at least to recognize, the illegal agreement.[95]

93. Norton *v.* Blinn, 39 Ohio St. 145; Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

94. Harriman Contr. 131.

95. *Alabama.*— Boyd *v.* Barclay, 1 Ala. 34, 34 Am. Dec. 762.

Georgia.— Clarke *v.* Brown, 77 Ga. 606, 4 Am. St. Rep. 98.

Illinois.— Goodrich *v.* Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371 [*affirming* 44 Ill. App. 331]; Craft *v.* McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Neustadt *v.* Hall, 58 Ill. 172; Skeels *v.* Phillips, 54 Ill. 309; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715.

Kansas.— Alexander *v.* Barker, 64 Kan. 396, 67 Pac. 829; Hinnen *v.* Newman, 35 Kan. 709, 12 Pac. 144.

Louisiana.— Little *v.* Johnson, 22 La. Ann. 474.

Massachusetts.— Dunham *v.* Presby, 120 Mass. 285; Snell *v.* Dwight, 120 Mass. 9; Denny *v.* Lincoln, 5 Mass. 385.

Missouri.— Green *v.* Corrigan, 87 Mo. 359.

Montana.— Morrison *v.* Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158.

New Hampshire.—Udall *v.* Metcalf, 5 N. H. 396.

New Jersey.— Watson *v.* Murray, 23 N. J. Eq. 257.

New York.— Leonard *v.* Poole, 114 N. Y. 371, 21 N. E. 707, 23 N. Y. St. 753, 11 Am. St. Rep. 667, 4 L. R. A. 728; English *v.* Rumsey, 32 Hun 486; Bettinger *v.* Bridenbecker, 63 Barb. 395; Negley *v.* Devlin, 12 Abb. Pr. N. S. 210; Belding *v.* Pitkin, 2 Cai. 147.

North Carolina.— King *v.* Winants, 71 N. C. 469, 17 Am. Rep. 11.

Pennsylvania.— Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Eberman *v.* Reitzel, 1 Watts & S. 181.

Utah.—Mexican International Banking Co. *v.* Lichtenstein, 10 Utah 338, 37 Pac. 574.

Vermont.— Buck *v.* Albee, 26 Vt. 184, 62 Am. Dec. 564.

Wisconsin.— Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

United States.— Wheeler *v.* Sage, 1 Wall. 518, 17 L. ed. 646; Bartle *v.* Nutt, 4 Pet. 184, 7 L. ed. 825 [*affirming* 3 Cranch C. C. 283, 2 Fed. Cas. No. 1,072]; Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, 69 Fed. 509; Hyer *v.* Richmond Traction Co., 80 Fed. 839, 26 C. C. A. 175; Jackson *v.* McLean, 36 Fed. 213; Lanahan *v.* Pattison, 1 Flipp. 410, 14 Fed. Cas. No. 8,036; Lanham *v.* Patterson, 14 Fed. Cas. No. 8,069.

England.— Edgar *v.* Fowler, 3 East 222, 7 Rev. Rep. 433; Thomson *v.* Thomson, 7 Ves. Jr. 470, 6 Rev. Rep. 151. In Sykes *v.* Beadon, 11 Ch. D. 170, 195, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 243, 27 Wkly. Rep. 464, Jessel, M. R., spoke of the leading English case to the contrary (Sharp *v.* Taylor, 2 Phil. 801, 22 Eng. Ch. 801), as "unconclusive and unsatisfactory," and said: "The notion that because a transaction which is illegal is closed, that therefore a Court of Equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority,— to authority in the well-known case of the highwaymen, where a robbery had been committed, and one highwayman unsuccessfully sued the other for a division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not. It is not sufficient to say that the transaction is concluded as a reason for the interference of the Court. If that were the reason, it would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the Court cannot maintain it, and the Court will not lend its aid at all to it. That reasoning, then, of Lord Cottenham's is not sufficient; and I should have answered the question — not as Lord Cottenham does, in the affirmative — but in the negative. I do not say that this observation at all affects the authority of Sharp *v.* Taylor as it stands; but I think it does affect very much the dicta which I have read from the judgment; and that is the reason I have read them. It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

See 11 Cent. Dig. tit. "Contracts," § 693 *et seq.*

Illustration.— In Thomson *v.* Thomson, 7 Ves. Jr. 470, 473, 6 Rev. Rep. 151, a sale of the command of an East India company ship was made to the defendant, who agreed to pay therefor an annuity of two hundred pounds. Under regulations adopted by the company to prevent such sales, the defendant subsequently relinquished the command, and was allowed three thousand five hundred pounds, two thousand and forty pounds

Certainly where the profits of an illegal transaction have been actually divided or invested in other property, the illegality of the original transaction in no way affects the title to such property or subsequent dealings in regard to it.[96] If one of the parties to an illegal and unenforceable contract, who has received profits under it, admits that a specified sum is due to the other party, it has been held that the latter may maintain an action upon an account stated between them;[97] or if he has made a special promise to pay him the action may be brought on that promise.[98]

h. Recovery by Agent Against Principal. It is held everywhere in this country that a broker or other agent who is employed to carry out an illegal transaction cannot recover for his services in the employment, on either an express or an implied contract for the same with his principal.[99] So if he by

of which was delivered to an agent of the defendant. A bill was filed by the annuitant for the purpose of procuring a decree declaring the value of the annuity, and enforcing its payment out of the allowance to the defendant. The master of the rolls found the agreement for the payment of the annuity to be illegal, and admitting there existed an equity against the fund, if it could be reached through a legal agreement, said: "You have no claim to this money except through the medium of an illegal agreement; which according to the determinations you cannot support. I should have no difficulty in following the fund; provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the Plaintiff, he might have recovered from that third person, who could not have set up this objection, as a reason for not performing his trust. Tenant *v.* Elliott, 1 B. & P. 3, 4 Rev. Rep. 755, is, I think, an authority for that. But in this instance it is paid to the party; for there can be no difference as to the payment to his agent. Then how are you to get at it except through this agreement? There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock-jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the Court to enforce it."

Distinction in case of mere statutory prohibition.— Some cases make a distinction where the agreement is to do something *per se* immoral, criminal, or involving moral turpitude, and where its illegality is merely in the thing being prohibited by statute. Watson *v.* Murray, 23 N. J. Eq. 257; Jenkins *v.* Fowler, 24 Pa. St. 308; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. ed. 107; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; Hanover Nat. Bank *v.* Burlingame First Nat. Bank, 109 Fed. 421, 48 C. C. A. 482; Pullman's Palace-Car Co. *v.* Central Transp. Co., 65 Fed. 158. In Sharp *v.* Taylor. 2 Phil. 801, 817, 22 Eng. Ch. 801, the parties, who were British subjects, bought an American vessel which had stranded off the port of Liverpool, rescued and repaired her, and put her in service between British and American ports. The ship was registered in the name of a citizen of the United States to evade an act of parliament which prohibited other than British ships to engage in such service under British ownership. One of the owners having refused to account to the other for profits earned, suit was brought, and relief decreed. "The violation of law suggested was not," said the lord chancellor, "any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the ship owners of this country."

96. Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769; Brooks *v.* Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732; Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, 69 Fed. 509; Scarfe *v.* Morgan, 1 H. & H. 292, 7 L. J. Exch. 324, 4 M. & W. 270. The status of such a case has been well put thus: "Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pockets of $1,000 and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to enquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business." King *v.* Winants, 71 N. C. 469, 473, 17 Am. Rep. 11.

97. Hanks *v.* Baber, 53 Ill. 292; Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171; Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410.

98. Brady *v.* Horvath, 167 Ill. 610, 47 N. E. 757.

99. *Illinois.*— Foss *v.* Cummings, 47 Ill. App. 665 [*affirmed* in 149 Ill. 353, 36 N. E. 553].

Kansas.— McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213.

virtue of his employment makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal.[1] In England, however, there are decisions holding that the principal is bound to indemnify the agent employed by him in an illegal transaction.[2] In all jurisdictions if the agent had no knowledge of the illegality of the transaction, or if his act was not a part of it then he may sue.[3] For example if a broker be employed to make purchases or sales the illegality of which depends upon the intention of his principal, the former may recover if he was not aware of the latter's illegal intent.[4]

3. Right of Third Parties to Set Up Illegality. The defense of illegality, although open to the parties and those claiming under them, cannot generally be invoked by third persons.[5] Thus one who has given his note for a legal and valuable consideration cannot avoid payment because the payee has transferred it in payment of a debt which the law would declare illegal.[6]

Louisiana.— Christian *v.* Baer, 22 La. Ann. 459.

Maryland.— Paine *v.* France, 26 Md. 46.

Massachusetts.— Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200; Fuller *v.* Dame, 18 Pick. 472.

Missouri.— Crane *v.* Whittemore, 4 Mo. App. 510.

New York.— Gray *v.* Hook, 4 N. Y. 449; Rose *v.* Truax, 21 Barb. 361; Harris *v.* Roof, 10 Barb. 489; Brinkman *v.* Eisler, 16 N. Y. Suppl. 154, 40 N. Y. St. 865 [*affirming* 7 N. Y. Suppl. 193, 26 N. Y. St. 94]. But see Ormes *v.* Dauchy, 45 N. Y. Super. Ct. 85.

Pennsylvania.— Fareira *v.* Gabell, 89 Pa. St. 89; Smith *v.* Bouvier, 70 Pa. St. 325; Clippinger *v.* Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519.

United States.— Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225; Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 953.

See Factors and Brokers; Principal and Agent.

1. *Georgia.*— Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400, 51 Am. Rep. 266, 75 Ga. 366.

Illinois.— Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Colderwood *v.* McCrea, 11 Ill. App. 543.

Indiana.— Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441.

Maryland.— Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327.

Massachusetts.— Stebbins *v.* Leowolf, 3 Cush. 137.

Michigan.— Gregory *v.* Wendell, 39 Mich. 337, 33 Am. Rep. 390.

Minnesota.— Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri.— Connor *v.* Black, 119 Mo. 126, 24 S. W. 184; Hill *v.* Johnson, 38 Mo. App. 383.

New York.— St. John *v.* St. John's Church, 15 Barb. 346; Ward *v.* Van Duzer, 2 Hall 162; Newburgh *v.* Galatian, 4 Cow. 340; Graves *v.* Delaplaine, 14 Johns. 146; Callagan *v.* Hallett, 1 Cai. 104.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Pennsylvania.— Fareira *v.* Gabell, 89 Pa. St. 89.

Wisconsin.— Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269; Hooker *v.* Knab, 26 Wis. 511.

United States.— Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; Kennett *v.* Chambers, 14 How. 38, 14 L. ed. 316; Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468; Kirkpatrick *v.* Adams, 20 Fed. 287.

See Factors and Brokers; Principal and Agent.

2. Seymour *v.* Bridge, 14 Q. B. D. 460, 54 L. J. Q. B. 347; Read *v.* Anderson, 13 Q. B. D. 779, 49 J. P. 4, 53 L. J. Q. B. 532, 51 L. T. Rep. N. S. 55, 32 Wkly. Rep. 950; Thacker *v.* Hardy, 4 Q. B. D. 685, 48 L. J. Q. B. 289, 39 L. T. Rep. N. S. 595, 27 Wkly. Rep. 158.

3. *Alabama.*— Moore *v.* Appleton, 26 Ala. 633.

Georgia.— Warren *v.* Hewitt, 45 Ga. 501.

Maine.— Drummond *v.* Humphreys, 39 Me. 347.

Massachusetts.— Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

United States.— Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468.

England.— Rosewarne *v.* Billing, 15 C. B. N. S. 316, 10 Jur. N. S. 496, 33 L. J. C. P. 55, 9 L. T. Rep. N. S. 441, 12 Wkly. Rep. 104, 109 E. C. L. 316.

See Factors and Brokers; Principal and Agent.

4. See the cases above cited.

5. *Louisiana.*— Gravier *v.* Carraby, 17 La. 118, 36 Am. Dec. 608.

Maine.— Ellsworth *v.* Mitchell, 31 Me. 247.

Michigan.— Cleveland *v.* Miller, 94 Mich. 97, 53 N. W. 961.

Mississippi.— Williams *v.* Simpson, 70 Miss. 113, 11 So. 689.

New Hampshire.— Clark *v.* Gibson, 12 N. H. 386.

New York.— Wood *v.* Erie R. Co., 9 Hun 648 [*affirmed* in 72 N. Y. 196, 28 Am. Rep. 125].

South Carolina.— Anderson *v.* Moncrieff, 3 Desauss. 124.

Vermont.— Edson *v.* Pawlet, 22 Vt. 291.

Wisconsin.— Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

See 11 Cent. Dig. tit. "Contracts," § 689½.

6. Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17.

Other illustrations.— So also a carrier who contracts with a corporation to transport

4. Form of Illegal Agreement. The substance, not the form, of the agreement is looked at, and although valid on its face, oral evidence is always admissible to show an illegal purpose.[7] Therefore, in order to arrive at the substance of it, a court will not confine its attention to the mere words in which it is expressed, for an illegal agreement may be sometimes concealed under the guise of language which on the face of it, if words were only to be considered, might constitute a legally enforceable contract.[8]

5. New Agreement on Same Consideration Void. If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity.[9] So every

goods for it cannot defend an action for damages resulting from his negligence in transporting such goods on the ground that the corporation could not lawfully acquire title to them. Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372. And the fact that one who delivers goods to a carrier for transportation carries on business under a firm name, when in fact he has no partner, and thus violates a law of the state, is no defense to an action by him against the carrier for injuries to the goods in course of transportation, if in fact he is the true owner of the goods. Wood *v.* Erie R. Co., 9 Hun (N. Y.) 648 [*affirmed* in 72 N. Y. 196, 58 Am. Rep. 125]. So also, although a wager is illegal and may be rescinded by the parties, a creditor cannot rescind his debtor's wager agreement and claim the money deposited with the stakeholder, unless the debtor is insolvent or financially embarrassed. Clark *v.* Gibson, 12 N. H. 386.

7. See *infra*, XII, J, 5; and, generally, Evidence.

8. In a well-known case, under the guise of a contract for the sale by the defendant to the plaintiff of a horse at a price to depend on the event of a trial of its speed and staying power, there was concealed a mere bet of the defendant's horse to £200 that the horse within a month should trot eighteen miles within an hour. The defendant's horse, having failed to accomplish the task set him, was claimed by plaintiff at the nominal price of one shilling. The nature of this wagering contract was transparent, and the plaintiff in vain argued that it was a *bona fide* conditional bargain. Brogden *v.* Marriott, 3 Bing. N. Cas. 88, 2 Hodges 136, 5 L. J. C. P. 302, 2 Scott 712, 32 E. C. L. 49.

Gambling in futures.— Contracts amounting to a mere gambling in the future rise and fall of prices of stocks or goods are generally disguised under the form of contracts for a *bona fide* sale; but the courts will always hold them illegal and void when their true character appears from the evidence. See Gaming.

9. *California.*— Buffendeau *v.* Brooks, 28 Cal. 641.

Georgia.— Chancely *v.* Bailey, 37 Ga. 532, 95 Am. Dec. 350; Howell *v.* Fountain, 3 Ga. 176, 46 Am. Dec. 415.

Indiana.— Hall *v.* Gavitt, 18 Ind. 390.

Iowa.— Lowe *v.* Young, 59 Iowa 364, 13 N. W. 329.

Louisiana.— Cummings *v.* Saux, 30 La. Ann. 207.

Massachusetts.— Howe *v.* Litchfield, 3 Allen 443; Holden *v.* Cosgrove, 12 Gray 216.

Michigan.— Lyon *v.* Waldo, 36 Mich. 345; Comstock *v.* Draper, 1 Mich. 481, 53 Am. Dec. 78.

Mississippi.— McLauren *v.* Graham, 26 Miss. 400; Coulter *v.* Robertson, 14 Sm. & M. 18; Collins *v.* McCargo, 6 Sm. & M. 128.

Missouri.— Claflin *v.* Torlina, 56 Mo. 369; Harrison *v.* McCluney, 32 Mo. App. 481.

New Jersey.—Crossley *v.* Moore, 40 N. J. L. 27; Wooden *v.* Shotwell, 23 N. J. L. 465.

New York.— Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Stanton *v.* Allen, 5 Den. 434, 49 Am. Dec. 282.

North Carolina.— Brown *v.* Kinsey, 81 N. C. 245; Steel *v.* Holt, 75 N. C. 188.

Pennsylvania.— Seidenbender *v.* Charles, 4 Serg. & R. 151, 8 Am. Dec. 682; Columbia Bridge Co. *v.* Kline, Brightly 320, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

South Carolina.— Edwards *v.* Skirving, 1 Brev. 548.

Tennessee.— Parks *v.* McKamy, 3 Head 297; Bates *v.* Watson, 1 Sneed 376.

Wisconsin.— Everingham *v.* Meighan, 55 Wis. 354, 13 N. W. 269.

United States.— Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468 [*affirming* 4 Wash. 297, 24 Fed. Cas. No. 14,078].

England.— Clay *v.* Ray, 17 C. B. N. S. 188, 112 E. C. L. 188; Fisher *v.* Bridges, 2 C. L. R. 929, 3 E. & B. 642, 1 Jur. N. S. 157, 23 L. J. Q. B. 276, 2 Wkly. Rep. 706, 77 E. C. L. 642; Græme *v.* Wroughton, 11 Exch. 146, 24 L. J. Exch. 265, 3 Wkly. Rep. 509; Geere *v.* Mare, 2 H. & C. 339, 33 L. J. Exch. 50, 8 L. T. Rep. N. S. 463, 12 Wkly. Rep. 17.

See 11 Cent. Dig. tit. "Contracts," § 713.

Successive or renewal notes.— "If a note is tainted by the consideration of the demand for which it is given, there can be no good reason for drawing the line at the first note. If the first is taken up and a new one given in its stead, to obtain an extension of time, to embrace in it additional demands, or for other purposes, the illegal consideration is as distinctly traced in the second note as in the first. The new considerations dilute but do not neutralize or extinguish the poison. If the second note is enforced, the money promised for an illegal consideration collected by one of the guilty parties — the other guilty party is forced by the law to do

new agreement in furtherance of, or for the purpose of carrying into effect, any of the unexecuted provisions of a previous illegal agreement is likewise illegal and void.[10]

6. Securities Given in Illegal Transaction. It follows from the principle just stated that notes given for illegal claims or as the consideration for illegal promises cannot be enforced.[11] The same is true of deeds, bonds, mortgages, and other securities.[12]

7. New Agreement on New Consideration. When an illegal agreement is carried out or abandoned, as the case may be, a new agreement wholly unconnected with the illegal act and in no sense a continuation of the old or including any claim or right springing therefrom is valid.[13] Thus a lender may recover from a

what he is commanded by the law not to do." Wegner *v.* Biering, 65 Tex. 506, 510. See also Cotton *v.* Brien, 6 Rob. (La.) 115; Scudder *v.* Thomas, 21 Fed. Cas. No. 12,567, 35 Ga. 364.

10. *Colorado.*—Brown *v.* Kennedy, 12 Colo. 235, 20 Pac. 696.

Kansas.— Cox *v.* Grubb, 47 Kan. 435, 28 Pac. 157, 27 Am. St. Rep. 303.

Mississippi.— Coulter *v.* Robertson, 14 Sm. & M. 18; Adams *v.* Rowan, 8 Sm. & M. 624.

Missouri.— Harrison *v.* McCluney, 32 Mo. App. 481.

New York.— Gray *v.* Hook, 4 N. Y. 449; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. 397.

Texas.— Shelton *v.* Marshall, 16 Tex. 344; Reed *v.* Brewer, (Civ. App. 1896) 36 S. W. 99, where after an action had been brought upon notes based on an illegal consideration plaintiff agreed to dismiss upon the execution of an agreement by defendant promising, in consideration of the dismissal, to pay a certain sum weekly until the notes should be paid, and it was held that the illegal consideration in the original notes extended to the new contract and rendered it void.

See 11 Cent. Dig. tit. "Contracts," § 714 *et seq.*

11. Murphy *v.* Weems, 69 Ga. 687; Bailey *v.* Cromwell, 4 Ill. 71; Nelson *v.* Beck, 89 Me. 264, 36 Atl. 374; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159. See Commercial Paper.

Negotiable instruments.— In the case of negotiable instruments, however, we have to consider not only the effect of the illegality as between the original parties, but the effect upon subsequent holders of the instrument. While as between the parties it is void, yet where it has passed into the hands of a *bona fide* holder for value without notice, its illegality is no defense as against him unless a statute expressly or by necessary implication declares it void, in which case even a *bona fide* holder cannot recover on it. See Commercial Paper.

12. *Alabama.*— Foreman *v.* Hardwicke, 10 Ala. 316; Jordan *v.* Locke, Minor 254.

Arkansas.— Stone *v.* Mitchell, 7 Ark. 91.

Colorado.—Ayer *v.* Younker, (1897) 50 Pac. 218.

Illinois.— Gilbert *v.* Holmes, 64 Ill. 548.

Indiana.— Winchester *v.* Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; Crowder *v.* Reed, 80 Ind. 1.

Kentucky.— Chiles *v.* Coleman, 2 A. K. Marsh. 296, 12 Am. Dec. 396; Morton *v.* Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366.

Maryland.— Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Missouri.—Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Shropshire *v.* Glascock, 4 Mo. 536, 31 Am. Dec. 189.

New York.— Dewitt *v.* Brisbane, 16 N. Y. 508; Gray *v.* Hook, 4 N. Y. 449.

North Carolina.— Bettis *v.* Reynolds, 34 N. C. 344, 55 Am. Dec. 417; Turner *v.* Peacock, 13 N. C. 303.

Pennsylvania.— Edgell *v.* McLaughlin, 6 Whart. 176, 36 Am. Dec. 214.

South Carolina.— Willis *v.* Hockaday, 1 Speers 379, 40 Am. Dec. 606.

Tennessee.— Russell *v.* Pyland, 2 Humphr. 131, 36 Am. Dec. 307; Merchants' Sav. Bank, etc., Co. *v.* Duncan, (Ch. 1896) 36 S. W. 887.

Texas.— Monroe *v.* Smelly, 25 Tex. 586, 78 Am. Dec. 541.

United States.— Teal *v.* Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. ed. 415.

See, generally, Bonds; Deeds; Mortgages.

Removal of mortgage as cloud on title.— Although a mortgage is void for illegality, its existence is a cloud on the mortgagor's title which equity will remove by cancellation. Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

13. *Alabama.*— Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

Connecticut.— Phalen *v.* Clark, 19 Conn. 421, 1 Am. Rep. 253.

Illinois.— Webster *v.* Sturges, 7 Ill. App. 560.

Michigan.— Smith *v.* Barstow, 2 Dougl. 155.

Missouri.— Roselle *v.* Beckemeir, 134 Mo. 380, 35 S. W. 1132.

New York.— Hook *v.* Gray, 6 Barb. 398 [*reversed* in 4 N. Y. 449]; Leavitt *v.* Blatchford, 5 Barb. 9; Gibson *v.* Pearsall, 1 E. D. Smith 90.

South Dakota.— Commercial Bank *v.* Jackson, 7 S. D. 135, 63 N. W. 548.

Tennessee.— Thornburg *v.* Harris, 3 Coldw. 157.

Texas.— Boggess *v.* Lilly, 18 Tex. 200.

Vermont.— Buck *v.* Albee, 26 Vt. 184, 62 Am. Dec. 564.

borrower money paid at his request in discharge of an illegal contract.[14] On the same principle, where a county made an illegal contract for the purchase of corn, a part of which was not delivered, and it afterward purchased and used the undelivered portion for a legal purpose, giving a warrant therefor, it was held that the consideration of the warrant was valid.[15] And where a promissory note, the consideration of which was the hiring of a substitute in the Confederate army, was, at the request of the principal, paid off by the surety at its value, and the principal gave his note to the surety for the amount paid, it was held that the last contract was not affected by the illegality of the original note.[16] There is, as we have seen, a difference of opinion in the courts as to the legality of a promise to pay over property or profits, the proceeds of an illegal adventure by a partner or agent, to the principal or copartner. Some courts hold such promise void,[17] while others hold it good on the ground that the new promise is not part of the illegal contract which has been executed before the making of the new agreement,[18] or on the ground that courts should not encourage violations of contracts for payment of debts, as between the parties, because growing out of tainted originals.[19]

8. Effect of Illegal Agreement on Prior Legal One. A subsequent illegal agreement will not affect a prior lawful one between the same parties.[20] Thus where the holder of a valid note gave the maker his receipt for the amount in consideration that the maker should desist from the prosecution of the holder for perjury, it was held that the illegality of the receipt did not affect the validity of the note.[21]

9. Consideration or Promise Wholly Illegal. Where an agreement consists of a single promise based on a single consideration, if either the promise or consideration is illegal, the agreement is void. This is elementary and undisputed.[22]

10. Consideration Legal but Promise Partly Illegal. Where an agreement founded on a legal consideration contains several promises or a promise to do several things, and some only of the things to be done are illegal, the promises which

West Virginia.— Morrison *v.* Lovell, 4 W. Va. 346.

United States.—McBlair *v.* Gibbes, 17 How. 232, 15 L. ed. 132; Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468 [*affirming* 4 Wash. 297, 24 Fed. Cas. No. 14,078].

See 11 Cent. Dig. tit. "Contracts," § 713 *et seq.*

14. Williams *v.* Carr, 80 N. C. 294; Kingsbury *v.* Suit, 66 N. C. 601.

15. Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

16. Powell *v.* Smith, 66 N. C. 401.

Other illustrations.— So where the defendant donated cotton to certain military companies to arm and equip them for the Confederate service, and the agents of the military companies sold the cotton to plaintiff for the purpose of raising the necessary money, the purpose for which the cotton was donated and money applied being known to plaintiff, and defendant agreed to hold the cotton subject to plaintiff's order, it was held that the agreement to hold the cotton subject to plaintiff's order was a valid contract. Holt *v.* Barton, 42 Miss. 711, 2 Am. Rep. 640. And where the principal in a contract to pay money for the abduction of a person paid the money to a surety, and the surety subsequently promised to pay it over to the other party, it was held that the contract of the surety was not affected by the illegality of the original promise, as the surety's promise was a separate undertaking. Barker *v.* Parker, 23 Ark. 390. So where A sold B a lottery ticket, which afterward drew a prize, and B for a valuable consideration assigned his interest to C, who was ignorant of the previous illegal sale, and A then made, and B indorsed, a promissory note to C in satisfaction of the prize money, it was held that the note was valid. Terry *v.* Olcott, 4 Conn. 442.

17. Belding *v.* Pitkin, 2 Cai. (N. Y.) 147; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Lanahan *v.* Pattison, 1 Flipp. (U. S.) 410, 14 Fed. Cas. No. 8,036; Lanham *v.* Patterson, 14 Fed. Cas. No. 8,069. See *supra*, VII, C, 2, g, (II).

18. Hamilton *v.* Canfield, 2 Hall (N. Y.) 526; De Leon *v.* Trevino, 49 Tex. 88, 30 Am. Rep. 101; McDonald *v.* Lund, 13 Wash. 412, 43 Pac. 348; Walker *v.* Kremer, 29 Fed. Cas. No. 17,076. See *supra*, VII, C, 2, g, (II).

19. Bly *v.* Titusville Second Nat. Bank, 79 Pa. St. 453.

20. Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Pond *v.* Smith, 4 Conn. 297; Utica Ins. Co. *v.* Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. *v.* Scott, 19 Johns. (N. Y.) 1; Wilcoxon *v.* Logan, 91 N. C. 449. *Contra*, Cate *v.* Blair, 6 Coldw. (Tenn.) 639.

21. Best *v.* Higginbotham, 7 B. Mon. (Ky.) 124.

22. See the cases cited *supra*, VII, C, 1.

can be separated, or the promise so far as it can be separated, from the illegality, may be valid. The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration.[23] Thus if the terms of a contract in restraint of trade can be construed divisibly as to the limits, it may be valid as to the limits which are reasonable, although other limits imposed are excessive, unreasonable, and void.[24] On the other hand, if a promise to do several things or several dis-

23. *Alabama.*— Ware *v.* Curry, 67 Ala. 274.

Arkansas.— St. Louis, etc., R. Co. *v.* Matthews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; Hanauer *v.* Gray, 25 Ark. 350, 99 Am. Dec. 226.

California.— Santa Clara Valley Mill, etc., Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.

Illinois.— Corcoran *v.* Lehigh, etc., Coal Co., 138 Ill. 390, 28 N. E. 759 [*reversing* 37 Ill. App. 571].

Iowa.— Merrill *v.* Reaver, 50 Iowa 404.

Louisiana.— Glaze *v.* Duson, 40 La. Ann. 692, 4 So. 861.

Massachusetts.— Rand *v.* Mather, 11 Cush. 1, 59 Am. Dec. 131 [*overruling* Loomis *v.* Newhall, 15 Pick. 159].

Minnesota.— Weitzner *v.* Thingstad, 55 Minn. 244, 56 N. W. 817.

Missouri.— Rosenblatt *v.* Townsley, 73 Mo. 536; Presbury *v.* Fisher, 18 Mo. 50.

New Hampshire.— Bixby *v.* Moor, 51 N. H. 402.

New Jersey.— Fishell *v.* Gray, 60 N. J. L. 5, 37 Atl. 606; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505; Union Locomotive, etc., Co. *v.* Erie R. Co., 35 N. J. L. 240.

New York.— Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Sizer *v.* Daniels, 66 Barb. 426; Thayer *v.* Rock, 13 Wend. 53.

Ohio.— Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333; State *v.* Board of Education, 35 Ohio St. 519; State *v.* Williams, 29 Ohio St. 161; Morris *v.* Way, 16 Ohio 469; State *v.* Findley, 10 Ohio 51.

South Carolina.— Wilson *v.* Wilson, 1 Desauss. 219.

Vermont.— Morgan *v.* Davis, 47 Vt. 610.

United States.— U. S. *v.* Mora, 97 U. S. 413, 24 L. ed. 1013; U. S. *v.* Hodson, 10 Wall. 395, 19 L. ed. 937; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; U. S. *v.* Bradley, 10 Pet. 343, 9 L. ed. 448; Western Union Tel. Co. *v.* Kansas Pac. R. Co., 4 Fed. 284; Northern Pac. R. Co. *v.* U. S., 15 Ct. Cl. 428.

England.— Pigot's Case, 11 Coke 26*b*.

See 11 Cent. Dig. tit. "Contracts," § 701 *et seq.*

24. *California.*— Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242. But see More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621.

Indiana.— Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Massachusetts.— Dean *v.* Emerson, 102 Mass. 480.

Michigan.—Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

New Jersey.— Rosenbaum *v.* U. S. Credit System Co., 65 N. J. L. 255, 48 Atl. 237, 53 L. R. A. 449; Union Locomotive, etc., Co. *v.* Erie R. Co., 35 N. J. L. 240.

New York.— Arnot *v.* Pittson, etc., Coal Co., 2 Hun 591; Jarvis *v.* Peck, Hoffm. 479.

Ohio.— Thomas *v.* Miles, 3 Ohio St. 274; Lange *v.* Werk, 2 Ohio St. 519.

United States.— Western Union Tel. Co. *v.* Burlington, etc., R. Co., 3 McCrary 130, 11 Fed. 1.

England.— Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 853; Chesnam *v.* Nainby, 2 Ld. Raym. 1456; Davies *v.* Lowen, 64 L. T. Rep. N. S. 655.

See 11 Cent. Dig. tit. "Contracts," § 706.

Illustrations.— Thus, where the restraint was to operate in London, or in any place in England or Scotland where the employer might have been practising during the employment, the restraint was held good as to London, but void as to the rest, because possibly extending everywhere. Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 853; Chesman *v.* Nainby, 2 Ld. Raym. 1456. So a covenant not to exercise a certain trade within the cities of London or Westminster, or within six hundred miles of the same, was construed divisibly, and held good as to London and Westminster, but void as to the six hundred miles beyond, which was not divisible. Green *v.* Price, 9 Jur. 880, 16 L. J. Exch. 108, 16 M. & W. 346. So a contract not to engage in a particular trade for a specific time, "in the city of St. Louis, or at any other place," was considered divisible, and as to the restriction imposed in St. Louis was held not void as in restraint of trade. Peltz *v.* Eichele, 62 Mo. 171. Upon the same principle a covenant by the articled clerk to a solicitor not to act for any person who had already been or who thereafter should become a client of the solicitor was held to be unreasonably large, but valid as to persons who were clients before and during the clerk's articles. Nicholls *v.* Stratton, 10 Q. B. 346, 11 Jur. 1009, 59 E. C. L. 346. So where a person agreed with another not to manufacture ocher in Lehigh county or elsewhere, it was held that he might be enjoined from manufacturing ocher in Lehigh county. Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251.

A distinction between illegality at common law and illegality by reason of the provision of a statute was made in the common law, it being said that a "statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and

tinct promises, although they be founded on a legal consideration, are indivisible, and one or more of the promises are illegal, the legal promise or promises cannot be enforced, but the whole agreement is void.[25] Whether the promises are separable or indivisible is a question of interpretation by the court. And where a contract contains illegal stipulations, and to sustain it in part would be practically to sustain it altogether, the court will treat it as wholly void.[26] So a contract illegal in part, and of such a nature that the good cannot be separated from the bad, is entirely void.[27] It has been held that separation of the good consideration from that which is illegal will be attempted only in those cases in which the party seeking to enforce the contract is not the wrong-doer.[28]

11. CONSIDERATION PARTLY ILLEGAL OR SEVERAL CONSIDERATIONS, SOME OF WHICH ARE ILLEGAL. If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise.[29] Thus if the con-

preserves the rest." Maleverer *v.* Redshaw, 1 Mod. 35; Pollock Contr. 321; Anson Contr. 206. And see Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252. This distinction, however, is no longer recognized either in England or the United States, and although part of an agreement is contrary to statute, this does not avoid or annul other parts of the agreement which are separable from the bad part and not founded upon it, unless the statute expressly or by necessary implication declares the whole void.

Illinois.— Wolsey *v.* Neeley, 62 Ill. App. 141.

Indiana.— Hynds *v.* Hays, 25 Ind. 31.

Massachusetts.— Rand *v.* Mather, 11 Cush. 1, 59 Am. Dec. 131.

Ohio.— State *v.* Findley, 10 Ohio 51.

United States.— U. S. *v.* Bradley, 10 Pet. 343, 9 L. ed. 448.

England.— Pickering *v.* Ilfracombe R. Co., L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. Rep. N. S. 650, 16 Wkly. Rep. 458.

25. Moffatt *v.* Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192; Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Thayer *v.* Rock, 13 Wend. (N. Y.) 53; Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

26. Gerlach *v.* Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; Burlington, etc., R. Co. *v.* Northwestern Fuel Co., 31 Fed. 652.

27. *California.*— Prost *v.* More, 40 Cal. 347.

Connecticut.— Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

Indiana.— Ricketts *v.* Harvey, 106 Ind. 564, 6 N. E. 325.

Mississippi.— Newberry Bank *v.* Stegall, 41 Miss. 142.

New York.— Bigelow *v.* Law, 5 Abb. Pr. 455; Decker *v.* Morton, 1 Redf. Surr. 477.

28. Saratoga County Bank *v.* King, 44 N. Y. 87.

29. *Alabama.*— Sims *v.* Alabama Brewing Co., 132 Ala. 311, 31 So. 35; Folmar *v.* Siler, 132 Ala. 297, 31 So. 719; Pettit *v.* Pettit, 32 Ala. 288; Carrington *v.* Caller, 2 Stew. 175.

California.— Santa Clara Valley Mill, etc., Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Valentine *v.* Stewart, 15 Cal. 387.

Colorado.— Pueblo, etc., R. Co. *v.* Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Georgia.— Allen *v.* Pearce, 84 Ga. 606, 10 S. E. 1015; Chandler *v.* Johnson, 39 Ga. 85.

Illinois.— St. Louis, etc., R. Co. *v.* Mathers, 104 Ill. 257; Tobey *v.* Robinson, 99 Ill. 222; Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Boehmer *v.* Foval, 55 Ill. App. 71; Miles *v.* Andrews, 40 Ill. App. 155.

Indiana.— Ricketts *v.* Harvey, 106 Ind. 564, 6 N. E. 325; James *v.* Jellison, 94 Ind. 292, 48 Am. Rep. 151.

Kansas.— Dennis *v.* Kuster, 57 Kan. 215, 45 Pac. 602; Flersheim *v.* Cary, 39 Kan. 178, 17 Pac. 825; Gerlach *v.* Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240.

Kentucky.— Kimbrough *v.* Lane, 11 Bush 556; Collins *v.* Merrell, 2 Metc. 163; Donallen *v.* Lennox, 6 Dana 89; Burgen *v.* Straughan, 7 J. J. Marsh. 583; Brown *v.* Langford, 3 Bibb 497.

Louisiana.— Sandidge *v.* Sanderson, 21 La. Ann. 757; Haden *v.* Phillips, 21 La. Ann. 517.

Massachusetts.— Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Taylor *v.* Jaques, 106 Mass. 291; Perkins *v.* Cummings, 2 Gray 258; Loomis *v.* Newhall, 15 Pick. 159.

Michigan.— Case *v.* Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341, 31 L. R. A. 282; Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931; McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Wisner *v.* Bardwell, 38 Mich. 278; Snyder *v.* Willey, 33 Mich. 483.

Missouri.—Sumner *v.* Summers, 54 Mo. 340.

New Hampshire.— Merrill *v.* Carr, 60 N. H. 114; Clements *v.* Marston, 52 N. H. 31; Bixby *v.* Moor, 51 N. H. 402; Coburn *v.* Odell, 30 N. H. 540; Carleton *v.* Woods, 28 N. H. 290; Clark *v.* Ricker, 14 N. H. 44; Hinds *v.* Chamberlin, 6 N. H. 225; Carlton *v.* Whitcher, 5 N. H. 196; Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

New York.—Haynes *v.* Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815 [*reversing* 30

sideration for a note or other promise to pay a certain sum of money be the sale of goods, some of which it is legal and some of which it is illegal to sell, the note or promise cannot be enforced,[30] as for example a note given for intoxicating liquors or things sold on Sunday and also for other articles, the sale of the former being illegal.[31] A note under seal in consideration of both past and future cohabitation is entirely void.[32] And the same is true of a chattel mortgage covering some articles which it is illegal to keep;[33] of a note or promise in consideration

Hun 237]; Foley *v.* Speir, 100 N. Y. 552, 3 N. E. 477; Saratoga County Bank *v.* King, 44 N. Y. 87; Rose *v.* Truax, 21 Barb. 361; Barton *v.* Port Jackson, etc., Plank Road Co., 17 Barb. 397; Steinfeld *v.* Levy, 16 Abb. Pr. N. S. 26; Jarvis *v.* Peck, Hoffm. 479.

North Carolina.— Covington *v.* Threadgill, 88 N. C. 186; Lindsay *v.* Smith, 78 N. C. 328, 24 Am. Rep. 463; Clemmons *v.* Hampton, 64 N. C. 264; Cameron *v.* McFarland, 4 N. C. 299, 6 Am. Dec. 566.

North Dakota.— Gage *v.* Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557.

Ohio.— Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; McQuade *v.* Rosecrans, 36 Ohio St. 442; State *v.* Board of Education, 35 Ohio St. 519; Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Fountain Square Theater Co. *v.* Evans, 4 Ohio S. & C. Pl. Dec. 151.

Pennsylvania.— Bredin's Appeal, 92 Pa. St. 241, 37 Am. Rep. 677; Filson *v.* Himes, 5 Pa. St. 452, 47 Am. Dec. 422; Frazier *v.* Thompson, 2 Watts & S. 235.

Rhode Island.— Sullivan *v.* Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110.

South Carolina.— Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937.

Tennessee.— Potts *v.* Gray, 3 Coldw. 468, 91 Am. Dec. 294.

Texas.— Reed *v.* Brewer, 90 Tex. 144, 37 S. W. 418; Edwards County *v.* Jennings, 89 Tex. 618, 35 S. W. 1053; Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537; Wegner *v.* Biering, 65 Tex. 506; Kottwitz *v.* Alexander, 34 Tex. 689; Sanger *v.* Miller, 26 Tex. Civ. App. 111, 62 S. W. 425.

Vermont.— Bowen *v.* Buck, 28 Vt. 308; Woodruff *v.* Hinman, 11 Vt. 592, 34 Am. Dec. 712; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599.

United States.— Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Burke *v.* Child, 21 Wall. 441, 22 L. ed. 623; Union Cent. L. Ins. Co. *v.* Berlin, 90 Fed. 779, 33 C. C. A. 274.

England.— Featherston *v.* Hutchinson, Cro. Eliz. 199.

See 11 Cent. Dig. tit. "Contracts," § 701 *et seq.*

Consideration void but not illegal.— The consideration must be illegal and not merely void. If part of the consideration is merely void, as where it is impossible, unreal, or the like, and there is still a valid consideration left, it will support the promise, for the law does not determine whether the consideration is adequate. See *supra*, IV, E. It is only where part of the consideration is illegal that it affects the entire agreement. Jarvis *v.* Peck, Hoffm. (N. Y.) 479; Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Doty *v.* Knox County Bank, 16 Ohio St. 133; Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Thomas *v.* Thomas, 2 Q. B. 851, 2 G. & D. 226, 6 Jur. 645, 11 L. J. Q. B. 104, 42 E. C. L. 945; Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 104; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 29 E. C. L. 695; King *v.* Sears, 2 C. M. & R. 48, 1 Gale 241, 4 L. J. Exch. 181, 5 Tyrw. 587; Ring *v.* Roxbrough, 2 Cromp. & J. 418.

30. *Alabama.*— Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

Georgia.— Allen *v.* Pearce, 84 Ga. 606, 10 S. E. 1015.

Iowa.— Gipps Brewing Co. *v.* De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; Braitch *v.* Guelick, 37 Iowa 212.

Maine.— Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17; Wirth *v.* Roche, 92 Me. 383, 42 Atl. 794; Ladd *v.* Dillingham, 34 Me. 316; Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592.

Mississippi.— Cotten *v.* McKenzie, 57 Miss. 418.

New Hampshire.—Kidder *v.* Blake, 45 N. H. 530; Coburn *v.* Odell, 30 N. H. 540.

Ohio.— Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

Contra, Hynds *v.* Hays, 25 Ind. 31; Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204; Shaw *v.* Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

See 11 Cent. Dig. tit. "Contracts," § 702 *et seq.*

31. *Alabama.*— Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699.

Iowa.— Braitch *v.* Guelick, 37 Iowa 212.

Kansas.— Gerlack *v.* Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240.

Maine.— Ladd *v.* Dillingham, 34 Me. 316; Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592.

Mississippi.— Cotten *v.* McKenzie, 57 Miss. 418.

Missouri.— Bick *v.* Seal, 45 Mo. App. 475.

New York.— Sanderson *v.* Goodrich, 46 Barb. 616.

Ohio.— Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

See 11 Cent. Dig. tit. "Contracts," § 703.

Liquors sold without a license.— Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592; Coburn *v.* Odell, 30 N. H. 540. But see Carleton *v.* Woods, 28 N. H. 290.

32. Massey *v.* Wallace, 32 S. C. 149, 10 S. E. 937. See *supra*, VII, B, 3, f, (v).

33. Flersheim *v.* Cary, 39 Kan. 178, 17 Pac. 825; Gerlach *v.* Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; Brigham *v.* Potter, 14 Gray (Mass.) 522. *Contra*, Shaw *v.* Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

of a number of sacks of fertilizer, a portion of which were sold without being inspected, branded, etc., as required by a statute then in force, and the rest after the repeal of the statute;[34] of a note in part for money lent for the purpose of gaming;[35] and of notes given to cover losses on several deals in options in grain, in one only of which the grain was to be actually delivered.[36] It has been held that there can be no recovery on an agreement to pay wages as bartender and clerk for a dealer in groceries and liquors, where the sale of the latter was prohibited when the contract was made and the services rendered.[37] And the principle also applies to other contracts to pay for services, some of which are illegal, or to pay for legal services and also for some other consideration which is illegal.[38]

34. Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

35. Reed *v.* Reeves, 13 Bush (Ky.) 447; Collins *v.* Merrell, 2 Metc. (Ky.) 163; Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423; Columbia Bridge Co. *v.* Kline, Brightly (Pa.) 320. See GAMING.

36. Miles *v.* Andrews, 40 Ill. App. 155. See GAMING.

37. Bixby *v.* Moor, 51 N. H. 402; Sullivan *v.* Horgan, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110. And see MASTER AND SERVANT. But one is not prevented from recovering for service contracted to be rendered in a lawful employment merely because, during the term of his employment, he occasionally assisted his employer in making unlawful liquor sales gratuitously — not expecting or seeking any compensation therefor. Goodwin *v.* Clark, 65 Me. 280.

38. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466; Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204.

Sunday laws.— Where a person was employed to manage the advertisements of the daily, weekly, and Sunday editions of a newspaper at a certain salary, and the agreement as to the Sunday paper was illegal under a statute, it was held that he could recover nothing for his services in the daily and weekly editions. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466. And where a person agreed to give seven public concerts for a certain sum, six on week days and one on Sunday afternoon, when Sunday concerts were prohibited by statute, it was held that there could be no recovery at all on the agreement. Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407.

Agreement in part to give testimony.— In Pollak *v.* Gregory, 9 Bosw. (N. Y.) 116, parties to an action involving the validity of a patent agreed to pay an expert a certain sum, and an additional sum on condition that the information possessed by him or the testimony given by him should enable them to succeed in the action, and further agreed to pay him his traveling expenses and the usual *per diem* of an expert, he agreeing, in consideration thereof, to hold himself at all times to give his testimony or to impart his information. It was held that he could not recover the regular fees of an expert or traveling expenses, as the whole agreement was void. See *supra*, VII, B, 3, f, (II), (I), (1).

Compounding offenses or suppression of prosecutions.— A note or other security given by a third party to an employer or another to settle a civil liability and also to prevent or suppress a criminal prosecution is void *in toto*, and cannot be sustained as to the consideration which is legal.

Georgia.— Mills *v.* Hudgins, 97 Ga. 417, 24 S. E. 146.

Kansas.— Ream *v.* Sauvain, 2 Kan. App. 550, 43 Pac. 982.

Massachusetts.— Taylor *v.* Jaques, 106 Mass. 291.

Michigan.— Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931; Wisner *v.* Bardwell, 38 Mich. 278; Snyder *v.* Willey, 33 Mich. 483.

New Hampshire.— Merrill *v.* Carr, 60 N. H. 114; Clark *v.* Ricker, 14 N. H. 44.

New York.— Haynes *v.* Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815 [*reversing* 30 Hun 237]; Decker *v.* Morton, 1 Redf. Surr. 477.

North Carolina.— Lindsay *v.* Smith, 78 N. C. 328, 24 Am. Rep. 463 (holding that where a person for a single consideration covenanted under a penalty to ditch another's land, and also to stop the prosecution of an indictment pending against him for maintaining a public nuisance, an action for the penalty could not be maintained); Cameron *v.* McFarland, 4 N. C. 299, 6 Am. Dec. 566.

Ohio.— Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37.

Rhode Island.— Wilcox *v.* Daniels, 15 R. I. 261, 3 Atl. 204.

South Carolina.— Banks *v.* Searles, 2 McMull. 356.

Texas.— Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537; Wegner *v.* Biering, 65 Tex. 506, 73 Tex. 89, 11 S. W. 155.

Vermont.— Bowen *v.* Buck, 28 Vt. 308; Woodruff *v.* Hinman, 11 Vt. 592, 34 Am. Dec. 712; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599.

Wisconsin.— Fernekes *v.* Bergenthal, 69 Wis. 464, 34 N. W. 238.

See 11 Cent. Dig. tit. "Contracts," § 710; and *supra*, VII, B, 3, f, (II), (I), (2).

Lobbying.— An agreement to pay a person for personal services before congress and also for "lobbying," that is, to personally influence members, is void *in toto*. McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213; Brown *v.* Young, 7 Ky. L. Rep. 664; Brown *v.* Brown, 34 Barb. (N. Y.) 533; Burke *v.*

12. Promises and Considerations Severable. Where the agreement consists of several promises based on several considerations, the fact that one or more of the considerations are illegal will not avoid all the promises, if those which are made on legal considerations are severable from the others.[39] Thus where goods are sold at a separate price for each article, and the sale of some of the articles is illegal, an action will lie nevertheless for the price of any of the other articles.[40] The same principle applies in proper cases to contracts to pay for labor or services.[41]

13. Intention — a. Unlawful Intention on Both Sides — (i) *In General.* Where the direct object of the parties is to do an illegal act, the agreement is void, and it is immaterial that either or both did not know that the object was illegal, for as a general rule ignorance of the law is no excuse.[42] An agreement, on the face of which no illegality appears, and of which neither the consideration nor the promise in itself imports any illegality, may nevertheless be made for an illegal purpose, and the agreement, although unobjectionable in its terms, may then be rendered void by the illegality of the purpose for which it is made, the illegal intention being common to both parties.[43]

Child, 21 Wall. (U. S.) 441, 22 L. ed. 623. See *supra*, VII, B, 3, f, (II), (B).

39. *Arkansas.*— Hanauer *v.* Gray, 25 Ark. 350, 99 Am. Dec. 226.

California.— Porter *v.* Fisher, (1893) 34 Pac. 700; Ragsdale *v.* Nagle, 106 Cal. 332, 29 Pac. 628; Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770.

Colorado.— Hoyt *v.* Macon, 2 Colo. 502.

Indiana.— Pierce *v.* Pierce, 17 Ind. App. 107, 46 N. E. 480.

Iowa.— Casady *v.* Woodbury County, 13 Iowa 113.

Kansas.— Fackler *v.* Ford, McCahon 21.

Massachusetts.— Robinson *v.* Green, 3 Metc. 159.

New Hampshire.— Carleton *v.* Woods, 28 N. H. 290.

New Jersey.— Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505; Feldman *v.* Gamble, 26 N. J. Eq. 494.

New York.— Leavitt *v.* Blatchford, 5 Barb. 9; Gay *v.* Lathrop, 6 N. Y. St. 603; Jarvis *v.* Peck, Hoffm. 479.

Ohio.— State *v.* Board of Education, 35 Ohio St. 519.

Pennsylvania.— Frazier *v.* Thompson, 2 Watts & S. 235.

Vermont.— Cobb *v.* Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

United States.— Gelpcke *v.* Dubuque, 1 Wall. 221, 17 L. ed. 519.

England.— Pickering *v.* Ilfracombe R. Co., L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. Rep. N. S. 650, 16 Wkly. Rep. 458; Shackell *v.* Rosier, 2 Bing. N. Cas. 634, 5 L. J. C. P. 193, 3 Scott 59, 29 E. C. L. 695.

See 11 Cent. Dig. tit. "Contracts," § 701 *et seq.*

40. Barrett *v.* Delano, (Me. 1888) 14 Atl. 288; Boyd *v.* Eaton, 44 Me. 51, 69 Am. Dec. 83; Carleton *v.* Woods, 28 N. H. 290; Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605; Chase *v.* Burkholder, 18 Pa. St. 48; Shaw *v.* Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

41. Where a plumber who had not registered and procured the necessary certificate contracted to do certain plumbing, and undertook to employ carpenters, masons, and painters to do other work on the premises which had no necessary connection with the plumbing work, the amount to be paid to each of the latter workmen being a matter between himself and the plumber, acting for the owner, and depending upon the amount of his work and its value, and the payment to persons employed in different kinds of work having no relation whatever to the amount to be paid to a man employed in any other kind of work, it was held that the contract was severable, so that the invalidity of the contract for plumbing work did not prevent a recovery for the other work. Johnston *v.* Dahlgren, 31 N. Y. App. Div. 204, 52 N. Y. Suppl. 555.

42. *Alabama.*— Whetstone *v.* Montgomery Bank, 9 Ala. 875.

Indiana.— Brown *v.* Columbus First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206.

Maine.— Webster *v.* Sanborn, 47 Me. 471.

Massachusetts.— Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407, as to which see *infra*, note 45.

New Hampshire.— Favor *v.* Philbrick, 7 N. H. 326.

United States.— Church *v.* Proctor, 66 Fed. 240, 13 C. C. A. 426.

England.— Gas Light, etc., Co. *v.* Turner, 5 Bing. N. Cas. 666, 9 L. J. C. P. 75, 7 Scott 779, 35 E. C. L. 357 [*affirmed* in 6 Bing. N. Cas. 324, 9 L. J. Exch. 336, 8 Scott 609, 37 E. C. L. 646].

See 11 Cent. Dig. tit. "Contracts," § 462.

Laws of another state.— But a contract made in one state, with the full knowledge of the parties that the property, which is its subject-matter, is to be used in another state, in no immoral manner, but in violation of the positive law of the latter state, is valid, and will be enforced in the latter state, when it is not shown that the parties knew that such use was forbidden. Merchants' Bank *v.* Spalding, 9 N. Y. 53.

43. Whetstone *v.* Montgomery Bank, 9 Ala. 875; Ralston *v.* Boady, 20 Ga. 449.

(II) *When the Rule Does Not Apply.* To the general principle that ignorance of the law is no excuse for making a contract violating that law, there are some exceptions. The rule does not apply where the performance of the agreement in the manner intended would, unknown to parties, be illegal, but a legal method of performance is possible.[44] Nor does the rule apply where the mistake is really one of fact and not of law. Where a person sues for services rendered another in an occupation which is illegal, unless the employer is duly licensed to carry it on, which he is not, he may recover unless he knew that the employer had no license; for while he is bound to know that the employer must have a license to make the business legal, his mistake as to his having a license is a mistake of fact and not of law.[45] So it is held that a bond given to a person to indemnify him against liability for seizing goods under a writ, or arresting a person, is illegal if the person to whom it is given knew the seizure or arrest to be without right, but legal if he believed it to be authorized.[46] An agreement is not necessarily illegal because carried out in an illegal way, if this was not contemplated when the agreement was made.[47]

b. Unlawful Intention on One Side Only. Where an agreement is lawful on its face or is capable of being executed in a lawful way, and the intention of one of the parties is that it be so executed, he is entitled to enforce it notwithstanding that the other party intended an illegal act, if he was unaware of the illegal

44. Fox *v.* Rogers, 171 Mass. 546, 50 N. E. 1041; Waugh *v.* Morris, L. R. 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. Rep. N. S. 265, 21 Wkly. Rep. 438.

Charter-party.— Thus where a person had chartered another's ship to take a cargo of hay from a port in France to London, the cargo to be taken "from the ship alongside" and landed at a certain wharf, and unknown to the parties an order in council had forbidden the landing of French hay, and the charterer on learning this instead of landing the cargo took it "from the ship alongside" into another ship and exported it, it was held in an action by the ship-owner for delay of his vessel that the charterer could not set up the unlawful intention as avoiding the contract. The court said: "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." Waugh *v.* Morris, L. R. 8 Q. B. 202, 208, 42 L. J. Q. B. 57, 28 L. T. Rep. N. S. 265, 21 Wkly. Rep. 438.

Contract of mail-carrier.— So it was held that a contract by a mail-carrier to carry and deliver a letter in a manner prohibited by statute was not void, where the contract was made without intent to defraud the post-office, and under a misapprehension of the parties as to the true meaning of the statute, and where the letter could have been delivered in such a way by the mail-carrier as to have answered all the purposes which he who sent it had in view without any violation of the statute. Favor *v.* Philbrick, 7 N. H. 326.

45. Roys *v.* Johnson, 7 Gray (Mass.) 162; Emery *v.* Kempton, 2 Gray (Mass.) 257.

Mistake of law distinguished.— In Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407, plaintiff sued defendant on an agreement for services in giving concerts on Sunday afternoon, when a statute permitted the licensing of sacred concerts on the evening of such day. The defense being that defendant had no license, it was argued that as plaintiff did not know this fact, it did not affect him; but it was held that the statute gave no right to license concerts on Sunday afternoon, and that plaintiff could not recover, his mistake being one of law, that the concert might be licensed, and not of fact.

46. *Indiana.*—Anderson *v.* Farns, 7 Blackf. 343.

Kentucky.—Davis *v.* Tibbats, 7 J. J. Marsh. 264.

Massachusetts.— Avery *v.* Halsey, 14 Pick. 174; Marsh *v.* Gold, 2 Pick. 285.

Missouri.— McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250.

New York.— Stone *v.* Hooker, 9 Cow. 154.

North Carolina.— Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

See *supra*, VII, B, 2, b, (III).

47. *Massachusetts.*— Fox *v.* Rogers, 171 Mass. 546, 50 N. E. 1041; Barry *v.* Capen, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808.

Missouri.— Sheffield *v.* Balmer, 52 Mo. 474, 14 Am. Rep. 430, where plaintiffs had contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year, and it was held that the contract was valid, as it did not appear and would not be presumed that it contemplated any labor to be done on Sunday.

New York.— Dowley *v.* Schiffer, 13 N. Y. Suppl. 552, 36 N. Y. St. 869; Ano *v.* Turner, 1 N. Y. Suppl. 228, 16 N. Y. St. 347.

Tennessee.— Ross *v.* Crow, 9 Baxt. 420.

intention.[48] If a person enters into a lawful contract, as an agreement to let premises or sell goods, which may be used and applied to various lawful purposes, and afterward discovers that the other party intends to use them for an illegal purpose, he may avoid the agreement and refuse completion.[49]

c. Mere Knowledge of Unlawful Intention of Other Party — (I) *In General.* It is held in England that where the agreement is innocent in itself, but the intention of one of the parties is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the mere fact that the other party knows of such purpose renders the agreement illegal and void.[50] In the leading English case action was brought to recover payment for the hire of a brougham engaged by a prostitute, and it being found that the plaintiffs knew that the brougham was hired for an immoral purpose, it was held that they could not recover.[51] In the United States, while some courts have followed the English rule,[52] most of the courts have taken a different view and have held that the

Vermont.— Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

48. *Illinois.*— Pixley *v.* Boynton, 79 Ill. 351; Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

Indiana.— Whitesides *v.* Hunt, 97 Ind. 191, 49 Am. Rep. 441; Wright *v.* Crabbs, 78 Ind. 487.

Louisiana.— Commagere *v.* Brown, 27 La. Ann. 314; Fee *v.* Gonegal, 19 La. Ann. 263.

Michigan.— Gregory *v.* Wendell, 40 Mich. 432; Quirk *v.* Thomas, 6 Mich. 76.

Missouri.— Williams *v.* Tiedemann, 6 Mo. App. 269.

New York.— Donovan *v.* The Companie Generale Trans-Atlantique, 39 N. Y. Super. Ct. 519.

Texas.— Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808; House *v.* Soder, 36 Tex. 629; Kottwitz *v.* Alexander, 34 Tex. 689.

United States.— Bartlett *v.* Smith, 4 McCrary 388, 13 Fed. 263.

See 11 Cent. Dig. tit. "Contracts," § 463 *et seq.*

49. Cowan *v.* Milbourn, L. R. 2 Exch. 230, 36 L. J. Exch. 124, 16 L. T. Rep. N. S. 290, 15 Wkly. Rep. 750; Clay *v.* Yates, 1 H. & N. 73, 2 Jur. N. S. 908, 25 L. J. Exch. 237, 4 Wkly. Rep. 557. But where a hall is let for an athletic entertainment of which sparring is to be a feature, and there is no likelihood that there will be a breach of the peace or that the sparring will be in the nature of a prize-fight, the lessor violates his contract by refusing to allow the entertainment to be held. Behrens *v.* Miller, 2 N. Y. City Ct. 427. And see O'Brien *v.* Brietenbach, 1 Hilt. (N. Y.) 304. And if a lease be executed, and possession given under the agreement, and the term vested in the lessee, it does not become voidable or forfeited to the lessor upon the lessee subsequently using the premises for an unlawful purpose, even though he may have intended to do so at the time of taking the lease. Feret *v.* Hill, 15 C. B. 207, 2 C. L. R. 1366, 18 Jur. 1014, 23 L. J. C. P. 185, 2 Wkly. Rep. 493, 80 E. C. L. 207; Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Dec. 383. See LANDLORD AND TENANT.

50. Pearce *v.* Brooks, L. R. 1 Exch. 213, 12 Jur. N. S. 342, 35 L. J. Exch. 134, 14 L. T. Rep. N. S. 288, 14 Wkly. Rep. 614; Cannan *v.* Bryce, 3 B. & Ald. 179, 23 E. C. L. 111; McKinnell *v.* Robinson, 7 L. J. Exch. 149, 3 M. & W. 435; and other cases in the note following. But see the earlier English cases to the contrary. Lloyd *v.* Johnson, 1 B. & P. 340, 4 Rev. Rep. 822; Faikney *v.* Reynous, 4 Burr. 2069; Bowry *v.* Bennet, 1 Campb. 348; Holman *v.* Johnson, Cowp. 341; Pellecat *v.* Angell, 2 C. M. & R. 311, 1 Gale 187, 4 L. J. Exch. 326, 5 Tyrw. 945; Hodgson *v.* Temple, 1 Marsh. 5, 5 Taunt. 181, 14 Rev. Rep. 738, 1 E. C. L. 100.

51. Pearce *v.* Brooks, L. R. 1 Exch. 213, 12 Jur. N. S. 342, 35 L. J. Exch. 134, 14 L. T. Rep. N. S. 288, 14 Wkly. Rep. 614.

Other illustrations.— The same rule has been applied to money loaned to be used by the borrower in gambling (Cannan *v.* Bryce, 3 B. & Ald. 179, 5 E. C. L. 111; McKinnell *v.* Robinson, 7 L. J. Exch. 149, 3 M. & W. 435); to the sale of goods for the purpose of being shipped in a foreign trade forbidden by statute (Lightfoot *v.* Tenant, 1 B. & P. 551); to a sale of drugs to a brewer to be used in the manufacture of beer, contrary to statute (Langton *v.* Hughes, 1 M. & S. 593); to a sale of beer to be retailed at an unlicensed house (Brooker *v.* Wood, 5 B. & Ad. 1052, 3 N. & M. 96, 3 L. J. K. B. 96, 27 E. C. L. 442); to a sale of goods to be used in the business of a brothel (Lloyd *v.* Johnson, 1 B. & P. 340, 4 Rev. Rep. 822; Bowry *v.* Bennet, 1 Campb. 348; Hamilton *v.* Grainger, 5 H. & N. 40, 5 Jur. N. S. 1108); and to the lease of a house or lodging for a like purpose (Girady *v.* Richardson, 1 B. & P. 341, note *a*, 1 Esp. 13; Appleton *v.* Campbell, 2 C. & P. 347, 12 E. C. L. 609; Jennings *v.* Throgmorton, R. & M. 251, 21 E. C. L. 744).

52. Wilson *v.* Stratton, 47 Me. 120; Riley *v.* Jordan, 122 Mass. 231; Sherman *v.* Wilder, 106 Mass. 537; Hotchkiss *v.* Finan, 105 Mass. 86; Adams *v.* Coulliand, 102 Mass. 167; Finch *v.* Mansfield, 97 Mass. 89; Webster *v.* Munger, 8 Gray (Mass.) 584; Dater *v.* Earl, 3 Gray (Mass.) 482; McIntyre *v.* Parks, 3 Metc. (Mass.) 207; McConihe *v.* McMann, 27 Vt. 95. But see the Vermont cases cited in the note following.

mere knowledge of the seller of goods or services, or of the vendor or lessor of property, that the buyer intends an illegal use of them is no defense to an action for the price or for rent.[53] According to this doctrine it is no defense in an action for the price or for rent that the seller of goods[54] or the vendor or lessor of premises[55] knew that the purchaser or lessee was a prostitute, and intended to use them in the carrying on of her trade; that the vendor of a house knew that the purchaser intended it for a residence for his mistress;[56] that a person doing work in and fitting up and furnishing a house knew that it was to be used and occupied as a gambling-house;[57] that a seller of goods or the lessor of premises knew that the buyer or lessee intended to use them for gambling purposes,[58] for a

53. *Alabama.*— Thedford *v.* McClintock, 47 Ala. 647.

Arkansas.— Parson Oil Co. *v.* Boyett, 44 Ark. 230.

Colorado.— Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520.

Indiana.— Wright *v.* Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Bickel *v.* Sheets, 24 Ind. 1; Higgins *v.* Muer, 13 Ind. 346.

Iowa.— Brunswick, etc., Co. *v.* Vallean, 50 Iowa 120, 32 Am. Rep. 119.

Kansas.— Feinman *v.* Sacks, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547.

Kentucky.— Hedges *v.* Wallace, 2 Bush 442, 92 Am. Dec. 497; Steele *v.* Curle, 4 Dana 381.

Louisiana.— Sampson *v.* Townsend, 25 La. Ann. 78; Lyman *v.* Townsend, 24 La. Ann. 625; Hubbard *v.* Moore, 24 La. Ann. 591, 13 Am. Rep. 128.

Maryland.— Cheney *v.* Duke, 10 Gill & J. 11.

Michigan.— Gambs *v.* Sutherland, 101 Mich. 355, 59 N. W. 652; Webber *v.* Donnelly, 33 Mich. 469.

Minnesota.— Anheuser-Busch Brewing Assoc. *v.* Mason, 44 Minn. 318, 46 N. W. 558, 20 Am. St. Rep. 580, 9 L. R. A. 506.

Mississippi.— Walker *v.* Jeffries, 45 Miss. 160.

Missouri.— Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383; Howell *v.* Stewart, 54 Mo. 400; Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138; Kerwin *v.* Doran, 29 Mo. App. 397; Curran *v.* Downs, 3 Mo. App. 468.

Nebraska.— Kittle *v.* De Lamater, 4 Nebr. 426.

New Hampshire.— Bryson *v.* Haley, 68 N. H. 337, 38 Atl. 1006; Delavina *v.* Hill, 65 N. H. 94, 19 Atl. 1000; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617.

New York.— Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Ross-Lewin *v.* Johnson, 32 Hun 408; Kreiss *v.* Seligman, 8 Barb. 439, 5 How. Pr. 425; O'Brien *v.* Brietenbach, 1 Hilt. 304; Updike *v.* Campbell, 4 E. D. Smith 570; De Groot *v.* Van Duzer, 17 Wend. 170.

North Carolina.— Armfield *v.* Tate, 29 N. C. 258.

Ohio.— Goodall *v.* Gerke Brewing Co., 56 Ohio St. 257, 46 N. E. 983.

Pennsylvania.— Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354; Columbia Bridge Co. *v.* Kline, Brightly 320, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

Rhode Island.— Read *v.* Taft, 3 R. I. 175.

South Carolina.— Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516.

Tennessee.— Henderson *v.* Waggoner, 2 Lea 133, 31 Am. Rep. 591; Jones *v.* Planters Bank, 9 Heisk. 455; Bond *v.* Perkins, 4 Heisk. 364; Tedder *v.* Odom, 2 Heisk. 68, 5 Am. Rep. 25; Gillam *v.* Looney, 1 Heisk. 319; McGavock *v.* Punyear, 6 Coldw. 34.

Texas.— Lewis *v.* Alexander, 51 Tex. 578; McKinney *v.* Andrews, 41 Tex. 363; Kottwitz *v.* Alexander, 34 Tex. 689; Bishop *v.* Honey, 34 Tex. 245.

Vermont.— Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154. And see Mound *v.* Barker, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767; Tuttle *v.* Holland, 43 Vt. 542; Lander *v.* Leaver, 32 Vt. 114, 76 Am. Dec. 156.

United States.— Hanaur *v.* Doane, 12 Wall. 342, 20 L. ed. 439; Sortwell *v.* Hughes, 22 Fed. Cas. No. 13,177, 1 Curt. 244.

See 11 Cent. Dig. tit. "Contracts," § 464 *et seq.*; and, generally, LANDLORD AND TENANT; SALES.

54. Mahood *v.* Tealza, 26 La. Ann. 108, 21 Am. Rep. 546; Sampson *v.* Townshend, 25 La. Ann. 78; Hubbard *v.* Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Anheuser-Busch Brewing Co. *v.* Mason, 44 Minn. 318, 46 N. W. 558, 20 Am. St. Rep. 580. There is nothing of the puritan in the language of the court in Hubbard *v.* Moore, 24 La. Ann. 591, 592, 13 Am. Rep. 128, where it was said: "To the vicious and depraved, as well as to the good and the virtuous, belong the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion that 'there is to be no more cakes and ale.'" But see Kathman *v.* Walters, 22 La. Ann. 54.

55. Lyman *v.* Townsend, 24 La. Ann. 625; Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383; Updike *v.* Campbell, 4 E. D. Smith (N. Y.) 570.

56. Armfield *v.* Tate, 29 N. C. 258.

57. Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138.

58. Brunswick, etc., Co. *v.* Valleau, 50 Iowa 120, 32 Am. Rep. 119 [*distinguishing* Spurgeon *v.* McElwain, 6 Ohio 442, 27 Am. Dec. 266]. See GAMING.

Horse-racing.—A horse-trainer may recover money laid out and expended for feed and shoes for a horse which he is fitting for a race on which money is bet; for, whether the race is run or not, it is necessary that the

lottery,[59] or for the illegal sale of intoxicating liquors;[60] or that the seller of goods knew that the buyer intended to resell them in a state where the sale of such goods was unlawful.[61] Where a tract of land was bought for the purpose of subdividing it into lots, and illegally disposing of them by a lottery, the fact that the vendor knew of the purchaser's intention with reference to the lottery was held not to bar a recovery of the purchase-money, there being no agreement that the vendor should participate in the profits of the lottery.[62]

(II) *Contemplated Illegal Act Highly Immoral or Heinous.* There are several exceptions to the prevailing American rule. In the first place, when the contemplated illegal act is of a highly immoral or heinous character, the bare knowledge of the seller of the illegal intention of the buyer will bar his suit.[63] Thus one who should sell poison with knowledge that the buyer is going to poison another with it would be so nearly a participator in the intended crime as to be himself charged with its immorality.[64] And it is held that one who, bound by his allegiance to his government, sells goods to the agent of an armed combination to overthrow that government, knowing that they are to be used for that purpose, is himself guilty of treason or a misprision thereof, and cannot say that although the purchaser bought them for the illegal purpose, he did not sell them for that purpose.[65]

(III) *Where Illegal Purpose Is in View.* So also, where goods are sold, premises leased, or services rendered for the express purpose of enabling the buyer, lessee, or beneficiary to accomplish an unlawful purpose, the agreement is void, and there can be no recovery of the price or rent; for here there is evidence of an unlawful intent common to both parties.[66] Thus it has been held that there can be no recovery where intoxicating liquors are sold to another for the express purpose of enabling the buyer to sell them in violation of law,[67] or where premises are rented for the express purpose of having them used as a

animal should be fed and shod, and such items are not necessarily a part of the gaming transaction. Mosher *v.* Griffin, 51 Ill. 184, 99 Am. Dec. 541.

59. Higgins *v.* Miner, 13 Ind. 346. See Lotteries.

60. Bryson *v.* Haley, 68 N. H. 337, 38 Atl. 1006; Goodall *v.* Gerke Brewing Co., 56 Ohio St. 257, 46 N. E. 983.

61. Jameson *v.* Gregory, 4 Metc. (Ky.) 363; McIntyre *v.* Parks, 3 Metc. (Mass.) 207; Webber *v.* Donnelly, 33 Mich. 469; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205; Smith *v.* Gregory, 28 N. H. 379, 61 Am. Dec. 617; Sortwell *v.* Hughes, 22 Fed. Cas. No. 13,177, 1 Curt. 244.

62. Columbia Bridge Co. *v.* Kline, Brightly (Pa.) 320, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

63. *Arkansas.*— Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717.

Maine.— Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301.

Missouri.— Howell *v.* Stewart, 54 Mo. 400.

New York.— Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

United States.—Hanauer *v.* Doane, 12 Wall. 342, 20 L. ed. 439.

England.— Lightfoot *v.* Tenant, 1 B. & P. 551; Langton *v.* Hughes, 1 M. & S. 593.

64. Lightfoot *v.* Tenant, 1 B. & P. 551; Langton *v.* Hughes, 1 M. & S. 593.

65. Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Milner *v.* Patton, 49 Ala. 423; Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717; Kingsbury *v.* Flemming, 66 N. C. 524; Smitheman *v.* Sanders, 64 N. C. 522; Sprout *v.* U. S., 20 Wall. (U. S.) 459, 22 L. ed. 371; Hanauer *v.* Doane, 12 Wall. (U. S.) 342, 20 L. ed. 439. See also Thedford *v.* McClintock, 47 Ala. 647; Williams *v.* Williams, 79 N. C. 411; Lewis *v.* Alexander, 51 Tex. 578. And see War.

66. Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717; Ernst *v.* Cosby, 140 N. Y. 364, 35 N. E. 603, 55 N. Y. St. 733; Talmadge *v.* Bell, 7 N. Y. 328.

67. Kohn *v.* Melcher, 43 Fed. 641, 10 L. R. A. 439. Where one has sold liquor to another to be sold by the buyer in a state in which the sale of liquor is contrary to law, and the seller "expected and desired the buyer to sell unlawfully" in such state, "and intended to facilitate his doing so," the purchase-price cannot be recovered. "If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient." Graves *v.* Johnson, 156 Mass. 211, 214, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834.

bawdy-house or for any other unlawful business.[68] So where a person in addition to conducting lawful races has arranged booths and appliances for gambling on the races, a contract with another whereby he is to furnish refreshments, thus increasing the attraction and promoting the gambling, is illegal and void.[69] And so it is where a person leases premises for the illegal sale of liquors and also agrees to supply ice to keep them cool;[70] and where the subject of a sale is a "slot machine" which can be used for no other purpose than for gambling.[71]

(IV) *Money Loaned.* At first glance no legal distinction can be observed between a loan of money and a sale of goods, the lender or the seller knowing that the borrower or buyer intends an illegal use of them. The seller sells to make a profit, the lender lends for the purpose of a profitable investment. Yet as money is in many cases loaned to assist the borrower in some undertaking, and since, if the undertaking be an illegal one, the lender may be said to assist in it, some courts have held that money loaned to gamble with, or to enable the borrower to use it in any other illegal purpose, cannot be recovered.[72] Other courts make no distinction between the case of a loan and a sale; the right of recovery being permitted in both.[73] If, instead of there being mere knowledge

68. *Colorado.*— Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823.

Georgia.— Ralston *v.* Boady, 20 Ga. 449.

Louisiana.— Milne *v.* Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189.

Massachusetts.—Riley *v.* Jordan, 122 Mass. 231; Sherman *v.* Wilder, 106 Mass. 537.

Missouri.— Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Ashbrook *v.* Dale, 27 Mo. App. 649.

New York.— Ernst *v.* Crosby, 140 N. Y. 364, 35 N. E. 603, 55 N. Y. St. 732 [*affirming* 21 N. Y. Suppl. 365, 50 N. Y. St. 429]; Edelmuth *v.* McGarren, 4 Daly 467.

Texas.— Hunstock *v.* Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294.

See Landlord and Tenant.

Lease for purpose of unlawful liquor traffic.— In Mound *v.* Barker, 71 Vt. 253, 254, 44 Atl. 346, it was said of a lease: "The lease was innocent, in itself, but at the time of its execution and delivery, both the plaintiff, who is the lessor, and the lessees understood and expected that the hotel would be used, not only for the entertainment of guests, but that intoxicating liquor would be sold therein in violation of law; and it was so sold, to the knowledge of the plaintiff. Therefore if this suit was upon the lease itself, it could not be maintained."

69. St. Louis Fair Assoc. *v.* Carmody, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571. See Holmead *v.* Maddox, 12 Fed. Cas. No. 6,629, 2 Cranch C. C. 161.

70. Kelly *v.* Counter, 1 Okla. 277, 30 Pac. 372.

71. Barnhart *v.* Goldstein, 27 Ind. App. 101, 59 N. E. 1067.

72. *Arkansas.*— Viser *v.* Bertrand, 14 Ark. 267.

Maryland.— Emerson *v.* Townsend, 73 Md. 224, 20 Atl. 984.

Massachusetts.— White *v.* Buss, 3 Cush. 448.

Michigan.— Raymond *v.* Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170.

New Hampshire.— Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207; Cutler *v.* Welsh, 43 N. H. 497.

New York.— Staples *v.* Gould, 9 N. Y. 520; Ruckman *v.* Bryan, 3 Den. 340; Peck *v.* Briggs, 3 Den. 107. But see Merchants' Bank *v.* Spalding, 12 Barb. 302; Leavitt *v.* Blatchford, 5 Barb. 9.

North Carolina.— Critcher *v.* Holloway, 64 N. C. 526.

South Carolina.— Mordecai *v.* Dawkins, 9 Rich. 262.

See Gaming.

Statutory provision.— In Missouri the loaning of money to gamble with is illegal by statute. Williamson *v.* Baley, 78 Mo. 636.

A loan of money to pay lost bets has been held recoverable as a "different thing from a loan of money to enable a man to pay a debt." *Ex p.* Pyke, 8 Ch. D. 754, 47 L. J. Bankr. 100, 38 L. T. Rep. N. S. 923, 26 Wkly. Rep. 806.

Money not used.— Money loaned for gambling purposes, but not so used by the borrower, may be recovered of him by the lender. Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301.

73. *Indiana.*— Plank *v.* Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Jackson *v.* Goshen City Nat. Bank, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657. But see Wright *v.* Crabbs, 78 Ind. 487.

Kentucky.— Lyon *v.* Respass, 1 Litt. 133; White *v.* Wilson, (1896) 37 S. W. 677.

Maine.— Tyler *v.* Carlisle, 79 Me. 210, 212, 9 Atl. 356, 1 Am. St. Rep. 301, where it was said: "It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,— to the man, and not to his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money

on the part of the lender that the money is to be used in an illegal transaction, it is the understanding of both parties that it shall be so used, it cannot be recovered.[74]

(v) *Where Party Aids in Illegal Purpose.* If in addition to mere knowledge of the buyer's illegal intention the seller does some act in aid of or in furtherance of the unlawful design; if in short he assists in any way the carrying out of the design, the agreement is void and he cannot recover the price.[75] Thus where the plaintiff had sold goods to the defendant knowing that they were to be smuggled into England, and had, by packing and marking the goods in a particular way so as to escape the eyes of the officers, furthered the defendant's design to violate the revenue laws, it was held that he could not recover.[76] And so it was held where the seller had marked casks of liquor in a certain way so as to conceal their contents from the authorities,[77] and where the plaintiffs had sold goods to the defendant with the knowledge that he intended to make an unlawful use of them, and to enable him to make such unlawful use, by his direction, put them up in packages in a convenient form for sale in violation of the law, with labels thereon calculated to facilitate such sales.[78]

D. Conflict of Laws as to Time[79]— **1. In General.** The agreement may have been valid when it was made, but may have afterward become illegal by a change in the law or by express legislation, or it may have been illegal when it was made and the law which made it unlawful may have been afterward repealed. The validity of an agreement depends upon the state of the law at the time it was entered into.[80]

shall be illegally used. . . . The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man."

Mississippi.— Walker *v.* Jeffries, 45 Miss. 160.

Missouri.— Howell *v.* Stewart, 54 Mo. 400; Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138. But see Williamson *v.* Baley, 78 Mo. 636, where such a loan was made a misdemeanor by statute.

Pennsylvania.— Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354.

Tennessee.— Henderson *v.* Waggoner, 2 Lea 133, 31 Am. Rep. 591; Puryear *v.* McGavock, 9 Heisk. 461; Jones *v.* Planters' Bank, 9 Heisk. 455; Bond *v.* Perkins, 4 Heisk. 364; McGavock *v.* Puryear, 6 Coldw. 34.

Texas.— Lewis *v.* Alexander, 51 Tex. 578.

74. Tyler *v.* Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; Appleton *v.* Maxwell, 10 N. M. 748, 65 Pac. 158, 55 L. R. A. 93; Waugh *v.* Peck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354.

75. *Georgia.*— Ralston *v.* Boady, 20 Ga. 449.

Kentucky.— White *v.* Wilson, 100 Ky. 367, 38 S. W. 495, 18 Ky. L. Rep. 892, 37 L. R. A. 197.

Louisiana.— Cooper *v.* Thompson, 20 La. Ann. 182, 96 Am. Dec. 392.

Maine.— Banchor *v.* Mansel, 47 Me. 58.

Massachusetts.— Foster *v.* Thurston, 11 Cush. 322; White *v.* Buss, 3 Cush. 448.

New York.— Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

Vermont.— Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

United States.— Green *v.* Collins, 10 Fed. Cas. No. 5,755, 3 Cliff. 494.

76. Biggs *v.* Lawrence, 3 T. R. 454, 1 Rev. Rep. 740. See also Waymell *v.* Reed, 5 T. R. 599, 2 Rev. Rep. 675; Clugas *v.* Penaluna, 4 T. R. 466, 2 Rev. Rep. 442.

77. Aiken *v.* Blaisdell, 41 Vt. 655; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

78. Skiff *v.* Johnson, 57 N. H. 475. And see Materne *v.* Horwitz, 101 N. Y. 469, 5 N. E. 331; Bloss *v.* Bloomer, 23 Barb. (N. Y.) 604.

Sale of furniture for use in bawdy-house.— Where a seller of household furniture on conveying it to a prostitute with knowledge that she intended to put it to an immoral use reserved the title and the right to take possession whenever he might deem himself insecure, even before the maturity of deferred payments, it was held that he so aided and participated in such immoral use as to make the sale void. Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960, 51 L. R. A. 889. See also Reed *v.* Brewer, (Tex. Civ. App. 1896) 36 S. W. 99.

79. **Conflict of laws as to place** see *infra*, XI, B, 9.

80. Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; Olson *v.* Nelson, 3 Minn. 53; Murrell *v.* Jones, 40 Miss. 565; Hunt *v.* Robinson, 1 Tex. 748.

Repeal of covenant by statute.— "Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant: So if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. . . . But if a man covenants not to do a thing which then was unlawful, and an act

2. Agreement Illegal When Made but Afterward Legalized. It follows that if an agreement was illegal by statute or on grounds of public policy when made, it is not rendered legal by repeal of the statute or a subsequent change in public or legislative policy.[81] "Perhaps the parties might be entitled to the benefit of a subsequent change in the law if their actual intention in making the contract was not unlawful."[82] And a contract which provides for something known to the parties to be illegal at the time being done in the event and only in the event of its becoming lawful is good,[83] unless the thing is of such a character that its becoming lawful cannot be seriously contemplated.[84]

3. Agreement Legal When Made but Afterward Prohibited. So a change in the law cannot make an agreement illegal which was legal when it was made.[85] Therefore where an agreement when entered into is legal, and is afterward made by statute illegal, acts done under it while it remained legal are legal,[86] and a contract that is valid when made is not affected by a change in the public policy of the state.[87] An agreement made after the passage of a prohibiting statute but before the act went into effect is not affected by it.[88] But a

comes and makes it lawful to do it, such act of parliament does not repeal the covenant." Brewster *v.* Kitchell, 1 Salk. 198.

81. *Alabama.*— Pacific Guano Co. *v.* Dawkins, 57 Ala. 115; Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Mays *v.* Williams, 27 Ala. 267.

Florida.— Mitchell *v.* Doggett, 1 Fla. 356.

Kansas.— Denning *v.* Yount, 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103.

Louisiana.— Quarles *v.* Evans, 7 La. Ann. 543; White *v.* Noland, 3 Mart. N. S. 636.

Maine.— Robinson *v.* Barrows, 48 Me. 186; Banchor *v.* Mansel, 47 Me. 58; Hathaway *v.* Moran, 44 Me. 67.

Massachusetts.— Springfield Bank *v.* Merrick, 14 Mass. 322.

Michigan.— Ludlow *v.* Hardy, 38 Mich. 690; Webber *v.* Howe, 36 Mich. 150, 24 Am. Rep. 590.

Minnesota.— Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466, where a person agreed to work for five years on a Sunday newspaper, and the agreement was illegal by a statute then in force, but the statute was afterward repealed. It was held that there could be no recovery on the agreement.

Mississippi.— Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 436; Murrell *v.* Jones, 40 Miss. 565.

New York.— Bailey *v.* Mogg, 4 Den. 60. But see Curtis *v.* Leavitt, 15 N. Y. 9; Washburn *v.* Franklin, 35 Barb. 599, 13 Abb. Pr. 140, 24 How. Pr. 515 [*reversing* 11 Abb. Pr. 93]; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

North Carolina.— Hughes *v.* Boone, 102 N. C. 137, 9 S. E. 286; Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

Ohio.— Nichols *v.* Poulson, 6 Ohio 305.

South Carolina.— Gilliland *v.* Phillips, 1 S. C. 152.

United States.— Hannay *v.* Eve, 3 Cranch 242, 2 L. ed. 427; Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212. And see Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 62 Fed. 904.

See 11 Cent. Dig. tit. "Contracts," §§ 480, 481.

82. Pollock Contr. 341 [*citing* Waugh *v.* Morris, L. R. 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. Rep. N. S. 265, 21 Wkly. Rep. 438].

New contract after repeal of prohibitory law.— If an agreement be made for the sale of lands at a time when such sale is in contravention of law, such agreement can interpose no objection to a covenant for the sale of the same land made after the legal impediment to the sale has been removed. Burleson *v.* Burleson, 11 Tex. 2.

83. Taylor *v.* Chichester, etc., R. Co., L. R. 4 H. L. 628, 39 L. J. Exch. 217, 23 L. T. Rep. N. S. 657, 16 Wkly. Rep. 146; Norwich *v.* Norfolk R. Co., 3 C. L. R. 519, 4 E. & B. 397, 1 Jur. N. S. 344, 27 L. J. Q. B. 105, 82 E. C. L. 397.

84. Pollock Contr. 348.

85. *California.*—Stephens *v.* Southern Pac. R. Co., 109 Cal. 86, 41 Pac. 783, 50 Am. St. Rep. 17, 29 L. R. A. 751; Gray *v.* Long, (1894) 37 Pac. 380.

Georgia.— Bennett *v.* Woolfolk, 15 Ga. 213.

Illinois.— Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597.

Kentucky.— Jump *v.* Johnson, 13 S. W. 843, 12 Ky. L. Rep. 100.

Mississippi.— Bradford *v.* Jenkins, 41 Miss. 328.

Nebraska.— Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633.

South Carolina.— Rose *v.* Macleod, 2 Bay 108.

United States.— Boyce *v.* Tabb, 18 Wall. 546, 21 L. ed. 757; Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 62 Fed. 904.

England.— Knight *v.* Lee, [1893] 1 Q. B. 41, 57 J. P. 117, 62 L. J. Q. B. 28, 67 L. T. Rep. N. S. 688, 5 Reports 54, 41 Wkly. Rep. 125.

See 11 Cent. Dig. tit. "Contracts," § 481.

86. Bennett *v.* Woolfolk, 15 Ga. 213; Bradford *v.* Jenkins, 41 Miss. 328.

87. Stephens *v.* Southern Pac. R. Co., 109 Cal. 86, 41 Pac. 783, 50 Am. St. Rep. 17, 29 L. R. A. 751.

88. Armstrong *v.* Bufford, 51 Ala. 410.

contract is discharged by illegality supervening subsequently to the time of contracting, which may occur by a new statute or other act of public authority rendering the performance legally impossible,[89] unless the discharge is prevented by the constitutional prohibition of laws impairing the obligation of contracts.[90]

VIII. CONSTRUCTION.

A. In General.[91] The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound; and those rules should be applied with consistency and uniformity; and it is not proper for a court to vary, change, or withhold their application.[92]

B. Intention of Parties — 1. In General. The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern.[93] Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.[94] If the words used clearly show the intention there is no need for apply-

89. See *infra*, IX, D, 5, b.

90. See CONSTITUTIONAL LAW, 8 Cyc. 929.

91. Construction of particular contracts see ACCIDENT INSURANCE; ARBITRATION AND AWARD; BONDS; BUILDERS AND ARCHITECTS; COMMERCIAL PAPER; CORPORATIONS; COVENANTS; DEEDS; GUARANTY; INDEMNITY; INSURANCE; LANDLORD AND TENANT; MASTER AND SERVANT; MORTGAGES; PARTITION; PARTNERSHIP; PRINCIPAL AND SURETY; SALES; VENDOR AND PURCHASER; and other special titles.

92. Johnson County *v.* Wood, 84 Mo. 489.

The rules of construction applied to wills do not necessarily apply to agreements. Varnum *v.* Thruston, 17 Md. 470.

The character of the transaction will be considered, and not merely the name given thereto by the parties. Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 468.

93. *Alabama.*—Bryant *v.* Stephens, 58 Ala. 636; Strong *v.* Gregory, 19 Ala. 146; Whitsett *v.* Womack, 8 Ala. 466.

Connecticut.— Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382.

Georgia.— Williams *v.* Waters, 36 Ga. 454.

Illinois.— Walker *v.* Tucker, 70 Ill. 527; Wilson *v.* Marlow, 66 Ill. 385; Elkins *v.* Wolfe, 44 Ill. App. 376.

Kentucky.— Murray *v.* Carothers, 1 Metc. 71; Montgomery *v.* Firemen's Ins. Co., 16 B. Mon. 427; Hunter *v.* Miller, 6 B. Mon. 612; Shultz *v.* Johnson, 5 B. Mon. 497; Hildrith *v.* Forrest, 4 J. J. Marsh. 217; Conn *v.* Lewis, 5 Litt. 66.

Louisiana.—McKie *v.* New Orleans, etc., R. Co., 16 La. Ann. 79; Parrott *v.* Wikoff, 1 La. Ann. 232; Wilcoxen *v.* Bowles, 1 La. Ann. 230; Marcotte *v.* Coco, 12 Rob. 167; Ross *v.* Garlick, 10 Rob. 365.

Maryland.— Varnum *v.* Thruston, 17 Md. 470.

Michigan.— Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108, 1 Am. St. Rep. 581; Norris *v.* Showerman, 2 Dougl. 16; Bronson *v.* Green, Walk. 56.

Mississippi.— Wadlington *v.* Hill, 10 Sm. & M. 560.

Missouri.— Davis *v.* Hendrix, 59 Mo. App. 444; Belch *v.* Miller, 32 Mo. App. 387.

New Hampshire.— Salmon Falls Mfg. Co. *v.* Portsmouth Co., 46 N. H. 249.

New Jersey.— Melick *v.* Pidcock, 44 N. J. Eq. 525, 15 Atl. 3, 6 Am. St. Rep. 901; Coster *v.* Monroe Mfg. Co., 2 N. J. Eq. 467.

New York.— Smith *v.* Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; Putnam *v.* Stewart, 97 N. Y. 411; White *v.* Hoyt, 73 N. Y. 505; Springsteen *v.* Samson, 32 N. Y. 703.

North Carolina.— Edwards *v.* Bowden, 99 N. C. 80, 5 S. E. 283, 6 Am. St. Rep. 487.

Ohio.— Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385; Kelly *v.* Mills, 8 Ohio 325.

Pennsylvania.— Williamson *v.* McClure, 37 Pa. St. 402.

Texas.— Swisher *v.* Grumbles, 18 Tex. 164.

Vermont.— Flagg *v.* Eames, 40 Vt. 16, 94 Am. Dec. 363; Noyes *v.* Nichols, 28 Vt. 159; Kettle *v.* Harvey, 21 Vt. 301; Hinsdale *v.* Partridge, 14 Vt. 547.

Wisconsin.—Radel *v.* Sharlan, 66 Wis. 138, 28 N. W. 136.

United States.—Chesapeake, etc., Canal Co. *v.* Hill, 15 Wall. 94, 21 L. ed. 64; Mauran *v.* Bullus, 16 Pet. 528, 10 L. ed. 1056; The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Wetherill *v.* Passaic Zinc Co., 29 Fed. Cas. No. 17,465, 6 Fish. Pat. Cas. 50; Akin *v.* U. S., 17 Ct. Cl. 260.

England.— Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852.

See 11 Cent. Dig. tit. "Contracts," § 730.

94. *Illinois.*— Walker *v.* Douglas, 70 Ill. 445; Rohinson *v.* Stow, 39 Ill. 568.

Kentucky.— Hunter *v.* Miller, 6 B. Mon. 612.

Maryland.— Baltimore First Nat. Bank *v.* Gerke, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453; Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318.

Massachusetts.— Gage *v.* Tirrell, 9 Allen 299.

ing any technical rules of construction for where there is no doubt there is no room for construction.[95]

2. Secret Intention. The secret intention of the parties, however, if different from the expressed intention, will not prevail, as the law looks to what the parties said as expressing their real intention.[96]

3. Words to Be Taken in Ordinary Sense. In construing a written contract the words used are to be taken in the ordinary and popular sense,[97] unless from the context it appears to have been the intention of the parties that they should be understood in a different sense.[98] Language must be interpreted in the sense in which the promisor knew, or had reason to know, that the promisee understood it.[99]

Minnesota.— Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26.

New York.— Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337.

Vermont.— Collins *v.* Lavelle, 44 Vt. 230.

United States.—Chesapeake, etc., Canal Co. *v.* Hill, 15 Wall. 94, 21 L. ed. 64.

England.— Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852.

95. Canterberry *v.* Miller, 76 Ill. 355; Walker *v.* Tucker, 70 Ill. 527; Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474; Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; Williamson *v.* McClure, 37 Pa. St. 402; Noyes *v.* Nichols, 28 Vt. 159.

96. *Alabama.*— Benziger *v.* Miller, 50 Ala. 206.

Illinois.— Nichols *v.* Mercer, 44 Ill. 250; Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474.

Iowa.— Browne *v.* Hickie, 68 Iowa 330, 27 N. W. 276; Garretson *v.* Bitzer, 57 Iowa 469, 10 N. W. 818; Spencer *v.* Millisack, 52 Iowa 31, 2 N. W. 606; White *v.* Van Horn, 19 Iowa 189.

Kentucky.— Triplett *v.* Gill, 7 J. J. Marsh. 432; Kelly *v.* Bradford, 3 Bibb 317, 6 Am. Dec. 656.

Louisiana.— McConnell *v.* New Orleans, 35 La. Ann. 273; Girod *v.* Pargoud, 11 La. Ann. 329; Peet *v.* Morgan, 6 Mart. N. S. 580.

Maryland.— Hall *v.* Farmers' Nat. Bank, 53 Md. 120.

Nevada.— Rankin *v.* New England, etc., Silver Min. Co., 4 Nev. 78.

New York.— Knapp *v.* Simon, 49 N. Y. Super. Ct. 17.

North Carolina.— Brunhild *v.* Freeman, 77 N. C. 128.

Texas.— Watrous *v.* McKie, 54 Tex. 65.

Vermont.— Clark *v.* Lillie, 39 Vt. 405.

United States.— Metropolis Nat. Bank *v.* Kennedy, 17 Wall. 19, 21 L. ed. 554; Crimp *v.* McCormick Const. Co., 72 Fed. 366; Cramp, etc., Ship, etc., Bldg. Co. *v.* Sloan, 21 Fed. 561; Mudgett *v.* U. S., 9 Ct. Cl. 467.

See 11 Cent. Dig. tit. "Contracts," § 730; and *supra*, II, B, 2, b.

Illustration.— Where a person was offered the principalship of a private school, and accepted, it was held that he was not bound to bring his wife with him, where the contract did not require him to do so, although it was known to him that the trustees understood he was to bring her with him to teach in the school. Johnson *v.* Sellers, 33 Ala. 265.

97. *California.*— Bullock *v.* Consumers' Lumber Co., (1892) 31 Pac. 367; Donaghue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78.

Connecticut.— Hall *v.* Rand, 8 Conn. 560.

Illinois.— Stettauer *v.* Hamlin, 97 Ill. 312; Stearns *v.* Sweet, 78 Ill. 446.

Iowa.— Cash *v.* Hinkle, 36 Iowa 623; Willmering *v.* McGaughey, 30 Iowa 205, 6 Am. Rep. 673.

Louisiana.—Janin *v.* Pontalba, 15 La. Ann. 691; Workman *v.* Insurance Co., 2 La. 507, 22 Am. Dec. 141.

Maine.— Hawes *v.* Smith, 12 Me. 429.

Maryland.— Hall *v.* Farmers' Nat. Bank, 53 Md. 120; Taylor *v.* Turley, 33 Md. 500; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

Michigan.— Holmes *v.* Hall, 8 Mich. 66, 77 Am. Dec. 444.

Mississippi.— Goosey *v.* Goosey, 48 Miss. 210.

Missouri.— Bradshaw *v.* Bradbury, 64 Mo. 334; Caldwell *v.* Layton, 44 Mo. 220; Pavey *v.* Burch, 3 Mo. 447, 26 Am. Dec. 682; Sachleben *v.* Wolfe, 61 Mo. App. 28.

Nevada.— Rankin *v.* New England, etc., Silver Min. Co., 4 Nev. 78.

New Hampshire.— Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

New York.—Herst *v.* De Comeau, 1 Sweeny 590; Lowber *v.* Le Roy, 2 Sandf. 202.

Ohio.— Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385.

Vermont.— Clark *v.* Lillie, 39 Vt. 405.

United States.— Potter *v.* Phenix Ins. Co., 63 Fed. 382; Rich *v.* Parrott, 20 Fed. Cas. No. 11,760, 1 Cliff. 55.

See 11 Cent. Dig. tit. "Contracts," § 732.

Technical words see *infra*, VIII, D, 3.

98. McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498; Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271, 1 Fish. Pat. Cas. 424; Rich *v.* Parrott, 20 Fed. Cas. No. 11,760, 1 Cliff. 55.

Parties may define the words which they will use in the contract, and if the agreed definitions are free from ambiguity the contract will be enforced according to the definitions thus assigned. Morrison *v.* Wilson, 30 Cal. 344.

99. *Illinois.*— Chicago Wharfing, etc., Co. *v.* Street, 54 Ill. App. 569; Clinton County *v.* Ramsey, 20 Ill. App. 577.

4. Preliminary Negotiations. In case of doubt, all the negotiations between the parties ought to be considered in giving a contract a construction.[1]

5. Whole Contract Looked At. In construing the contract, the intention is to be collected, not from detached parts of the instrument, but from the whole of it.[2]

Iowa.— Evans *v.* McConnell, 99 Iowa 326, 63 N. W. 570; Chicago Lumber Co. *v.* Tibble's Mfg. Co., 80 Iowa 369, 45 N. W. 893; Cobb *v.* McElroy, 79 Iowa 603, 44 N. W. 824.

Missouri.— Farley *v.* Pettes, 5 Mo. App. 262.

New York.— Tallcot *v.* Arnold, 61 N. Y. 616.

Ohio.— Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

Vermont.— Jordon *v.* Dyer, 34 Vt. 104, 80 Am. Dec. 668; Gunnison *v.* Bancroft, 11 Vt. 490.

United States.— Potter *v.* Berthelet, 20 Fed. 240.

1. *Indiana.*— Woodall *v.* Greater, 51 Ind. 539.

Maryland.— Stockham *v.* Stockham, 32 Md. 196.

Massachusetts.— Jennings *v.* Whitehead, etc., Mach. Co., 138 Mass. 594.

New Jersey.— Freeman *v.* Bartlett, 47 N. J. L. 33.

New York.— Kennedy *v.* Porter, 109 N. Y. 526, 17 N. E. 426, 16 N. Y. St. 613; Pierson *v.* Hoag, 47 Barb. 243.

Pennsylvania.—Stover *v.* Metzgar, 1 Watts & S. 269.

United States.— Gill Mfg. Co. *v.* Hurd, 18 Fed. 673.

See 11 Cent. Dig. tit. "Contracts," § 731.

2. *Florida.*— Pensacola Gas Co. *v.* Lotze, 23 Fla. 368, 2 So. 609; Stewart *v.* Preston, 1 Fla. 1, 44 Am. Dec. 621.

Illinois.— Field *v.* Leiter, 118 Ill. 17, 6 N. E. 877; Chicago, etc., R. Co. *v.* Aurora, 99 Ill. 205; Walker *v.* Douglas, 70 Ill. 445; Massie *v.* Belford, 68 Ill. 290; Davis *v.* Rider, 53 Ill. 416; McCarty *v.* Howell, 24 Ill. 341; Stout *v.* Whitney, 12 Ill. 218; Goodyear Shoe Mach. Co. *v.* Selz, 51 Ill. App. 390.

Kentucky.— White *v.* Booker, 4 Metc. 267; Hunter *v.* Meade, 6 B. Mon. 612; Singleton *v.* Carroll, 6 J. J. Marsh. 527, 22 Am. Dec. 95.

Louisiana.— McKerall *v.* McMillan, 9 Rob. 19; Berthoud *v.* Barbaroux, 4 Mart. N. S. 543.

Maine.— Chapman *v.* Seccomb, 36 Me. 102; Chase *v.* Bradley, 26 Me. 531; Patrick *v.* Grant, 14 Me. 233.

Massachusetts.— Rich *v.* Lord, 18 Pick. 322; Heywood *v.* Perrin, 10 Pick. 228, 20 Am. Dec. 518; Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Michigan.— Norris *v.* Showerman, 2 Dougl. 16.

Minnesota.—Lindley *v.* Groff, 37 Minn. 338, 34 N. W. 26.

Mississippi.— Goosey *v.* Goosey, 48 Miss. 210.

Missouri.— Davis *v.* Hendrix, 59 Mo. App. 444.

New York.— Ward *v.* Whitney, 8 N. Y. 442; Jackson *v.* Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

Ohio.— German F. Ins. Co. *v.* Roost, 55 Ohio St. 581, 45 N. E. 1097, 60 Am. St. Rep. 711, 36 L. R. A. 236; Kelly *v.* Mills, 8 Ohio 325.

Pennsylvania.— Berridge *v.* Glassey, 112 Pa. St. 442, 3 Atl. 583, 56 Am. Rep. 322; Stewart *v.* Lang, 37 Pa. St. 201, 78 Am. Dec. 414.

South Carolina.— Anderson *v.* Holmes, 14 S. C. 162; Allen *v.* Brazier, 2 Bailey 55.

Vermont.— Flagg *v.* Eames, 40 Vt. 16, 94 Am. Dec. 363; Gray *v.* Clark, 11 Vt. 583; Morey *v.* Homan, 10 Vt. 565.

Virginia.— Tabb *v.* Archer, 3 Hen. & M. 399, 3 Am. Dec. 657.

United States.—Chesapeake, etc., Canal Co. *v.* Hill, 15 Wall. 94, 21 L. ed. 64; Bell *v.* Bruen, 1 How. 169, 11 L. ed. 89; Boardman *v.* Reed, 6 Pet. 328, 8 L. ed. 415; Knowlton *v.* Oliver, 28 Fed. 516; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 3 Story 122.

England.— Walsh *v.* Trevanion, 15 Q. B. 733, 14 Jur. 1134, 19 L. J. Q. B. 458, 69 E. C. L. 733; Mallan *v.* May, 9 Jur. 19, 14 L. J. Exch. 48, 13 M. & W. 511.

See 11 Cent. Dig. tit. "Contracts," § 743.

Illustrations.— Where a building contract provided that if there should arise any dispute between the parties the architect should decide them, and that his decision should be final and conclusive, the court held that while the literal meaning of the words was that the decision of the architect was to be final and conclusive, even if it was a wilful and fraudulent decision, yet the intention of the parties being clearly to provide for a fair and definite decision of matters arising in dispute between them, that intention would prevail over the words used by them. Chism *v.* Schipper, 51 N. J. L. 1, 15, 16 Atl. 316, 14 Am. St. Rep. 668, 2 L. R. A. 544. See Builders and Architects, 6 Cyc. 1. In the case just cited the court also said: "Another illustration of the principle that a literal interpretation is out of place when its adoption would run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall be void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor." See Landlord and Tenant.

Contract or gift.— Where a person by writing said that he would "give" another a certain sum of money if he would do a certain thing, it was held that the word "give" should be construed as importing a contract

And all parts of the writing, and every word in it, will if possible be given effect.[3]

6. Several Writings Construed Together. Where several instruments are made as part of one transaction, they will be read together, and each will be construed with referenee to the other.[4] Thus where two or more written instru-

and not a gift. Hamer *v.* Sidway, 124 N. Y. 538, 27 N. E. 256, 36 N. Y. St. 888, 21 Am. St. Rep. 693, 12 L. R. A. 463; Wilkinson *v.* Oliveira, 1 Bing. N. Cas. 490, 27 E. C. L. 733. See Gifts.

Agreement to "devote whole time" to work. — Where a person agreed to "devote his whole time and attention to the management" and cultivation of an orchard, it was held no breach of contract for him to occasionally absent himself from the premises at times when his presence was not necessary. Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62; Ehrlich *v.* Ætna L. Ins. Co., 88 Mo. 249. See Master and Servant.

Where a policy of insurance on a stock of goods in a store provided that it should be null and void "if the said property should be sold or conveyed," it was held that, although the words were broad enough to cover any kind of a sale, the intention of the parties was clearly not that they should have so wide a meaning; for such a construction "would bring the first mercantile sale at the counter within the condition"; but the kind of sale the parties intended was a sale of the property interest in the stock. Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337. See Insurance.

3. *Alabama.*— Hunter *v.* McCraw, 32 Ala. 518.

California.— Mickle *v.* Sanchez, 1 Cal. 200.

Illinois.— Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Hill *v.* Lowden, 33 Ill. App. 196.

Iowa.— Emerick *v.* Clemens, 26 Iowa 332.

Louisiana.— Ross *v.* Garlick, 10 Rob. 365.

Maine.— Metcalf *v.* Taylor, 36 Me. 28; Moore *v.* Griffin, 22 Me. 350.

Missouri.—Bent *v.* Alexander, 15 Mo. App. 181; Haarstick *v.* Shields, 11 Mo. App. 602.

New Hampshire.— Richardson *v.* Palmer, 38 N. H. 212.

North Carolina.— Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335.

Oregon.— Chapman *v.* Wilbur, 3 Oreg. 326.

United States.— Hollingsworth *v.* Fry, 4 Dall. 345, 12 Fed. Cas. No. 6,619.

4. *Alabama.*— Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15; Prater *v.* Darby, 24 Ala. 496; Holman *v.* Crane, 16 Ala. 570; Sewall *v.* Henry, 9 Ala. 24; Whitehurst *v.* Boyd, 8 Ala. 375.

Arkansas.— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17; Pillow *v.* Brown, 26 Ark. 240.

Colorado.— O'Reilly *v.* Burns, 14 Colo. 7, 22 Pac. 1090.

District of Columbia.— Gibbons *v.* Dudley, 7 Mackey 320.

Florida.— Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356; Pensacola Gas Co. *v.* Lotze, 23 Fla. 368, 2 So. 609.

Illinois.— Freer *v.* Lake, 115 Ill. 662, 4 N. E. 512; Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Greenbaum *v.* Gage, 61 Ill. 46; Bradley *v.* Marshall, 54 Ill. 173; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Duncan *v.* Charles, 5 Ill. 561; Bailey *v.* Cromwell, 4 Ill. 71; Neill *v.* Chessen, 15 Ill. App. 266; Hill *v.* Parker, 10 Ill. App. 323; Derby *v.* Graff, 10 Ill. App. 195.

Indiana.—Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118; Wood *v.* Ridgeville College, 114 Ind. 320, 16 N. E. 619; Carr *v.* Hays, 110 Ind. 408, 11 N. E. 25; Wood *v.* Bibbins, 58 Ind. 392; Judah *v.* Zimmerman, 22 Ind. 388; Allen *v.* Notsinger, 13 Ind. 494; Leach *v.* Leach, 4 Ind. 628, 58 Am. Dec. 642; Fellows *v.* Kress, 5 Blackf. 536; Cunningham *v.* Gwinn, 4 Blackf. 341; Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562.

Iowa.— Burlington, etc., R. Co. *v.* Ross, 48 Iowa 706.

Kentucky.— Parks *v.* Cooke, 3 Bush 168; Knott *v.* Hogan, 4 Metc. 99; Hughes *v.* Saunder, 3 Bibb 360; Shanks *v.* Stephens, 4 Ky. L. Rep. 838.

Maryland.— Ahern *v.* White, 39 Md. 409; Owings *v.* Emery, 7 Gill 405.

Massachusetts.— Hunt *v.* Frost, 4 Cush. 54; Makepeace *v.* Harvard College, 10 Pick. 298; Sibley *v.* Holden, 10 Pick. 249, 20 Am. Dec. 521; Hunt *v.* Livermore, 5 Pick. 395; King *v.* King, 7 Mass. 496; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; Clap *v.* Draper, 4 Mass. 266, 3 Am. Dec. 215; Newall *v.* Wright, 3 Mass. 138, 3 Am. Dec. 98.

Michigan.— Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58; Sutton *v.* Beckwith, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344; Singer Mfg. Co. *v.* Haines, 36 Mich. 385; Dudgeon *v.* Haggart, 17 Mich. 273; Bronson *v.* Green, Walk. 56; Disbrow *v.* Jones, Harr. 48.

Minnesota.— Lindley *v.* Geoff, 37 Minn. 338, 34 N. W. 26; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

Missouri.— Waples *v.* Jones, 62 Mo. 440.

Montana.— Huntoon *v.* Lloyd, 8 Mont. 283, 20 Pac. 693.

New Hampshire.— Hill *v.* Huntress, 43 N. H. 480.

New Jersey.— Owens *v.* Owens, 23 N. J. Eq. 60.

New York.— Knowles *v.* Toone, 96 N. Y. 534; Morss *v.* Salisbury, 48 N. Y. 636; Meriden Britannia Co. *v.* Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Rogers *v.* Smith, 47 N. Y. 324; Mallory *v.* Tioga R. Co., 42 N. Y. 354; Hunt *v.* Utica, 23 Barb. 390; Pepper *v.* Haight, 20 Barb. 429; Mann *v.* Witbeck, 17 Barb. 388; Hanford *v.* Rogers, 11 Barb. 18; Thomas *v.* Austin, 4 Barb. 265; Ludington *v.* Low, 53 N. Y. Super. Ct. 374; Buchanan

ments are executed on the same day, relate to the same subject-matter, and one refers to the other, the presumption is that they evidence but a single contract.[5] So if two or more agreements are executed at different times as parts of the same agreement they will be taken and construed together.[6] As a rule several instruments executed at the same time and relating to the same subject-matter cannot be construed together as one contract, unless they are between the same parties,[7] but sometimes this may be done.[8]

v. Chesebrough, 5 Duer 237; Brandreth *v.* Sandford, 1 Duer 390; Beman *v.* Green, 1 Duer 382; Rubber Tip Pencil Co. *v.* Hovey, 9 Abb. Pr. N. S. 74; Cornell *v.* Todd, 2 Den. 130; Jackson *v.* McKenny, 3 Wend. 233, 20 Am. Dec. 690; Bailey *v.* Freeman, 11 Johns. 221, 6 Am. Dec. 371, Jackson *v.* Dunsbaugh, 1 Johns. Cas. 91; Hills *v.* Miller, 3 Paige 254, 24 Am. Dec. 218; Van Horne *v.* Crain, 1 Paige 455; Shaw *v.* Leavitt, 3 Sandf. Ch. 163.

North Carolina.— Kitchin *v.* Grandy, 101 N. C. 86, 7 S. E. 663; Bobbitt *v.* Liverpool, etc., Ins. Co., 66 N. C. 70, 8 Am. Rep. 494; Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335.

Ohio.— Smith *v.* Turpin, 20 Ohio St. 478; White *v.* Brocaw, 14 Ohio St. 339; Trowbridge *v.* Holcomb, 4 Ohio St. 38; Berry *v.* Wisdom, 3 Ohio St. 241.

Oregon.— Dean *v.* Lawham, 7 Oreg. 422.

Pennsylvania.— Blim *v.* Torode, 4 Phila. 118, 7 Leg. Int. 332.

Texas.— Atcheson *v.* Hutchison, 51 Tex. 223; Wallis *v.* Beauchamp, 15 Tex. 303; Howard *v.* Davis, 6 Tex. 174; Campbell *v.* Nicholson, (App. 1892) 18 S. W. 135; Shaw *v.* Parvin, 1 Tex. App. Civ. Cas. § 365.

Vermont.— Collin *v.* Lavelle, 44 Vt. 230; Reed *v.* Field, 15 Vt. 672; Strong *v.* Barnes, 11 Vt. 221, 34 Am. Dec. 684; Raymond *v.* Roberts, 2 Aik. 204, 16 Am. Dec. 698.

Virginia.— Byrd *v.* Ludlow, 77 Va. 483.

Wisconsin.— Hagerty *v.* White, 69 Wis. 317, 34 N. W. 92; Helmholz *v.* Everingham, 24 Wis. 266; Norton *v.* Kearney, 10 Wis. 443.

United States.— Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 155 U. S. 156, 15 S. Ct. 42, 39 L. ed. 106; Bailey *v.* Hannibal, etc., R. Co., 17 Wall. 96, 21 L. ed. 611; Telfner *v.* Russ, 60 Fed. 224, 8 C. C. A. 585; Thomson *v.* Beal, 48 Fed. 614; Woodwards *v.* Jewell, 25 Fed. 689; Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609; Wildman *v.* Taylor, 29 Fed. Cas. No. 17,654, 4 Ben. 42.

See 11 Cent. Dig. tit. "Contracts," § 746.

Where the duplicate parts of an agreement vary when they were intended to be similar, neither can be deemed the agreement of the parties more than the other, but they must be construed together as best they can. Munson *v.* Osborn, 10 Ill. App. 508; Morss *v.* Salisbury, 48 N. Y. 636.

5. *Alabama.*— Byrne *v.* Marshall, 44 Ala. 355; Sewall *v.* Henry, 9 Ala. 24.

Arkansas.— Vaugine *v.* Taylor, 18 Ark. 65.

Iowa.— Logan *v.* Tibbett, 4 Greene 389.

Kentucky.— Dillingham *v.* Estill, 3 Dana 21.

Maine.— Adams *v.* Hill, 16 Me. 215.

Michigan.— Rorabacher *v.* Lee, 16 Mich. 169.

Mississippi.— Doe *v.* Bernard, 7 Sm. & M. 319.

New York.— Rogers *v.* Kneeland, 13 Wend. 114.

Pennsylvania.— Spangler *v.* Springer, 22 Pa. St. 454.

Papers not executed as parts of same transaction.— It does not necessarily follow that because two papers were executed on the same day they were executed at the same time and were parts of the same transaction. Mann *v.* Witbeck, 17 Barb. (N. Y.) 388.

A writing designed to supersede a former writing cannot be construed in connection with the former one in order to determine the intention of the parties thereto. Oberbeck *v.* Sportman's Park, etc., Assoc., 17 Mo. App. 310.

6. *Illinois.*—Stacey *v.* Randall, 17 Ill. 467; Duncan *v.* Charles, 5 Ill. 561.

Indiana.— O'Donald *v.* Evansville, etc., Straight Line R. Co., 14 Ind. 259.

Iowa.— Greene *v.* Day, 34 Iowa 328.

Massachusetts.— Thayer *v.* Burnhard, 99 Mass. 508; Makepeace *v.* Harvard College, 10 Pick. 298; Sibley *v.* Holden, 10 Pick. 250, 20 Am. Dec. 521; Hunt *v.* Livermore, 5 Pick. 395.

Missouri.— Johnson County *v.* Wood, 84 Mo. 489; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

New Hampshire.— Hill *v.* Huntress, 43 N. H. 480.

New York.— Meriden Britannia Co. *v.* Zingsen, 4 Rob. 312; Brandreth *v.* Sandford, 1 Duer 390; Harper *v.* Raymond, 7 Abb. Pr. 142; Stephens *v.* Baird, 9 Cow. 274.

Ohio.—Berry *v.* Wisdom, 3 Ohio St. 241.

Pennsylvania.— Thompson *v.* McClenachan, 17 Serg. & R. 110.

South Carolina.— Cordray *v.* Mordecai, 2 Rich. 518.

Texas.—Wallis *v.* Beauchamp, 15 Tex. 303.

Vermont.— Reed *v.* Field, 15 Vt. 672; Strong *v.* Barnes, 11 Vt. 221, 34 Am. Dec. 684.

Wisconsin.— Richardson *v.* Single, 42 Wis. 40; Norton *v.* Kearney, 10 Wis. 443.

See 11 Cent. Dig. tit. "Contracts," § 747.

Several inconsistent contracts.— But where there are several contracts on the same matter of different dates, inconsistent with each other, the latest must govern. Loper *v.* U. S., 13 Ct. Cl. 269.

7. Berry *v.* Dons, 33 Mich. 515; Craig *v.* Wells, 11 N. Y. 315; De Wit *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896.

8. Logan *v.* Tibbott, 4 Greene (Iowa) 389; Turver *v.* Field, 13 N. Y. St. 12; Rogers *v.*

7. Papers Referred to or Annexed to Contract. Where one paper refers to another for its terms, it is the same as though the words of the one referred to were inserted in the former; and the same is true as to papers annexed to the principal one.[9]

C. Implied Terms — 1. In General. A contract must be construed so as to include not only what the parties actually wrote down or said, but also all those things which the law implies as part of it, and likewise all matters which the parties intended to express but did not.[10] This is subject, however, to the rule that in the absence of fraud or mistake parol evidence is not admissible to add to or vary a written contract.[11]

2. Custom or Usage. A particular or general custom or usage may be proven to vary the usual meaning of the language of the contract, or to import a term not expressed therein.[12]

3. Law of Place Implied. The law of the place where the contract is entered into at the time of making the same is as much a part of the contract as though it were expressed therein.[13] But a contract cannot be construed with reference

Kneeland, 10 Wend. (N. Y.) 218. Where parties executed several instruments at different times in furtherance of a common purpose, although neither was a party to the same instrument with the other, but the execution by each was known to the other, it was held that the instruments should be construed as one contract between them. McDonald *v.* Wolff, 40 Mo. App. 302.

9. *Alabama.*— Casey *v.* Holmes, 10 Ala. 776.

California.—Goodwin *v.* Nickerson, 51 Cal. 166.

Illinois.— Lake View City *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663; St. Clair County Benev. Soc. *v.* Fietsam, 97 Ill. 474, 6 Ill. App. 151; Galena, etc., R. Co. *v.* Barrett, 95 Ill. 467.

Iowa.— Elmore *v.* Higgins, 20 Iowa 250.

Kansas.— Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894.

Kentucky.— Dillingham *v.* Estill, 3 Dana 21.

Maine.— Bradstreet *v.* Rich, 74 Me. 303; Adams *v.* Hill, 16 Me. 215; Sawyer *v.* Hammatt, 15 Me. 40.

Massachusetts.— Bergin *v.* Williams, 138 Mass. 544; Franklin Sav. Ins. Co. *v.* Rend, 125 Mass. 365.

Michigan.— Rorabacher *v.* Lee, 16 Mich. 169; Bronson *v.* Green, Walk. 56.

Minnesota.— Short *v.* Van Dyke, 50 Minn. 286, 52 N. W. 643.

Montana.— Dawes *v.* Power, 5 Mont. 59, 1 Pac. 421.

New York.— Matter of Washington Park, 52 N. Y. 131; Riley *v.* Brooklyn, 46 N. Y. 444; Hutcheon *v.* Johnson, 33 Barb. 392; Van Nostrand *v.* New York Guaranty, etc., Co., 39 N. Y. Super. Ct. 73; Stocker *v.* Partridge, 2 Rob. 193; Rogers *v.* Kneeland, 13 Wend. 114.

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

Pennsylvania.— Cooper *v.* Staver, 101 Pa. St. 547; Seitzinger *v.* Ridgway, 4 Watts & S. 472.

Tennessee.— Hopkins *v.* Rogers, 3 Yerg. 457.

See 11 Cent. Dig. tit. "Contracts," § 749.

10. See *supra*, II, C, 2, d, (II).

Implied warranties see Sales; Vendor and Purchaser.

Implied terms of other contracts see Guaranty; Insurance; Landlord and Tenant; Master and Servant; Principal and Surety; and other special titles.

11. See Evidence.

12. See Customs and Usages.

13. *Arkansas.*— Parsel *v.* Barnes, 25 Ark. 261; Thurston *v.* Peay, 21 Ark. 85.

California.— Fowler *v.* Smith, 2 Cal. 568.

Florida.— Hayward *v.* Le Baron, 4 Fla. 404; Mitchell *v.* Doggett, 1 Fla. 356.

Illinois.— Matthias *v.* Cook, 31 Ill. 83; Reynolds *v.* Hall, 2 Ill. 35.

Indiana.— U. S. Saving Fund, etc., Co. *v.* Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; Free *v.* Haworth, 19 Ind. 404.

Iowa.— Talbott *v.* Merchant's Despatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589; Webster *v.* Rees, 23 Iowa 269; Madera *v.* Jones, Morr. 204.

Kentucky.— Collins *v.* Collins, 79 Ky. 88, 1 Ky. L. Rep. 323; Moore *v.* Fauntleroy, 3 A. K. Marsh. 360.

Louisiana.— Forgay *v.* Ferguson, 6 La. Ann. 770; Durnford's Succession, 11 Rob. 183; Waggaman *v.* Zacharie, 8 Rob. 181; Fletcher *v.* Cavelier, 10 La. 116; Rowlett *v.* Shepherd, 4 La. 86; Town *v.* Morgan, 2 La. 112, 20 Am. Dec. 299; Brown *v.* Reves, 7 Mart. N. S. 235.

Maryland.— Moale *v.* Baltimore, 56 Md. 496.

Mississippi.— Carter *v.* Cox, 44 Miss. 148.

Missouri.— Parks *v.* Connecticut F. Ins. Co., 26 Mo. App. 511.

Nebraska.— Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51.

New York.— Baker *v.* Johnson, 2 Rob. 570.

North Carolina.— O'Kelly *v.* Williams, 84 N. C. 281.

Pennsylvania.— Snyder *v.* Leibengood, 4 Pa. St. 305.

South Carolina.—Belcher *v.* Orphan House, 2 McCord 23.

to a foreign law, unless the intent of the parties to be governed by such law is evident from the instrument itself without the aid of extrinsic evidence.[14]

D. Words and Clauses — 1. All Words to Be Considered. No word in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it.[15]

2. Meaning of Particular Words. As we have seen, all words are to be taken in the ordinary and popular sense, unless there is something to show that they were used in a different sense.[16]

3. Technical Words. But technical words will be taken in a technical sense,[17] as for example legal terms,[18] unless they are clearly used in a different sense.[19] Parol evidence is admissible to show the meaning of technical terms in a written contract.[20]

4. Repugnant Words. Where it is clear that a word has been used inadvertently, and it is clearly inconsistent with and repugnant to the meaning of the parties, it will be rejected altogether.[21]

5. Inconsistent and Conflicting Clauses. Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument.[22] If one clause be at variance

Tennessee.— McKissick *v.* McKissick, 6 Humphr. 75.

Wisconsin.— Martin *v.* Veeder, 20 Wis. 466.

United States.— Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020; McCracken *v.* Hayward, 2 How. 608, 11 L. ed. 397; U. S. *v.* New Orleans, 17 Fed. 483; Camfranque *v.* Burnell, 4 Fed. Cas. No. 2,342, 1 Wash. 340; Smith *v.* Atwood, 22 Fed. Cas. No. 13,006, 3 McLean 545.

See 11 Cent. Dig. tit. "Contracts," § 750.

14. Paret *v.* Bryson, 18 Fed. Cas. No. 10,710.

15. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151; World's Fair Hotel, etc., Bureau *v.* Courtright, 57 Ill. App. 281; Rolland *v.* McCarty, 19 La. 77; Heywood *v.* Heywood, 42 Me. 229, 66 Am. Dec. 277.

Whole contract looked at see *supra*, VIII, B, 5.

16. See *supra*, VIII, B, 3.

17. *Illinois.*— Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; McAvoy *v.* Long, 13 Ill. 147.

Iowa.—Rindskoff *v.* Barrett, 14 Iowa 101.

Maryland.—Maryland Coal Co. *v.* Cumberland, etc., R. Co., 41 Md. 343.

Massachusetts.— Eaton *v.* Smith, 20 Pick. 150.

New York.— Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

Pennsylvania.— Ellmaker *v.* Ellmaker, 4 Watts 89.

Virginia.— Findley *v.* Findley, 11 Gratt. 434.

United States.— Potter *v.* Phenix Ins. Co., 63 Fed. 382.

18. Knott *v.* Burleson, 2 Greene (Iowa) 660; Bowen *v.* Kaughran, 1 N. Y. St. 121; Findley *v.* Findley, 11 Gratt. (Va.) 434.

19. Bowman *v.* Long, 89 Ill. 19; Wynkoop *v.* Cowing, 21 Ill. 570; Jackson *v.* Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504.

20. See Evidence.

21. *Illinois.*—Hibbard *v.* McKinley, 28 Ill. 240.

Kentucky.— Stockton *v.* Turner, 7 J. J. Marsh. 192.

New York.— Buck *v.* Buck, 18 N. Y. 337.

North Carolina.— Iredell *v.* Barbee, 31 N. C. 250.

England.— Wells *v.* Tregusan, 2 Salk. 463; Dollman *v.* King, 4 Bing. N. Cas. 105, 3 Hodges 283, 7 L. J. C. P. 6, 5 Scott 382, 33 E. C. L. 619.

Illustration.— Where a bond recited a debt due from the obligor to the obligee, but the condition was that it should be void if the obligor did "not" pay it, it was held that the word "not" would be rejected as repugnant. Wells *v.* Tregusan, 2 Salk. 463.

22. *Iowa.*— Tuck *v.* Singer Mfg. Co., 67 Iowa 576, 25 N. W. 812.

Massachusetts.— Heywood *v.* Perrin, 10 Pick. 228, 20 Am. Dec. 518; Knower *v.* Emerson, 9 Pick. 422; Worthington *v.* Hylyer, 4 Mass. 196.

Missouri.—Bent *v.* Alexander, 15 Mo. App. 181.

Pennsylvania.—Straus *v.* Wanamaker, 175 Pa. St. 213, 34 Atl. 648; Hazleton Coal Co. *v.* Buck Mountain Coal Co., 57 Pa. St. 301.

Virginia.— State Sav. Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543; Preston *v.* Heiskell, 32 Gratt. 48; Wootton *v.* Redd, 12 Gratt. 196.

See 11 Cent. Dig. tit. "Contracts," § 744.

Illustrations.— Where a lot was described in a deed by a wrong number and also described by fixed and known objects, it was held that the number of the lot might be rejected. Loomis *v.* Jackson, 19 Johns. (N. Y.) 449. See Deeds. And where a mortgage described the several lots conveyed by numbers, with the additional clause, "being all block 25," and block 25 did not contain the lots mentioned in the deed, but they were in another block, and it appeared that it was the intention of the mortgagor to mortgage the block in which he resided, and that he resided in block 25, it was held that block 25 was, and the lots named were not, subject to the mortgage. Sharp *v.* Thomp-

with another the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less.[23]

6. WRITING AND PRINTING. Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail.[24]

7. EXPRESSIO UNIUS. The expression in a contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed.[25]

8. GENERAL AND SPECIFIC DESCRIPTIONS. The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply.[26] Thus general words following particular or specific

son, 100 Ill. 447, 39 Am. Rep. 61. See MORTGAGES.

23. Smith *v.* Davenport, 34 Me. 520; Vary *v.* Shea, 36 Mich. 388.

24. *Alabama.*— Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337.

Illinois.— Loveless *v.* Thomas, 152 Ill. 479, 38 N. E. 907; People *v.* Dulaney, 96 Ill. 503; American Express Co. *v.* Pinckney, 29 Ill. 392.

Michigan.— Russell *v.* Bondie, 51 Mich. 76, 16 N. W. 239.

Minnesota.— Murray *v.* Pillsbury, 59 Minn. 85, 60 N. W. 844; Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

New York.— Chadsey *v.* Guion, 97 N. Y. 333; Clark *v.* Woodruff, 83 N. Y. 518; Hill *v.* Miller, 76 N. Y. 32; Hutt *v.* Zimmer, 78 Hun 23, 28 N. Y. Suppl. 1014, 60 N. Y. St. 493; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. 122; Howland *v.* Commercial Ins. Co., Anth. N. P. 42.

Pennsylvania.— Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50.

United States.— Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Hernandez *v.* Sun Mut. Ins. Co., 12 Fed. Cas. No. 6,415, 6 Blatchf. 317.

See 11 Cent. Dig. tit. "Contracts," § 745.

Illustration.— In Union Pac. R. Co. *v.* Graddy, 25 Nebr. 849, 41 N. W. 809, defendant was employed by plaintiff to render such services as might be necessary as "consulting oculist and aurist," the contract being partly written and partly of printed form. By the printed form the physician employed agreed "to perform all necessary surgical and medical services for the treatment of said persons, if required to do so, and to furnish the necessary medicines and surgical appliances for the same." The words "and to furnish the necessary medicines and surgical appliances for the same" were erased, so that the portion of the contract which was in writing immediately following the words, "if required to do so" was "by the chief surgeon as consulting oculist and aurist," etc. Under a statute declaring that when an instrument is partly in writing, and partly in printed form, the former controls in case of inconsistency, it was held that the employment was only as consulting oculist and aurist and not as operating physician or surgeon.

Bill-heads and letter-heads.— A printed bill-head or letter-head cannot be allowed to control, modify, or alter the terms of a contract which is clearly expressed in writing below it. Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093. Where a person wrote another an unconditional offer to buy certain goods, and the other wrote back, accepting the offer, and the acceptance was unqualified, but was written on a letter-head, at the top of which were printed the words, "All sales subject to strikes and accidents," it was held that these words formed no part of the contract. Summers *v.* Hibbard, etc., Co., 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872 [*affirming* 50 Ill. App. 381]. But when there is no such conflict, the provisions not being inconsistent, the written provisions will not supersede the printed ones. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Peck *v.* Scoville Mfg. Co., 43 Ill. App. 360; Barhydt *v.* Ellis, 45 N. Y. 107; Wheeling, etc., R. Co. *v.* Gourley, 99 Pa. St. 171.

25. Hammerquist *v.* Swensson, 44 Ill. App. 627; Higgins *v.* Eagleton, 13 Misc. (N. Y.) 223, 34 N. Y. Suppl. 225, 68 N. Y. St. 82; Cree *v.* Bristol, 12 Misc. (N. Y.) 1, 33 N. Y. Suppl. 19, 66 N. Y. St. 518. But see New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499, 71 Am. Dec. 337.

26. *Illinois.*— Cecil *v.* Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; Stettauer *v.* Hamlin, 97 Ill. 312; Hammerquist *v.* Swensson, 44 Ill. App. 627.

Maine.— Emery *v.* Fowler, 38 Me. 99.

Massachusetts.— Dawes *v.* Prentice, 16 Pick. 435; Ellery *v.* New England Ins. Co., 8 Pick. 14.

Missouri.— Miller *v.* Wagenhauser, 18 Mo. App. 11.

New York.— Chapin *v.* Clemitson, 1 Barb. 311.

Vermont.— Vaughan *v.* Porter, 16 Vt. 266.

England.— Cullen *v.* Butler, 4 Campb. 289, 5 M. & S. 461, 17 Rev. Rep. 400; Phillips *v.* Barber, 5 B. & Ald. 161, 24 Rev. Rep. 317, 7 E. C. L. 96.

Limitation of rule.—But a special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both then both are to be retained. Corwin *v.* Hood, 58 N. H. 401; German F. Ins. Co. *v.* Roost, 55 Ohio 581, 45 N. E. 1097, 60 Am. St. Rep. 711,

terms are restricted in meaning to those things or matters which are of the same kind as those first mentioned.[27] And in like manner general expressions will be restricted by particular descriptions or additions following them.[28]

9. Recitals. Where the language of the covenants or promises in a contract is more comprehensive than that of the recitals, the intent is to be ascertained from a consideration of the entire instrument.[29]

10. Clerical Errors and Omissions. The contract must be read according to the intent of the parties in spite of clerical errors and omissions which if followed would change that intention.[30]

11. Surplusage. If no meaning can be given to a word from the connection in which it is used, nor consistently with express provisions of the instrument, nor upon examination of the whole instrument, such word or term will be treated as surplusage.[31]

E. Grammatical Construction — 1. In General. The grammatical construction of a contract will not be followed, if a different construction will give effect to the intention of the parties as shown by the whole instrument and accomplish the object for which the contract was executed.[32]

36 L. R. A. 236; Mellen *v.* Ford, 28 Fed. 639.

27. Torrance *v.* McDougald, 12 Ga. 526; Baxter *v.* State, 9 Wis. 38; and other cases in the preceding note.

Illustration.—Where, in a contract for shipment of horses, the shipper agreed to take the risk of injury to the horses "in loading, unloading, conveyance," and "otherwise," and the company put the horses in a car with a defective floor and they were injured, it was held liable, the court holding that the word "otherwise" meant injuries caused during the loading, unloading, and transportation of the animals, and did not extend to its failure to furnish safe cars. The word "otherwise" was wide enough to include any kind of a loss, even from the carrier's not sending them at all or refusing to deliver them, but it was restricted to the kinds of things mentioned before it. Hawkins *v.* Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

28. Leake Contr. 278; Johnson County *v.* Wood, 84 Mo. 489; Railton *v.* Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246; and cases in the notes preceding.

29. *Georgia.*— Torrance *v.* McDougald, 12 Ga. 526.

Illinois.— Trower *v.* Elder, 77 Ill. 452.

Missouri.— Miller *v.* Wagenhauser, 18 Mo. App. 11.

Wisconsin.— Baxter *v.* State, 9 Wis. 38.

United States.— Davenport *v.* Lamb, 14 Fed. Cas. No. 8,015, 1 Sawy. 609 [*affirmed* in 18 Wall. 307, 21 L. ed. 759].

See also Price *v.* Bigham, 7 Harr. & J. (Md.) 296; Ming *v.* Woolfolk, 3 Mont. 380; Kehoe *v.* Blethen, 10 Nev. 445.

30. Marion *v.* Faxon, 20 Conn. 486; Blanchard *v.* Gloyd, 7 Rob. (La.) 542; Monmouth Park Assoc. *v.* Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 39 Am. St. Rep. 626, 19 L. R. A. 456; Weed *v.* Abbott, 51 Vt. 609; Richmond *v.* Woodard, 32 Vt. 833.

31. Tucker *v.* Meeks, 2 Sweeny (N. Y.) 736.

32. *Alabama.*— Lively *v.* Robbins, 39 Ala. 461.

California.— Hancock *v.* Watson, 18 Cal. 137.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657; Fowle *v.* Bigelow, 10 Mass. 379.

Michigan.— Newton *v.* McKay, 29 Mich. 1.

Minnesota.— Butler *v.* Bohn, 31 Minn. 325, 17 N. W. 862; Fowler *v.* Woodward, 26 Minn. 347, 4 N. W. 231.

Mississippi.— De Soto County *v.* Dickson, 34 Miss. 150.

Missouri.— Caldwell *v.* Layton, 44 Mo. 220.

New Jersey.— Monmouth Park Assoc. *v.* Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 39 Am. St. Rep. 626, 19 L. R. A. 456.

New York.— Jackson *v.* Topping, 1 Wend. 388, 19 Am. Dec. 515.

North Carolina.— Cobb *v.* Hines, 44 N. C. 343, 59 Am. Dec. 559.

Pennsylvania.— Knisely *v.* Shenberger, 7 Watts 193; Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669.

Vermont.— Gray *v.* Clark, 11 Vt. 583; Morey *v.* Homan, 10 Vt. 565.

Virginia.— Harman *v.* Howe, 27 Gratt. 676.

England.— Wilson *v.* Wilson, 5 H. L. Cas. 40, 23 L. J. Ch. 697; Phipps *v.* Tanner, 5 C. & P. 488, 24 E. C. L. 669.

Illustration.— In Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515, a father conveyed his property to his son in consideration that the son would support him and pay his debts. The deed contained a condition that if the son should neglect or refuse to pay his debts and should suffer the grantor to be put to cost, trouble, or expense on account thereof, the property should revert to him. The son failed to pay the debts, but the father was not put to any cost or trouble, for they were not demanded of him. It was held that as the intent of the father was that the property should revert if his debts were not paid, the estate was forfeited, and this intent would be carried out by the court, which would dis-

2. PUNCTUATION. The punctuation of a document, although it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances.[33]

F. Construction to Uphold Contract and to Exclude Fraud — 1. VALID RATHER THAN INVALID. Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid, and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract.[34] Thus where an assignment was in the form: "I hereby assign to Reuben R. Thrall a note in my favor against Theodore Woodward and John H. Phillips, dated 13th Nov. 1838, for one hundred and fifty dollars payable in one year from date with use for value received," and to sustain the assignment it was necessary to show a consideration for it, so that the question was whether the words "for value received" referred to the note or to the assignment, they were construed as referring to the assignment, as that construction was necessary to sustain the instrument.[35]

2. CONSTRUCTION AS LEGAL RATHER THAN ILLEGAL. So where one construction will make the contract legal and another will make it contrary to law or public policy, the former construction will be adopted, if reasonable.[36]

regard the grammatical construction of the deed and make "and" read "or."

33. *Alabama.*— Seay *v.* McCormick, 68 Ala. 549; English *v.* McNair, 34 Ala. 40.

Illinois.— Osborn *v.* Farwell, 87 Ill. 89, 29 Am. Rep. 47.

Missouri.— Bruensmann *v.* Carroll, 52 Mo. 313.

North Carolina.— Bunn *v.* Wells, 94 N. C. 67.

Pennsylvania.— White *v.* Smith, 33 Pa. St. 186, 75 Am. Dec. 589.

United States.— Ewing *v.* Burnet, 11 Pet. 41, 9 L. ed. 624.

34. *Alabama.*— Lively *v.* Robbins, 39 Ala. 61; Adams *v.* Adams, 26 Ala. 272; Evans *v.* Sanders, 8 Port. 497, 33 Am. Dec. 297.

California.— Saunders *v.* Clark, 29 Cal. 299.

Colorado.— People *v.* Wright, 6 Colo. 92.

Georgia.— Dismukes *v.* Parrott, 56 Ga. 513.

Illinois.— Field *v.* Leiter, 118 Ill. 17, 6 N. E. 877; Peckham *v.* Haddock, 36 Ill. 38; Crittenden *v.* French, 21 Ill. 598; Hughes *v.* Lane, 11 Ill. 123, 50 Am. Dec. 436; Dwelling-house Ins. Co. *v.* Butterly, 33 Ill. App. 626.

Indiana.— Gano *v.* Aldridge, 27 Ind. 294.

Louisiana.— Steinspring *v.* Bennett, 16 La. Ann. 201; Morancy *v.* Dumesnil, 3 La. Ann. 363; Wells *v.* Compton, 3 Rob. 171; Millikin *v.* Minnis, 12 La. 539; Dufart *v.* Dufour, 8 Mart. N. S. 363; Hill *v.* Martin, 12 Mart. 177, 13 Am. Dec. 372; Mcarty *v.* Foucher, 12 Mart. 114; McMicken *v.* Stewart, 10 Mart. 571.

Maine.— Higgins *v.* Wasgatt, 34 Me. 305.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657.

Michigan.—Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699.

Minnesota.— Wells *v.* Atkinson, 24 Minn. 161; Phipps *v.* McFarlane, 3 Minn. 109, 74 Am. Dec. 743.

Mississippi.— Riley *v.* Vanhouten, 4 How. 428.

Missouri.— Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; Reilly *v.* Chouquette, 18 Mo. 220.

Nebraska.— People *v.* Gosper, 3 Nebr. 285.

New York.— Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. 372; Archibald *v.* Thomas, 3 Cow. 284.

North Carolina.— Hunter *v.* Anthony, 53 N. C. 385, 80 Am. Dec. 333.

Ohio.— Lewis *v.* Tipton, 10 Ohio St. 88, 75 Am. Dec. 498; Greenough *v.* Smead, 3 Ohio St. 415; Lamping *v.* Cole, 2 Ohio Dec. (Reprint) 737, 5 West. L. Month. 187.

South Carolina.— Carter *v.* King, 11 Rich. 125.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

United States.— Tieman *v.* Jackson, 5 Pet. 580, 8 L. ed. 234; Watts *v.* Camors, 10 Fed. 145; Mattocks *v.* Rogers, 16 Fed. Cas. No. 9,300, 1 Hask. 547.

England.— Haigh *v.* Brooks, 10 A. & E. 309, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180.

See 11 Cent. Dig. tit. "Contracts," § 734.

35. Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682. They were held as referring to the assignment for the further reason that the language of a contract is to be construed most strongly against the party using the words. See *infra*, VIII, J.

Further illustration.— Where a man gave a note payable Jan. 1, 1836, "with interest from eighteen hundred and thirty-five," it was held that interest was recoverable from Jan. 1, 1835, because otherwise the clause as to interest was of no effect, since without it interest would be recoverable only from Jan. 1, 1836. Evans *v.* Sanders, 8 Port. (Ala.) 497, 33 Am. Dec. 297.

36. *Illinois.*— Crittenden *v.* French, 21 Ill. 598.

Mississippi.— Merrill *v.* Melchoir, 30 Miss. 516.

Missouri.— Wiggin Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

3. Good Faith and Bad Faith. So where an instrument is susceptible of two conflicting constructions, one of which imputes bad faith or fraud to one of the parties, and the other does not, the latter construction should be adopted.[37]

G. Reason and Equity — 1. In General. The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one,[38] and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other.[39] Thus where the meaning is doubtful, the construction will be avoided which will entail a forfeiture.[40]

2. Where Meaning Not Uncertain. It is not the province of a court, however, to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by doing so the terms of a contract are ignored; for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used, and the intention of the parties using that language.[41]

H. Nature and Objects of Agreement and Situation of Parties. To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of

New York.— Lorillard *v.* Clyde, 86 N. Y. 384; Ormes *v.* Dauchey, 82 N. Y. 443, 37 Am. Rep. 583; Archibald *v.* Thomas, 3 Cow. 284.

United States.— U. S. *v.* Central Pac. R. Co., 118 U. S. 235, 6 S. Ct. 1038, 30 L. ed. 173; Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

See 11 Cent. Dig. tit. "Contracts," § 734.

Illustration.— Thus where a contract between a ferry company and railroad company provided that the railroad company would always employ the ferry company to transport across the river all persons and property taken across to or from the railroad, and that "no other than the said ferry" should ever be employed by the railroad company to cross any passengers or freight coming or going on such road, it was held that the contract did not prevent the railroad company from crossing its freight and passengers by means of a wagon and railroad bridge afterward constructed, but simply prohibited them from employing any other ferry to transport them. If the contract prevented the use of the bridge by the railroad company for the transportation of its freight and passengers, it would have been contrary to public policy and void, and therefore it was construed so as to uphold it as a legal contract. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

37. Gauss *v.* Orr, 46 Ark. 129.

38. *Alabama.*—Williams *v.* Glover, 66 Ala. 189.

Illinois.— Wilson *v.* Marlow, 66 Ill. 385; Streeter *v.* Streeter, 43 Ill. 155.

Vermont.— Royalton *v.* Royalton, etc., Tp. Co., 14 Vt. 311.

United States.— Coghlan *v.* Stetson, 19 Fed. 727.

England.— Atwood *v.* Emery, 1 C. B. N. S. 110, 26 L. J. C. P. 73, 5 Wkly. Rep. 19, 87 E. C. L. 110.

39. *Alabama.*— Evans *v.* Sanders, 8 Port. 497, 33 Am. Dec. 297.

California.— Saunders *v.* Clark, 29 Cal. 299.

Illinois.— Field *v.* Leiter, 118 Ill. 17, 6 N. E. 877; Wilson *v.* Marlow, 66 Ill. 385; Robinson *v.* Stow, 39 Ill. 568; Peckham *v.* Haddock, 36 Ill. 38; Crabtree *v.* Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; Gale *v.* Dean, 20 Ill. 320; Crittenden *v.* French, 21 Ill. 598.

Indiana.— Franklin L. Ins. Co. *v.* Wallace, 93 Ind. 7.

Louisiana.— Baron *v.* Placide, 7 La. Ann. 229; Clay *v.* Ballard, 9 Rob. 308, 41 Am. Dec. 328; Erwin *v.* Greene, 5 Rob. 70; Wagner *v.* Kenner, 2 Rob. 120.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657.

Missouri.— Johnson County *v.* Wood, 84 Mo. 489; McManus *v.* Fair Shoe, etc., Co., 60 Mo. App. 216.

New York.— Smith *v.* Robson, 148 N. Y. 252, 42 N. E. 677; Russell *v.* Allerton, 108 N. Y. 288, 15 N. E. 391; Lorillard *v.* Hyde, 86 N. Y. 384; Archibald *v.* Thomas, 3 Cow. 284.

North Carolina.— Hunter *v.* Anthony, 53 N. C. 385, 80 Am. Dec. 333.

Ohio.— Kinney *v.* Hamilton County, 8 Ohio Cir. Ct. 433.

Pennsylvania.— Smiley *v.* Gallagher, 164 Pa. St. 498, 30 Atl. 713; Bickford *v.* Cooper, 41 Pa. St. 142.

Texas.— Whitis *v.* Polk, 36 Tex. 602.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682.

West Virginia.— Findley *v.* Armstrong, 23 W. Va. 113.

United States.— U. S. *v.* Central Pac. R. Co., 118 U. S. 235, 6 S. Ct. 1038, 30 L. ed. 173; Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

40. Franklin L. Ins. Co. *v.* Wallace, 93 Ind. 7; Uhler *v.* Farmers' American F. Ins. Co., 4 Leg. Gaz. (Pa.) 354.

41. Larguier *v.* White, 29 La. Ann. 156; Lowber *v.* Le Roy, 2 Sandf. (N. Y.) 202.

the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible.[42] This rule does not apply, however, where the language of the contract leaves no doubt as to the meaning of the parties; but in such a case the contract is to be construed without regard to extraneous facts.[43] Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties at the time of making the contract, and the language used must be construed in reference to such facts.[44]

I. Construction by Parties — 1. In General. Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement them-

42. *Alabama.*— Watson *v.* Kirby, 112 Ala. 436, 20 So. 624; Evington *v.* Smith, 66 Ala. 398; Bryant *v.* Stephens, 58 Ala. 636; Brantley *v.* Southern L. Ins. Co., 53 Ala. 554; Pollard *v.* Maddox, 28 Ala. 321; Strong *v.* Gregory, 19 Ala. 146; Ely *v.* Witherspoon, 2 Ala. 131.

California.— McNeil *v.* Shirley, 33 Cal. 202.

Connecticut.— Brown *v.* Slater, 16 Conn. 192, 41 Am. Dec. 136.

Georgia.— Armistead *v.* McGuire, 46 Ga. 232.

Illinois.— Stettauer *v.* Hamlin, 97 Ill. 312; Thomas *v.* Wiggers, 41 Ill. 470; Robinson *v.* Stow, 39 Ill. 568; Tracy *v.* Chicago, 24 Ill. 500; Goodyear Shoe Machinery Co. *v.* Selz, 51 Ill. App. 390; Lynch *v.* Scroth, 50 Ill. App. 668; Rice *v.* Weber, 48 Ill. App. 573; Adams, etc., Mfg. Co. *v.* Cook, 16 Ill. App. 161.

Indiana.— Reissner *v.* Oxley, 80 Ind. 580.

Iowa.— Corbett *v.* Berryhill, 29 Iowa 157.

Kansas.— Simpson *v.* Kimberlin, 12 Kan. 579; Bell *v.* Rankin, 1 Kan. App. 209, 40 Pac. 1094.

Kentucky.— Montgomery *v.* Firemen's Ins. Co., 16 B. Mon. 427; Porter *v.* Breckenridge, Hard. 21.

Maine.— Chamberlain *v.* Black, 64 Me. 40; Merrill *v.* Gore, 29 Me. 346; Robinson *v.* Fiske, 25 Me. 401.

Maryland.— Roberts *v.* Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; Varnum *v.* Thruston, 17 Md. 470; Haines *v.* Haines, 6 Md. 435.

Michigan.— Holland *v.* Rea, 48 Mich. 218, 12 N. W. 167.

Mississippi.— Pratt *v.* Canton Cotton Co., 51 Miss. 470.

Missouri.—Crawford *v.* Elliott, 78 Mo. 497; Price *v.* Evans, 26 Mo. 30; Dobbins *v.* Edmonds, 18 Mo. App. 307.

New Hampshire.— Nettleton *v.* Billings, 13 N. H. 446.

New Jersey.— Morris Canal, etc., Co. *v.* Matthiesen, 17 N. J. Eq. 385.

New York.—Woodruff *v.* Woodruff, 52 N. Y. 53; Dent *v.* North American Steamship Co., 49 N. Y. 390; Field *v.* Munson, 47 N. Y. 221; Dodge *v.* Gardiner, 31 N. Y. 239; Phelps *v.* Bostwick, 22 Barb. 314; Bellinger *v.* Kitts, 6 Barb. 273; Hasbrook *v.* Paddock, 1 Barb. 635; Stapenhorst *v.* Wolff, 35 N. Y. Super. Ct. 25; Colwell *v.* Foulks, 36 How. Pr. 306; Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458.

North Carolina.— Fowle *v.* Kerchner, 87 N. C. 49.

Pennsylvania.— Lacy *v.* Greene, 84 Pa. St. 514; Williamson *v.* McClure, 37 Pa. St. 402; Miller *v.* Fichthorn, 31 Pa. St. 252; McCullough *v.* Wainwright, 14 Pa. St. 171; Overton *v.* Tracey, 14 Serg. & R. 311; Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669.

Vermont.— Parker *v.* Adams, 47 Vt. 139; Gray *v.* Clark, 11 Vt. 583.

West Virginia.— Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Caperton *v.* Caperton, 36 W. Va. 479, 15 S. E. 257; Titchenell *v.* Jackson, 26 W. Va. 460.

Wisconsin.— Sigerson *v.* Cushing, 14 Wis. 527.

United States.— Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527; Reed *v.* Merchants' Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Moran *v.* Prather, 90 U. S. 492, 23 L. ed. 121; Chesapeake & O. Canal Co. *v.* Hill, 82 U. S. 94, 21 L. ed. 64; Waring *v.* Louisville, etc., R. Co., 19 Fed. 863; The Orient, 16 Fed. 916, 4 Woods 255; The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Hart *v.* Shaw, 11 Fed. Cas. No. 6,155, 1 Cliff. 358; James *v.* Lycoming Ins. Co., 13 Fed. Cas. No. 7,182, 4 Cliff. 272; Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609 [*affirmed* in 85 U. S. 307]; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603 [*affirmed* in 94 U. S. 477, 24 L. ed. 276]; Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598.

See 11 Cent. Dig. tit. "Contracts," § 752.

Admissibility of parol evidence see Evidence.

43. Groot *v.* Story, 44 Vt. 200, holding that an instrument in the words "Due Mr. Harvey Groot two hundred and ninety-five dollars, in part payment for a piano. Said piano to be selected by Mr. Groot," signed and dated, constituted a written contract susceptible of legal construction without extrinsic aid. And see Evidence.

44. Woodruff *v.* Woodruff, 52 N. Y. 53.

selves, are to be looked to by the court, and in some cases may be controlling.[45] Thus where a contract provided that a theater should be operated as "a strictly first-class place of amusement," the court, in order to determine whether there had been a breach of this condition, took as a standard of first-class attractions one

45. *California.*— Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826.

Colorado.— Union Pac. R. Co. *v.* Anderson, 11 Colo. 293, 18 Pac. 24.

Connecticut.— Elting *v.* Sturtevant, 41 Conn. 176; French *v.* Pearce, 8 Conn. 439, 21 Am. Dec. 680.

Florida.— Shouse *v.* Doane, 39 Fla. 95, 21 So. 807; Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745; Webster *v.* Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217, 27 L. R. A. 126.

Illinois.— St. Louis Consol. Coal Co. *v.* Schneider, 163 Ill. 393, 45 N. E. 126; People *v.* Murphy, 119 Ill. 159, 6 N. E. 488; Garrison *v.* Nute, 87 Ill. 215; Western Union R. Co. *v.* Smith, 75 Ill. 496; Becker *v.* Vandegrift, 58 Ill. App. 95; Crown Coal, etc., Co. *v.* Yoch Coal Min. Co., 57 Ill. App. 666; Hammerquist *v.* Swensson, 44 Ill. App. 627; Fougner *v.* Chicago First Nat. Bank, 41 Ill. App. 202; Davis *v.* Sexton, 35 Ill. App. 407; Home Nat. Bank *v.* Waterman, 30 Ill. App. 535.

Indiana.— Childers *v.* Jeffersonville First Nat. Bank, 147 Ind. 430, 46 N. E. 825; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Reissner *v.* Oxney, 80 Ind. 580; Heath *v.* West, 68 Ind. 548; Conwell *v.* Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; Merchants', etc., Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341; Irwin *v.* Smith, Wils. 544.

Louisiana.— Faries *v.* Ranger, 35 La. Ann. 102; Commercial Bank *v.* New Orleans, 17 La. Ann. 190; Williams *v.* McHatton, 16 La. Ann. 196; Casey *v.* Pennoyer, 6 La. Ann. 776; D'Aquin *v.* Barbour, 4 La. Ann. 441; Farrar *v.* Rowly, 2 La. Ann. 475; Marcotte *v.* Coco, 12 Rob. 167; Wells *v.* Compton, 3 Rob. 171; Millikin *v.* Minnis, 12 La. 539.

Maryland.— Mitchell *v.* Wedderburn, 68 Md. 139, 11 Atl. 760; Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360; Varnum *v.* Thruston, 17 Md. 470.

Massachusetts.— Jennings *v.* Whitehead, etc., Mach. Co., 138 Mass. 594.

Minnesota.— Hill *v.* Duluth City, 57 Minn. 231, 58 N. W. 992; Staples *v.* Edwards, etc., Lumber Co., 56 Minn. 16, 57 N. W. 220; O'Dea *v.* Winona, 41 Minn. 424, 43 N. W. 97; Luverne First Nat. Bank *v.* Jagger, 41 Minn. 308, 43 N. W. 70; Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584.

Missouri.— St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121; Rose *v.* Eclipse Carbonating Co., 60 Mo. App. 28; Reisenleiter *v.* Evangelische Lutherische, etc., 29 Mo. App. 291; Mathews *v.* Danahy, 26 Mo. App. 660; Krey *v.* Hussmann, 21 Mo. App. 343.

Nebraska.— Davis *v.* Ravena Creamery Co., 48 Nebr. 471, 67 N. W. 436; Paxton *v.* Smith, 41 Nebr. 56, 59 N. W. 690.

New Jersey.— Camden, etc., R. Co. *v.* Lippincott, 45 N. J. L. 405; Conover *v.* Wardell, 20 N. J. Eq. 266.

New York.—Glacius *v.* Black, 67 N. Y. 563; Finlayson *v.* Wiman, 84 Hun 357, 32 N. Y. Suppl. 347, 65 N. Y. St. 545; Stokes *v.* Recknagel, 38 N. Y. Super. Ct. 368; Reading *v.* Gray, 37 N. Y. Super. Ct. 79; Levy *v.* Kottman, 11 Misc. 372, 32 N. Y. Suppl. 241, 65 N. Y. St. 422 [*reversing* 8 Misc. 504, 28 N. Y. Suppl. 1150, 59 N. Y. St. 403]; Lyon *v.* Motley, 9 Misc. 500, 30 N. Y. Suppl. 218, 61 N. Y. St. 115; New York *v.* New York Refrigerating Constr. Co., 8 Misc. 61, 28 N. Y. Suppl. 614, 59 N. Y. St. 295; Hassett *v.* McArdle, 7 Misc. 710, 28 N. Y. Suppl. 48, 58 N. Y. St. 336 [*affirming* 6 Misc. 622, 26 N. Y. Suppl. 1135, 56 N. Y. St. 902]; Tanenbaum *v.* Feist, 6 Misc. 368, 26 N. Y. Suppl. 748, 56 N. Y. St. 340; Campbell *v.* Jimenes, 3 Misc. 516, 23 N. Y. Suppl. 333, 52 N. Y. St. 495; Whittemore *v.* Sloat, 9 How. Pr. 317.

Ohio.— Kinney *v.* Hamilton County, 8 Ohio Cir. Ct. 433; Cincinnati *v.* Cinoinnati Gas Light, etc., Co., 8 Ohio Cir. Ct. 429 [*affirmed* in 53 Ohio St. 278, 41 N. E. 239]; Proctor *v.* Snodgrass, 5 Ohio Cir. Ct. 547.

Pennsylvania.— People's Natural Gas Co. *v.* Braddock Wire Co., 155 Pa. St. 22, 25 Atl. 749; Coleman *v.* Grubb, 23 Pa. St. 393.

Texas.— Rogers *v.* Brodnax, 27 Tex. 238; Cleburne Water, etc., Co. *v.* Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733.

Vermont.— White *v.* Amsden, 67 Vt. 1, 30 Atl. 972; Tullar *v.* Baxter, 59 Vt. 467, 8 Atl. 493; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

Virginia.— Clark *v.* Nunn, 25 Gratt. 287; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676.

Wisconsin.— Hosmer *v.* McDonald, 80 Wis. 54, 49 N. W. 112; Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1.

United States.— District of Columbia *v.* Gallaher, 124 U. S. 505, 8 S. Ct. 585, 31 L. ed. 526; Topliff *v.* Topliff, 122 U. S. 121, 7 S. Ct. 1057, 30 L. ed. 1110; Reed *v.* Baltimore Merchants Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Paige *v.* Banks, 13 Wall. 608, 20 L. ed. 709, Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. 367, 19 L. ed. 948; Chicago *v.* Sheldon, 9 Wall. 50, 19 L. ed. 594; Cavazos *v.* Trevino, 6 Wall. 773, 18 L. ed. 813; Rockefeller *v.* Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633; Leavitt *v.* Windsor Land, etc., Co., 54 Fed. 439, 4 C. C. A. 425; Davis *v.* Shafer, 50 Fed. 764; New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 34 Fed. 254; Foster *v.* Goldschmidt, 21 Fed. 70; Nickerson *v.* Atchison, etc., R. Co., 17 Fed. 408, 3 McCrary 455; Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603 [*affirmed* in 94 U. S. 477, 24 L. ed. 276]; Gibbons *v.* U. S., 2 Ct. Cl. 353.

which the parties themselves thought first class.[46] So also the fact that one who had contracted to construct the road-bed of a railroad between two towns had performed the work within the corporate limits of such towns, without asking for terms or for a contract as to that part of the work, was held evidence that he understood the work within the corporate limits of the towns to be embraced in his original contract.[47] And in an action on a note, evidence that defendants, on receiving from plaintiff a letter stating that he understood that a certain deed was to be delivered to them, not at the making, but on the payment of the note, remained silent, was held to raise a presumption that they acquiesced in such construction of the contract.[48]

2. WHERE MEANING NOT UNCERTAIN. The rule above stated does not apply, however, where the meaning of the terms used is clear. In such a case the fact that the parties have themselves, by their subsequent conduct or otherwise, placed an erroneous construction upon them will not prevent the court from giving the true construction.[49]

3. OPINION NOT CARRIED INTO EFFECT. The opinion of the parties as to the meaning of the contract not carried into effect by them is irrelevant.[50]

J. Construction Against Party Using Words. It is a well-settled rule of construction that words will be construed most strongly against the party who used them;[51] the reason for the rule being that a man is responsible for ambigui-

See 11 Cent. Dig. tit. "Contracts," § 753; and, generally, EVIDENCE.

46. Leavitt *v.* Windsor Land, etc., Co., 54 Fed. 439, 4 C. C. A. 425.

47. Western Union R. Co. *v.* Smith, 75 Ill. 496.

48. Bourland *v.* Gibson, 7 Ill. App. 227.

Other illustrations.— In O'Dea *v.* Winona, 41 Minn. 424, 43 N. W. 97, grading and other work was to be done under the direction of the city engineer, and he fixed the grade line on the ground in conformity with the new line alleged by plaintiff to have been laid down on the profile; and plaintiff in good faith filled the street up to such grade line under the constant supervision of the engineer, who finally approved the work and certified that it had been performed in accordance with the contract. It was held that there was a practical construction of the contract, which the court could not ignore. In Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1, where a contract of lease between two railroad companies required the lessee to pay eight per cent on the whole cost of the leased road, it was held that, although it would seem from the language of the contract that the sum on which the eight per cent should be calculated was the actual outlay of money directly made for the construction of the leased road, yet the meaning put on the contract by the parties themselves by the payment of rent and adjustment of accounts, that the basis of the costs should be measured by the capital stock paid in, with interest on the expenditures from the time they were made in pursuance of the contract of lease, would govern in determining the true meaning of the contract in that respect. And in Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676, where a person had contracted with a railroad company to build a bridge on its road and received the monthly estimates of the amounts to which he was entitled, founded on a particular construction of his contract, without making any objection, he was held to have acquiesced in that construction and to be bound by it.

49. *Arkansas.*— Hershey *v.* Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

Illinois.— Davis *v.* Sexton, 35 Ill. App. 407.

Indiana.— Morris *v.* Thomas, 57 Ind. 316.

Maine.— Bishop *v.* White, 68 Me. 104.

Maryland.— Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360.

Minnesota.— St. Paul, etc., R. Co. *v.* Blackmar, 44 Minn. 514, 47 N. W. 172.

New Jersey.—Lehigh Valley R. Co. *v.* Stewart, 37 N. J. L. 53; Rogers *v.* Colt, 21 N. J. L. 704.

New York.— Giles *v.* Comstock, 4 N. Y. 270, 53 Am. Dec. 374; Lowber *v.* Le Roy, 2 Sandf. 202.

Pennsylvania.— Johnston R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151; Hepburn *v.* Snyder, 3 Pa. St. 72.

Rhode Island.— Dike *v.* Green, 4 R. I. 285.

Virginia.— Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

United States.—Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. 367, 19 L. ed. 948; Davis *v.* Shafer, 50 Fed. 764.

See 11 Cent. Dig. tit. "Contracts," § 753; and, generally, EVIDENCE.

Compare Reissner *v.* Oxley, 80 Ind. 580, holding that it is the right of the parties to a contract to put an interpretation upon the same, even to the extent of doing away practically with the ordinary and plain meaning of terms.

The subsequent declarations of one of the parties to a contract are inadmissible to change or modify it. McDermott *v.* Centennial Mut. L. Assoc., 24 Mo. App. 73.

50. Potter *v.* Phenix Ins. Co., 63 Fed. 382; Shaw *v.* Andrews, 62 Fed. 460.

51. *Alabama.*—Seay *v.* McCormick, 68 Ala. 549; Livingston *v.* Arrington, 28 Ala. 424;

ties in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.[52] But this rule, it is said, is the last one which the courts will apply, and then only if a satisfactory result cannot be reached by the other rules of construction.[53] The rule is never applied to words which are the common language of both parties;[54] and it will not be followed where it will cause a forfeiture.[55]

K. Law and Fact. The question of the meaning of a written contract is ordinarily one of law for the court and not one of fact for a jury.[56] But where

Evans *v.* Sanders, 8 Port. 497, 33 Am. Dec. 297.

California.— Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 151.

Georgia.— Hill *v.* John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445.

Illinois.— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Richardson *v.* People, 85 Ill. 495; Massie *v.* Belford, 68 Ill. 290; Wells *v.* Carpenter, 65 Ill. 447; Commercial Ins. Co. *v.* Robinson, 64 Ill. 235, 16 Am. Rep. 557; McCarty *v.* Howell, 24 Ill. 341; Walker *v.* Kimball, 22 Ill. 537; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Norton *v.* Brophy, 56 Ill. App. 661.

Indiana.— Falley *v.* Giles, 29 Ind. 114.

Louisiana.— Soye *v.* Merchants' Ins. Co., 6 La. Ann. 761; Hoover *v.* Miller, 6 La. Ann. 204; Crowley *v.* Concordia, 3 La. Ann. 224; Union Bank *v.* Guice, 2 La. Ann. 249; Wells *v.* Compton, 3 Rob. 171.

Maine.— Pike *v.* Munroe, 36 Me. 309, 58 Am. Dec. 751.

Maryland.— Varnum *v.* Thruston, 17 Md. 470.

Massachusetts.— Barney *v.* Newcomb, 9 Cush. 46.

New York.— Duryea *v.* New York, 62 N. Y. 592; Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; Gifford *v.* Syracuse First Presb. Soc., 56 Barb. 114; Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500.

Pennsylvania.— Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Rung *v.* Shoneberger, 2 Watts 23, 26 Am. Dec. 95.

Rhode Island.— Waterman *v.* Andrews, 14 R. I. 589; De Blois *v.* Earle, 7 R. I. 26.

Vermont.— Thrall *v.* Newell, 19 Vt. 202, 47 Am. Dec. 682, as to which see *supra*, VIII, F, 1, note 35.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Hewitt, 55 Wis. 96, 12 N. W. 382, 42 Am. Rep. 701.

United States.— Phœnix Ins. Co. *v.* Slaughter, 12 Wall. 404, 20 L. ed. 444; Noonan *v.* Bradley, 9 Wall. 394, 19 L. ed. 757; Turner *v.* Meridan F. Ins. Co., 16 Fed. 454; Tho Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Otis *v.* U. S., 20 Ct. Cl. 315; Gantz *v.* Dist. of Columbia, 18 Ct. Cl. 569.

England.— Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917.

See 11 Cent. Dig. tit. "Contracts," § 736.

Construction of deeds see DEEDS.

52. Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917.

53. Falley *v.* Giles, 29 Ind. 114; Johnson County *v.* Wood, 84 Mo. 489; Flagg *v.* Eames, 40 Vt. 16, 94 Am. Dec. 363; Adams *v.* Warner, 23 Vt. 395.

54. Beckwith *v.* Howard, 6 R. I. 1.

55. Chicago, etc., R. Co. *v.* Aurora, 99 Ill. 205; Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; Bennehan *v.* Webb, 28 N. C. 57; Butler *v.* Wigge, 1 Saund. 65.

56. *Alabama.*— Barnhill *v.* Howard, 104 Ala. 412, 16 So. 1; Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408; Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52; Kidd *v.* Cromwell, 17 Ala. 648; Holman *v.* Crane, 16 Ala. 570.

Arkansas.— Estes *v.* Boothe, 20 Ark. 583.

Connecticut.— Auffmordt *v.* Stevens, 46 Conn. 411; Thompson School Dist. No. 8 *v.* Lynch, 33 Conn. 330; Jennings *v.* Sherwood, 8 Conn. 122.

Illinois.— Graham *v.* Sadlier, 165 Ill. 95, 46 N. E. 221; Howe Sewing Mach. Co. *v.* Layman, 88 Ill. 39; Heaton *v.* Kemper, 3 Ill. 367; Ehrler *v.* Worthen, 47 Ill. App. 550; Ramming *v.* Caldwell, 43 Ill. App. 175; Spencer *v.* Dougherty, 23 Ill. App. 399; Carpenter *v.* Burkhardt, 17 Ill. App. 180; Adams, etc., Mfg. Co. *v.* Cook, 16 Ill. App. 161; Cook County *v.* Sexton, 16 Ill. App. 93.

Indiana.— Symmes *v.* Brown, 13 Ind. 318.

Iowa.— Hughbanks *v.* Boston Invest. Co., 92 Iowa 267, 60 N. W. 640; Chandler *v.* Knott, 86 Iowa 113, 53 N. W. 88; Andrews *v.* Tedford, 37 Iowa 314; Rohrabacher *v.* Ware, 37 Iowa 85.

Kansas.— Cosper *v.* Nesbit, 45 Kan. 457, 25 Pac. 866; Bell *v.* Keepers, 37 Kan. 64, 14 Pac. 542; Warner *v.* Thompson, 35 Kan. 27, 10 Pac. 110.

Kentucky.— Thomas *v.* Thomas, 15 B. Mon. 178; Williams *v.* Hay, 10 Ky. L. Rep. 319.

Maine.— Guptill *v.* Damon, 42 Me. 271; Woodman *v.* Chesley, 39 Me. 45.

Maryland.—New York, etc., R. Co. *v.* Bates, 68 Md. 184, 11 Atl. 705; Whiteford *v.* Munroe, 17 Md. 135; Emery *v.* Owings, 6 Gill 191.

Massachusetts.—Fowle *v.* Bigelow, 10 Mass. 379.

Michigan.— Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522; Wagner *v.* Egleston, 49 Mich. 218, 13 N. W. 522; McKenzie *v.* Sykes, 47 Mich. 294, 11 N. W. 164; Dudgeon *v.* Haggart, 17 Mich. 273.

the construction of a written contract depends upon extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court.[57] Where the terms of an oral contract are shown without any conflict of evidence, its interpretation, as in the case of written contracts, is a question of law for the court.[58] But where the evidence as to the terms of an oral contract is conflicting, or the meaning doubtful, it is for the jury to ascertain the intention of the parties and determine what the contract was under proper instructions.[59] If the intention of the parties to

Minnesota.— Dodge *v.* Rogers, 9 Minn. 223.

Missouri.— Belt *v.* Goode, 31 Mo. 128; Judge *v.* Leclaire, 31 Mo. 127; Caldwell *v.* Dickson, 26 Mo. 60; State *v.* Donnelly, 9 Mo. App. 519; Vastine *v.* Wyman, 5 Mo. App. 598.

Nebraska.— Simms *v.* Summers, 39 Nebr. 781, 58 N. W. 431.

New Hampshire.— Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.— Smalley *v.* Hendrickson, 29 N. J. L. 371; Rogers *v.* Colt, 21 N. J. L. 704; Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659.

North Carolina.— Millhiser *v.* Pleasants, 118 N. C. 237, 23 S. E. 969; Lindsay *v.* Hamburg Bremen Ins. Co., 115 N. C. 212, 20 S. E. 370; Sellars *v.* Johnson, 65 N. C. 104; Swepson *v.* Summey, 64 N. C. 293; Festerman *v.* Parker, 32 N. C. 474; Brown *v.* Hatton, 31 N. C. 319.

Ohio.— Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659; Sinton *v.* Butler, 40 Ohio St. 158.

Pennsylvania.— Elliott *v.* Wanamaker, 155 Pa. St. 67, 25 Atl. 826; Fidelity Title, etc., Co. *v.* People's Natural Gas Co., 150 Pa. St. 8, 24 Atl. 339; Harris *v.* Kelly, (1888) 13 Atl. 523; Folsom *v.* Cook, 115 Pa. St. 539, 9 Atl. 93; Stokes *v.* Burrell, 3 Grant 241; Roth *v.* Miller, 15 Serg. & R. 100; Evans *v.* Negley, 13 Serg. & R. 218; Denison *v.* Wertz, 7 Serg. & R. 372; Moore *v.* Miller, 4 Serg. & R. 279; Welsh *v.* Dusar, 3 Binn. 329.

South Carolina.— Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19; De Camp *v.* Carpin, 19 S. C. 121; Russell *v.* Arthur, 17 S. C. 477; Mowry *v.* Stogner, 3 S. C. 251.

Tennessee.—Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254; Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311.

Texas.— Linch *v.* Paris Lumber, etc., Co., (Sup. 1890) 14 S. W. 701; Cook *v.* Dennis, 61 Tex. 246; Shepherd *v.* White, 10 Tex. 72; Gulf, etc., R. Co. *v.* Malone (Civ. App. 1894) 25 S. W. 1077.

Vermont.— Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465, 30 Atl. 28; Wason *v.* Rowe, 16 Vt. 525.

Wisconsin.— Cohn *v.* Stewart, 41 Wis. 527; Ranny *v.* Higby, 5 Wis. 62.

United States.— Bell *v.* Bruen, 1 How. 169, 11 L. ed. 89.

See 11 Cent. Dig. tit. "Contracts," § 767 *et seq.*; and *infra*, XII, L.

57. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408.

Arkansas.— Haney *v.* Caldwell, 35 Ark. 156.

Colorado.— Halsey *v.* Darling, 13 Colo. 1, 21 Pac. 913.

Connecticut.— School Dist. No. 8 *v.* Lynch, 33 Conn. 330; Jennings *v.* Sherwood, 8 Conn. 122.

Indiana.— Reissner *v.* Oxley, 80 Ind. 580.

Massachusetts.— Nashua Iron, etc., Foundry Co. *v.* Chandler Adjustable Chair, etc., Co., 166 Mass. 419, 44 N. E. 348; Bascom *v.* Smith, 164 Mass. 61, 41 N. E. 130; Fowle *v.* Bigelow, 10 Mass. 379.

Nebraska.— Coquillard *v.* Hovey, 23 Nebr. 622, 37 N. W. 479, 8 Am. St. Rep. 134.

New York.— Spring First Nat. Bank *v.* Dana, 79 N. Y. 108; Noonan *v.* Strahan, 53 N. Y. Super. Ct. 419; Campbell *v.* Jimenes, 3 Misc. 516, 23 N. Y. Suppl. 333, 52 N. Y. St. 495.

North Carolina.— Simpson *v.* Pegram, 112 N. C. 541, 17 S. E. 430.

Oregon.— Winter *v.* Norton, 1 Oreg. 42.

Pennsylvania.— Edelman *v.* Yeakel, 27 Pa. St. 26; McCullough *v.* Wainright, 14 Pa. St. 171; Bilborough *v.* Coulter, 5 Phila. 12.

Texas.— Taylor *v.* McNutt, 58 Tex. 71; Taliaferro *v.* Cundiff, 33 Tex. 415.

Wisconsin.— Manistee Iron-Works Co. *v.* Shores Lumber Co., 92 Wis. 21, 65 N. W. 863; Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.

United States.— Etting *v.* U. S. Bank, 11 Wheat. 59, 6 L. ed. 419.

See 11 Cent. Dig. tit. "Contracts," § 769; and *infra*, XII, L.

58. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451; Willard *v.* A. Siegel Gas-Fixture Co., 47 Mo. App. 1; Spragins *v.* White, 103 N. C. 449, 13 S. E. 171; Rhodes *v.* Chesson, 44 N. C. 336; Chicago Cheese Co. *v.* Fogg, 53 Fed. 72.

59. *Alabama.*— Swanner *v.* Swanner, 50 Ala. 66.

Colorado.— Halsey *v.* Darling, 13 Colo. 1, 21 Pac. 913.

Connecticut.— Jennings *v.* Sherwood, 8 Conn. 122.

Iowa.— Kingsbury *v.* Buchanan, 11 Iowa 387.

Maine.— Brown *v.* Orland, 36 Me. 376; Herbert *v.* Ford, 33 Me. 90.

Maryland.— Columbian Iron Works, etc., Co. *v.* Douglas, 84 Md. 44, 34 Atl. 1118, 57 Am. St. Rep. 362, 33 L. R. A. 103.

Massachusetts.— Gassett *v.* Glazier, 165 Mass. 473, 43 N. E. 193.

Michigan.— Beebe *v.* Koshnic, 55 Mich. 604, 22 N. W. 59; Wagner *v.* Egleston, 49 Mich. 218, 13 N. W. 522; McKenzie *v.* Sykes, 47 Mich. 294, 11 N. W. 164.

an oral contract is doubtful, although there may be no conflict in the evidence, the jury are to determine what the contract was.[60]

IX. DISCHARGE.

A. Modes of Discharge. A contract may be discharged in various ways, namely, (1) by agreement, (2) by performance, (3) by impossibility of performance, (4) by operation of law, and (5) by breach.[61]

B. Discharge by Agreement — 1. By New Agreement — a. In General. As a contract is the result of agreement, so an agreement may put an end to a contract. Therefore a contract may be discharged at any time before the performance is due, by a new agreement with the effect of altering the terms of the original agreement or of rescinding it altogether; and a claim under the original contract may then be met by the new agreement, so far as the latter operates to alter or rescind the former.[62] A proposition for a mutual rescission of a contract assumes its validity, and the proposition being rejected the parties stand where they did before.[63]

b. Sufficiency of Agreement and Consideration. The new agreement must have all the requisites of a valid and enforceable agreement or it will not be binding.[64] Therefore a consideration is essential, unless there is an instrument under seal dispensing with the necessity for a consideration.[65] While a contract

Minnesota.— Egan *v.* Faendel, 19 Minn. 231.

Missouri.— Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474; Watson *v.* Stromberg, 46 Mo. App. 630; Dennis *v.* Crooks, 23 Mo. App. 532.

Nebraska.— Monteith *v.* Bax, 4 Nebr. 166.

New Hampshire.— Folsom *v.* Plumer, 43 N. H. 469.

New York.— Patten *v.* Pancoast, 109 N. Y. 625, 15 N. E. 893, 14 N. Y. St. 75; Bloom *v.* P. Cox Shoe Mfg. Co., 83 Hun 611, 31 N. Y. Suppl. 517, 64 N. Y. St. 132.

North Carolina.— Pendleton *v.* Jones, 82 N. C. 249; Massey *v.* Belisle, 24 N. C. 170; Islay *v.* Stewart, 20 N. C. 297.

Pennsylvania.— Muckle *v.* Moore, 134 Pa. St. 608, 26 Wkly. Notes Cas. 333, 19 Atl. 801; Edwards *v.* Goldsmith, 16 Pa. St. 43; Warnick *v.* Grosholz, 3 Grant 234; Harper *v.* Kean, 11 Serg. & R. 280.

South Carolina.— Winship *v.* Buzzard, 9 Rich. 103.

Wisconsin.— Holm *v.* Colman, 89 Wis. 233, 61 N. W. 767.

United States.— Zimmerman *v.* Girardi, 74 Fed. 686, 21 C. C. A. 1; Dawes *v.* Peebles, 6 Fed. 856.

See 11 Cent. Dig. tit. "Contracts," § 770; and *infra*, XII, L.

60. Monteith *v.* Bax, 4 Nebr. 166; and other cases in the note preceding.

61. See *infra*, IX, B, *et seq.*

62. *Arkansas.*— Byrd *v.* Bertrand, 7 Ark. 321.

Indiana.— Mills *v.* Riley, 7 Ind. 137.

Iowa.— Mather *v.* Butler County, 28 Iowa 253.

Massachusetts.— Dunham *v.* Barnes, 9 Allen 352; Johnson *v.* Reed, 9 Mass. 78, 6 Am. Dec. 36.

Michigan.— Smith *v.* Kelley, 115 Mich. 411, 73 N. W. 385; Blagborne *v.* Hunger, 101 Mich. 375, 59 N. W. 657; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 255, 5 N. W. 303; Seaman *v.* O'Hara, 29 Mich. 66.

Mississippi.— Baum *v.* Covert, 62 Miss. 113.

New York.— Hart *v.* Lauman, 29 Barb. 410; Hadden *v.* Dimick, 13 Abb. Pr. N. S. 135; Lawrence *v.* Dale, 17 Johns. 437 [*affirming* 3 Johns. Ch. 23].

Ohio.— Reed *v.* McGrew, 5 Ohio 375.

South Carolina.— Smith *v.* Tunno, 1 McCord Eq. 443, 16 Am. Dec. 617.

Texas.— Foley *v.* Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442.

63. Gillespie *v.* Battle, 15 Ala. 276.

64. *Georgia.*—Stix *v.* Roulston, 88 Ga. 743, 15 S. E. 826.

New York.— Murray *v.* Harway, 56 N. Y. 337.

Pennsylvania.— Lauer *v.* Lee, 42 Pa. St. 165.

Rhode Island.— Wood *v.* Moriarty, 16 R. I. 201, 14 Atl. 855.

Virginia.— Smith *v.* Watson, 82 Va. 712, 1 S. E. 96.

Wisconsin.— O'Donnell *v.* Brand, 85 Wis. 97, 55 N. W. 154.

United States.—Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 29 L. ed. 341.

65. *Connecticut.*— Raymond *v.* Smith, 5 Conn. 555.

Georgia.— Mills *v.* Mercer, Dudley 158.

Indiana.— Hyler *v.* Humble, 100 Ind. 38.

Iowa.— Tomlinson *v.* Smith, 2 Iowa 39; Jones *v.* Alley, 4 Greene 181.

Maine.— Haynes *v.* Fuller, 40 Me. 162.

Minnesota.— Little *v.* Rees, 34 Minn. 277, 26 N. W. 7.

New Jersey.— Stryker *v.* Vanderbilt, 27 N. J. L. 68.

New York.— Babcock *v.* Kuntzsch, 85 Hun 615, 32 N. Y. Suppl. 663, 66 N. Y. St. 47; Pittsburgh Bessemer Steel Co. *v.* Buckley, 51

remains executory on both sides, an agreement to annul on one side is a consideration for the agreement to annul on the other, and *vice versa*.[66] On the other hand if the contract has been executed on one side, an agreement without any new consideration that it shall not be binding is without consideration and void.[67] In England it is said that bills of exchange and promissory notes are an exception to this rule, and that the rights of the holder may be waived and discharged without any consideration moving to him for such act.[68] The rule in this country is that such instruments in this respect stand on the same footing as any other simple contract, but that if the instrument itself is destroyed or surrendered for the purpose of discharging the debt, it will so operate without any consideration, for here there is a valid executed gift of the instrument; such instruments being regarded as the contract and not merely the evidence of the contract.[69]

N. Y. Super. Ct. 342; Wood *v.* Edwards, 19 Johns. 205.

Ohio.— Thurston *v.* Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328; Marshall *v.* Ames, 11 Ohio Cir. Ct. 363.

South Dakota.— Barnard, etc., Mfg. Co. *v.* Galloway, 5 S. D. 205, 58 N. W. 565.

Texas.— Gibson *v.* Irby, 17 Tex. 173.

See 11 Cent. Dig. tit. "Contracts," § 1119 *et seq.*

66. *Alabama.*—Cooper *v.* McIlwain, 58 Ala. 296; Thomason *v.* Dill, 30 Ala. 444.

Arkansas.— Byrne *v.* Berthand, 7 Ark. 321.

Georgia.— Crutchfield *v.* Dailey, 98 Ga. 462, 25 S. E. 526.

Illinois.— Farrer *v.* Toliver, 88 Ill. 408. And see Biederman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876.

Iowa.— Leach *v.* Keach, 7 Iowa 232; Cox *v.* Carrell, 6 Iowa 350. And see Maxwell *v.* Graves, 59 Iowa 613, 13 N. W. 758.

Kentucky.— Crawford *v.* Colyer, 12 Ky. L. Rep. 990.

Massachusetts.— Hobbs *v.* Columbus Falls Brick Co., 157 Mass. 109, 31 N. E. 756; Alden *v.* Thurber, 149 Mass. 271, 21 N. E. 312; Rollins *v.* Marsh, 128 Mass. 116; Cutter *v.* Cochrane, 116 Mass. 408; Johnston *v.* Reed, 9 Mass. 78, 4 Am. Dec. 36. And see Holmes *v.* Doane, 9 Cush. 135.

Michigan.— Blagborne *v.* Hunger, 101 Mich. 375, 59 N. W. 657; Perkins *v.* Hoyt, 35 Mich. 506. And see McKay *v.* Evans, 48 Mich. 597, 12 N. W. 86.

Missouri.—Chouteau *v.* Jupiter Iron Works, 83 Mo. 73; Fine *v.* Rogers, 15 Mo. 315.

New Hampshire.— Miles *v.* Roberts, 34 N. H. 245.

New Jersey.— Stryker *v.* Vanderbilt, 25 N. J. L. 482.

New York.— McCreery *v.* Day, 119 N. Y. 1, 23 N. E. 198, 28 N. Y. St. 597, 16 Am. St. Rep. 793, 6 L. R. A. 503; Bacon *v.* Proctor, 13 Misc. 1, 33 N. Y. Suppl. 995, 67 N. Y. St. 845; French *v.* Wallack, 12 N. Y. St. 159; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Fleming *v.* Gilbert, 3 Johns. 528.

North Carolina.— Brown *v.* Catawba River Lumber Co., 117 N. C. 287, 23 S. E. 253.

Pennsylvania.— Flegal *v.* Hoover, 156 Pa. St. 276, 27 Atl. 162, 33 Wkly. Notes Cas. 29; McNish *v.* Reynolds, 95 Pa. St. 483.

Rhode Island.— Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

South Carolina.— Smith *v.* Tunno, 1 McCord Eq. 443, 16 Am. Dec. 617.

Vermont.— Thrall *v.* Mead, 40 Vt. 540; Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363. See Hill *v.* Smith, 34 Vt. 535.

Wisconsin.— Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488. See Hathaway *v.* Lynn, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

See 11 Cent. Dig. tit. "Contracts," §§ 1119, 1150.

67. *Alabama.*— Manes *v.* Henry, 96 Ala. 454, 11 So. 410.

Illinois.— Davidson *v.* Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367.

Michigan.— Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

New Jersey.— Landon *v.* Hutton, 50 N. J. Eq. 500, 25 Atl. 953. See also to the same effect Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564.

New York.— Crawford *v.* Millspaugh, 13 Johns. 87.

Pennsylvania.— Saeger *v.* Runk, 148 Pa. St. 77, 23 Atl. 1006; Kidder *v.* Kidder, 33 Pa. St. 268.

Rhode Island.— Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

England.— King *v.* Gillett, 10 L. J. Exch. 164, 7 M. & W. 55.

See RELEASE.

68. Foster *v.* Dawber, 6 Exch. 839, 20 L. J. Exch. 385.

69. *Massachusetts.*— Slade *v.* Mutrie, 156 Mass. 19, 30 N. E. 168; Bragg *v.* Danielson, 141 Mass. 195, 4 N. E. 622; Smith *v.* Bartholomew, 1 Metc. 276, 25 Am. Dec. 365; Shaw *v.* Pratt, 22 Pick. 305; Bender *v.* Sampson, 11 Mass. 42.

Minnesota.— Stewart *v.* Hidden, 13 Minn. 43.

New Jersey.— Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265.

New York.— Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, 35 N. Y. St. 106, 11 L. R. A. 710; Larkin *v.* Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Seymour *v.* Minturn, 17 Johns. 169, 8 Am. Dec. 380; Crawford *v.* Millspaugh, 13 Johns. 87.

North Carolina.—Paxton *v.* Wood, 77 N. C. 11.

c. Substituted Agreement — (I) *In General.* The discharge may take the form either of a total obliteration of all contractual relations between the parties in regard to the subject-matter of the contract,[70] or it may be effected by the substitution of a new agreement in place of the old one. In such case the new agreement takes the place of the old[71] and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged; in other words a contract may be rescinded in part and stand as to the residue.[72] Thus the period for the performance of a written contract or the payment of money may be enlarged by agreement, and an action in the contract cannot be sustained until the expiration of the new time.[73] An agreement in writing to deliver an article at a particular place may be controlled and modified by a subsequent agreement to deliver it at a different place.[74] And a provision in a contract against extra work, except as agreed to in writing, may be rescinded by the parties, who may agree to alterations by parol.[75]

(II) *Effect as to Third Parties.* The making of a new contract between the parties to an old one does not affect the rights of third persons which have accrued thereunder.[76] Executory contracts may be rescinded by the parties to them only where they continue interested until the agreement to rescind is made.[77] Where a promise is made for the benefit of a stranger to the contract, it may be rescinded by the parties thereto before it is accepted by the stranger.[78]

d. Novation. A contract may also be discharged by the acceptance by the creditor of a new debtor in place of the old one, where the original parties and the new party are all parties to the agreement. This is called a novation.[79]

e. Implied Rescission — (I) *Inconsistent Subsequent Agreement.* One written contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter. If agreements be made between the same parties concerning the same matter, and the terms of the later are inconsistent with those of the former so that they cannot subsist together, the later will be construed to discharge the former.[80] But

Pennsylvania.— Albert *v.* Ziegler, 29 Pa. St. 50; Campbell's Estate, 7 Pa. St. 100, 47 Am. Dec. 503.

Vermont.— Ellsworth *v.* Fogg, 35 Vt. 355.

See Commercial Paper, 7 Cyc. 1048.

70. See Compromise and Settlement; Release.

71. *Illinois.*— Stow *v.* Russell, 36 Ill. 18.

Massachusetts.— Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122.

Missouri.— Lanitz *v.* King, 93 Mo. 513, 6 S. W. 263.

New York.— McCreery *v.* Day, 119 N. Y. 1, 23 N. E. 198, 28 N. Y. St. 597, 16 Am. St. Rep. 793, 6 L. R. A. 503.

North Carolina.— Brown *v.* Catawba River Lumber Co., 117 N. C. 287, 23 S. E. 253.

Pennsylvania.— McCauly *v.* Keeler, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. Rep. 758.

72. Borum *v.* Garland, 9 Ala. 452.

73. *Alabama.*— Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118.

Illinois.— Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40.

Iowa.— Chandler *v.* Knott, 86 Iowa 113, 53 N. W. 88; Cox *v.* Carrell, 6 Iowa 350.

Maryland.— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

New Jersey.— Stryker *v.* Vanderbilt, 25 N. J. L. 482.

New York.— Stewart *v.* Keteltas, 36 N. Y. 388; Clark *v.* Dales, 20 Barb. 42; Schmidt *v.* Couperthwait, 66 How. Pr. 477; Meehan *v.* Williams, 36 How. Pr. 73; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Fleming *v.* Gilbert, 3 Johns. 528.

Pennsylvania.— Green *v.* Paul, 155 Pa. St. 126, 25 Atl. 867; Huckestein *v.* Kelly, 152 Pa. St. 631, 25 Atl. 747; McNish *v.* Reynolds, 95 Pa. St. 483.

Vermont.— Thrall *v.* Mead, 40 Vt. 540; Lane *v.* Sprague, 36 Vt. 289.

United States.— Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263.

England.— Thornhill *v.* Neats, 8 C. B. N. S. 831, 2 L. T. Rep. N. S. 539, 98 E. C. L. 831.

See Commercial Paper, 7 Cyc. 875 *et seq.*

74. Langford *v.* Cummings, 4 Ala. 46; Miles *v.* Roberts, 34 N. H. 245.

75. McFadden *v.* O'Donnell, 18 Cal. 160.

76. Sargeant *v.* Daunoy, 14 La. 43, 33 Am. Dec. 573.

77. Johnson *v.* Reed, 9 Mass. 78, 6 Am. Dec. 36.

78. Thompson *v.* Parker, 83 Ind. 96; Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671.

79. See Novation.

80. *Alabama.*— Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118.

California.— Green *v.* Wells, 2 Cal. 584.

Illinois.— Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Harrison *v.* Polar Star Lodge, 116 Ill. 279, 5 N. E. 543; Farrar *v.* Toliver, 88 Ill. 408; Bacon *v.* Cobb, 45 Ill. 47; Stow *v.* Russell, 36 Ill. 18.

Maine.— Paul *v.* Meservey, 58 Me. 419.

where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear.[81] A new contract with reference to the subject-matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto.[82] Where a new contract is consistent with the continuance of the former one, and only provides a new mode of discharging the same, it has no effect unless or until it is performed.[83]

(II) *Lapse of Time.* A rescission may be implied where the first agreement has never been followed or acted upon for a length of time.[84]

f. Form of New Agreement — (I) *Contracts Under Seal* — (A) *In General.* The ancient rule of the common law was that the new agreement to discharge the old must have been in the same form or at least in as high a form as the old, and hence a sealed executory agreement could not be discharged by a parol agreement, whether oral or in writing; and this rule has been repeatedly followed in the United States.[85] In some jurisdictions, however, there are decisions to the con-

Maryland.— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

Massachusetts.—Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122; Rollins *v.* Marsh, 128 Mass. 116.

Missouri.— Chrisman *v.* Hodges, 75 Mo. 413; Munford *v.* Wilson, 15 Mo. 540.

New Hampshire.— Wheeden *v.* Fiske, 50 N. H. 125.

New York.— Murray *v.* Harway, 56 N. Y. 337; Renard *v.* Sampson, 12 N. Y. 561.

Ohio.— Reed *v.* McGrew, 5 Ohio 375.

Pennsylvania.— Huckestein *v.* Kelly, 152 Pa. St. 631, 25 Atl. 747.

United States.— Harmon *v.* Harmon, 51 Fed. 113; Bridges *v.* Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507; Parish *v.* U. S., 2 Ct. Cl. 366.

England.— Thornhill *v.* Neats, 8 C. B. N. S. 831, 2 L. T. Rep. N. S. 539, 98 E. C. L. 831; Patmore *v.* Colburn, 1 C. M. & R. 65, 3 L. J. Exch. 314, 4 Tyrw. 840.

See 11 Cent. Dig. tit. "Contracts," § 1129 *et seq.*

81. Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903.

82. Uhlig *v.* Barnum, 43 Nebr. 584, 61 N. W. 749.

83. McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

84. Rushbrook *v.* Lawrence, L. R. 5 Ch. 3, 21 L. T. Rep. N. S. 477, 18 Wkly. Rep. 101.

Illustration.— Where in an action for milk sold and delivered, defendant counter-claimed for damages sustained by reason of plaintiff's failure to deliver at the place agreed, and it appeared that defendant received the milk at a substituted locality for five months without objection, and renewed his contract for another year without dissent as to the place of delivery, it was held that defendant's course constituted an implied assent to a modification of the agreement. Gibson *v.* Donnelly, 13 N. Y. Suppl. 808.

85. *Alabama.*— Standifer *v.* White, 9 Ala. 527.

Arkansas.— Miller *v.* Hemphill, 9 Ark. 488.

Connecticut.— Smith *v.* Lewis, 24 Conn. 624, 63 Am. Dec. 180.

Florida.— Tischler *v.* Kurtz, 35 Fla. 323, 17 So. 661.

Illinois.— Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869 [*affirming* 55 Ill. App. 416]; Loach *v.* Farnum, 90 Ill. 368; Emery *v.* Mohler, 69 Ill. 221; Hume *v.* Taylor, 63 Ill. 43; Chapman *v.* McGrew, 20 Ill. 101; Frankfort Whisky Process Co. *v.* Manhattan Distilling Co., 45 Ill. App. 432; Albrecht *v.* Kraisinger, 44 Ill. App. 313; Kneedler *v.* Anderson, 43 Ill. App. 317; Gilbert *v.* Coons, 37 Ill. App. 448; U. S. Equitable L. Assur Soc. *v.* Smith, 25 Ill. App. 471; Illinois Cent. R. Co. *v.* Baltimore, etc., R. Co., 23 Ill. App. 531. But see Cooke *v.* Merker, 70 Ill. 96.

Indiana.— Woodruff *v.* Dobbins, 7 Blackf. 582; Sinard *v.* Patterson, 3 Blackf. 353. And see Woodherry *v.* Duvall, 15 Ind. 160.

Kentucky.—Handley *v.* Moorman, 4 Bibb 1.

New Hampshire.— McMurphy *v.* Garland, 47 N. H. 316.

New Jersey.— Hogencamp *v.* Ackerman, 24 N. J. L. 133.

New York.— Lawrence *v.* Miller, 86 N. Y. 131; French *v.* New, 28 N. Y. 147; Coe *v.* Hobby, 7 Hun 157 [*affirmed* in 72 N. Y. 141, 28 Am. Rep. 120]; Kuhn *v.* Stevens, 36 How. Pr. 275; Eddy *v.* Graves, 23 Wend. 82; Allen *v.* Jaquish, 21 Wend. 628; Delacroix *v.* Bulkley, 13 Wend. 71.

Tennessee.— Bond *v.* Jackson, Cooke 500.

Vermont.— Sherwin *v.* Rutland, etc., R. Co., 24 Vt. 347.

England.— Spence *v.* Healey, 8 Exch. 668, 22 L. J. Exch. 249; West *v.* Blakeway, 9 Dowl. P. C. 846, 5 Jur. 630, 2 M. & G. 729, 3 Scott N. R. 199, 40 E. C. L. 828; Cordwent *v.* Hunt, 2 Moore C. P. 660, 8 Taunt. 596, 20 Rev. Rep. 578, 4 E. C. L. 294; Thompson *v.* Brown, 1 Moore C. P. 358, 7 Taunt. 656, 2 E. C. L. 535.

See 11 Cent. Dig. tit. "Contracts," § 1124; and, generally, Covenants; Deeds.

trary.[86] And it has been held that the time fixed for the performance of a contract under seal may be extended by parol,[87] and that a condition in a sealed instrument may be waived by parol.[88] Parties to a contract under seal may by parol fix the time of performance where the contract is silent on the subject.[89]

(B) *Parol Contract at Variance With Sealed Contract.* It is clearly settled that parties who have undertaken contractual obligations by an agreement under seal may nevertheless enter into a new parol agreement creating obligations separate from the old ones, and at variance with them, and such new agreement will be binding.[90]

(C) *Parol Agreement Acted On.* And in this country it is almost universally held that where a contract under seal has been rescinded or modified or altered by a subseqnent parol agreement, and this new agreement has been executed, the parol agreement may be shown in an action on the sealed instrument.[91]

(II) *Written Contract Not Under Seal*—(A) *In General.* A simple contract, whether written or oral, may be discharged, according to the weight of

Contract secured by mortgage.— The fact that a contract not under seal is secured by a mortgage under seal does not prevent modification of the contract by a subsequent parol agreement. Woodberry *v.* Duvall, 15 Ind. 160.

86. Esmond *v.* Benschoten, 12 Barb. (N. Y.) 366; Wilgus *v.* Whitehead, 89 Pa. St. 131; McGrann *v.* North Lebanon R. Co., 29 Pa. St. 82; Lawall *v.* Rader, 2 Grant (Pa.) 426; Lawrence *v.* Dole, 11 Vt. 549. *Compare*, however, Vaughn *v.* Ferris, 2 Watts & S. (Pa.) 46.

87. Flanders *v.* Barstow, 18 Me. 357; Stryker *v.* Vanderbilt, 25 N. J. L. 482; Stone *v.* Sprague, 20 Barb. (N. Y.) 509; Flynn *v.* McKeon, 6 Duer (N. Y.) 203; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

88. Moses *v.* Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194 [*reversing* 55 Ill. App. 342, and holding that, although it is the general rule that a sealed instrument cannot be modified by parol, yet where a lease contains a provision that alterations in the demised premises made by the tenant without the landlord's consent in writing shall work a forfeiture of the lease, and the landlord makes a parol request of the tenant to make an alteration there is a binding waiver of the condition of the lease]; New York *v.* Butler, 1 Barb. (N. Y.) 325; Hadden *v.* Dimick, 13 Abb. Pr. N. S. (N. Y.) 135; Devling *v.* Little, 26 Pa. St. 502.

89. Lawrence *v.* Miller, 86 N. Y. 131.

90. Nash *v.* Armstrong, 10 C. B. N. S. 259, 7 Jur. N. S. 1060, 30 L. J. C. P. 286, 9 Wkly. Rep. 782, 100 E. C. L. 259, where a person had let rooms to another by contract under seal for a certain time, at a rent to be ascertained in a certain way; and after his death his administrator entered into a parol agreement with the tenant by which, in consideration of a certain sum to be paid by the latter to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. The tenant failed to make the payment so agreed upon and the administrator sued him upon the parol contract. It was held that the parol contract created a new binding obligation.

91. *Alabama.*— Robinson *v.* Bullock, 66 Ala. 548.

California.— McDonald *v.* Mountain Lake Water Co., 4 Cal. 335; Whiting *v.* Heslep, 4 Cal. 327; Beach *v.* Covillard, 4 Cal. 315; Green *v.* Wells, 2 Cal. 584.

Illinois.— Cooke *v.* Murphy, 70 Ill. 96; White *v.* Walker, 31 Ill. 422.

Indiana.— Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Unthank *v.* Henry County Turnpike Co., 6 Ind. 125.

Maryland.— Herzog *v.* Sawyer, 61 Md. 344.

Massachusetts.— Holdsworth *v.* Tucker, 143 Mass. 369, 9 N. E. 764; Mill Dam Foundery *v.* Henry, 21 Pick. 417; Munroe *v.* Perkins, 9 Pick. 298, 20 Am. Dec. 475.

Minnesota.— McClay *v.* Gluck, 41 Minn. 193, 42 N. W. 875; Siebert *v.* Leonard, 17 Minn. 433.

Missouri.— Pratt *v.* Morrow, 45 Mo. 404, 100 Am. Dec. 381; Lancaster *v.* Elliot, 55 Mo. App. 249.

New Hampshire.— McMurphy *v.* Garland, 47 N. H. 316; Buel *v.* Miller, 4 N. H. 196.

New Jersey.— Van Syckel *v.* O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024.

New York.— McCreery *v.* Day, 119 N. Y. 1, 23 N. E. 198, 28 N. Y. St. 597, 16 Am. St. Rep. 793, 6 L. R. A. 503; Lawrence *v.* Miller, 86 N. Y. 131; Jenks *v.* Robertson, 58 N. Y. 621; Dodge *v.* Crandall, 30 N. Y. 294; Allen *v.* Jaquish, 21 Wend. 628; Dearborn *v.* Cross, 7 Cow. 48; Jewell *v.* Schroeppel, 4 Cow. 654; Fleming *v.* Gilbert, 3 Johns. 528.

North Carolina.— Cabe *v.* Jameson, 32 N. C. 193, 51 Am. Dec. 386.

Pennsylvania.— McCauley *v.* Keller, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. Rep. 758; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

Vermont.— Hydeville Co. *v.* Eagle R., etc., Co., 44 Vt. 395; Lawrence *v.* Dole, 11 Vt. 549.

Virginia.— Phelps *v.* Seely, 22 Gratt. 573.

United States.— Chesapeake, etc., Canal Co. *v.* Ray, 101 U. S. 522, 25 L. ed. 792.

authority, by a subsequent written or oral contract,[92] unless there is a statutory provision to the contrary.[93] Nor is it material that the written contract provides

92. *Alabama.*— Robinson *v.* Bullock, 66 Ala. 548; Langford *v.* Cummings, 4 Ala. 46; Deshazo *v.* Lewis, 5 Stew. & P. 91, 24 Am. Dec. 769.

California.— Hewlett *v.* Miller, 63 Cal. 185; Barilari *v.* Ferrea, 59 Cal. 1; Waugenheim *v.* Graham, 39 Cal. 169. *Contra,* by statute, see the note following.

Connecticut.— West Haven Water Co. *v.* Redfield, 58 Conn. 39, 18 Atl. 978.

Florida.— Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745; Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

Georgia.— Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

Illinois.— Low *v.* Forbes, 18 Ill. 568. See also Sharkey *v.* Miller, 69 Ill. 560; Bishop *v.* Busse, 69 Ill. 403; Baker *v.* Whiteside, 1 Ill. 174, 12 Am. Dec. 168; Danforth *v.* McIntyre, 11 Ill. App. 417.

Indiana.— Loomis *v.* Donovan, 17 Ind. 198; Rigshee *v.* Bowler, 17 Ind. 167; Billingsley *v.* Stratton, 11 Ind. 396; Rhodes *v.* Thomas, 2 Ind. 638.

Iowa.—Aldrich *v.* Price, 57 Iowa 151, 9 N. W. 376, 10 N. W. 339; Jones *v.* Alley, 4 Greene 181.

Louisiana.— Leeds *v.* Fassman, 17 La. Ann. 32; Bouligny *v.* Urquhart, 4 La. 29; Commandeur *v.* Russell, 5 Mart. N. S. 456.

Maine.— Wiggin *v.* Goodwin, 63 Me. 389; Richardson *v.* Cooper, 25 Me. 450.

Maryland.—Allen *v.* Sowerby, 37 Md. 410; Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206; Coates *v.* Sangston, 5 Md. 121; Franklin *v.* Long, 7 Gill & J. 407.

Massachusetts.— Stearns *v.* Hall, 9 Cush. 31; Munroe *v.* Perkins, 9 Pick. 298, 20 Am. Dec. 475.

Michigan.— Blagborne *v.* Hunger, 101 Mich. 375, 59 N. W. 657; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; Seaman *v.* O'Hara, 29 Mich. 66.

Minnesota.— Hewitt *v.* Brown, 21 Minn. 163.

Missouri.— Chouteau *v.* Jupiter Iron-Works, 94 Mo. 389, 7 S. W. 467; McLaran Real Estate, etc., Co. *v.* Lindsay, 50 Mo. App. 225; Monahan *v.* Finn, 13 Mo. App. 485.

Nebraska.— Izard *v.* Kimmel, 26 Nebr. 51, 41 N. W. 1068; Delaney *v.* Linder, 22 Nebr. 274, 34 N. W. 630; Morrissey *v.* Schindler, 18 Nebr. 672, 26 N. W. 476.

New Hampshire.— Miles *v.* Roberts, 34 N. H. 245; Cummings *v.* Putnam, 19 N. H. 569; Barker *v.* Barker, 16 N. H. 333; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566; Buel *v.* Miller, 4 N. H. 196; Robinson *v.* Batchelder, 4 N. H. 40.

New Jersey.— Church *v.* Florence Iron Works, 45 N. J. L. 129; Sharp *v.* Wyckoff, 39 N. J. Eq. 376; Maryott *v.* Renton, 21 N. J. Eq. 381; Tompkins *v.* Tompkins, 21 N. J. Eq. 338; McKinstry *v.* Runk, 12 N. J. Eq. 60.

New York.— Clark *v.* Dales, 20 Barb. 42; New York *v.* Butler, 1 Barb. 325; Wood *v.* Perry, 1 Barb. 114; Porter *v.* Swan, 17 N. Y. Suppl. 351; Stearns *v.* St. Louis, etc., R. Co., 4 N. Y. St. 715; Schmidt *v.* Couperthwait, 66 How. Pr. 477; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Langworthy *v.* Smith, 2 Wend. 587, 20 Am. Dec. 652; Bailey *v.* Johnson, 9 Cow. 115; Frost *v.* Everett, 5 Cow. 497; Keating *v.* Price, 1 Johns. Cas. 22, 1 Am. Dec. 92.

Ohio.— Thurston *v.* Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

Pennsylvania.— Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 27 Atl. 756; Holloway *v.* Frick, 149 Pa. St. 178, 30 Wkly. Notes Cas. 235, 24 Atl. 201; Locust Mountain Water Co. *v.* Yorgey, (1888) 13 Atl. 956; McNish *v.* Reynolds, 95 Pa. St. 483; McGrann *v.* North Lebanon R. Co., 29 Pa. St. 82.

South Carolina.— Solomons *v.* Jones, 3 Brev. 54, 5 Am. Dec. 538.

Vermont.— Flanders *v.* Fay, 40 Vt. 316; Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363. See also Cutler *v.* Smith, 43 Vt. 577; Sherwin *v.* Rutland, etc., R. Co., 24 Vt. 347.

West Virginia.— Shepherd *v.* Wysong, 3 W. Va. 46.

Wisconsin.— Maher *v.* Davis, etc., Lumber Co., 86 Wis. 530, 57 N. W. 357; Brown *v.* Everhard, 52 Wis. 205, 8 N. W. 725.

United States.— Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263; Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54; Swain *v.* Seamens, 9 Wall. 254, 19 L. ed. 554.

See 11 Cent. Dig. tit. "Contracts," § 1123.

In the leading case of Goss *v.* Nugent, 5 B. & Ad. 58, 65, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34, it is said: "By the general rules of the common law, if there be a contract which has been reduced into writing, . . . it is competent to the parties, at any time before breach of it. by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement."

Executory oral agreement.— There are some cases holding that a contract in writing is not discharged by a mere executory oral agreement varying or modifying its terms. Walker *v.* Greene, 22 Ala. 679; Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Rucker *v.* Harrington, 52 Mo. App. 481. See also Romaine *v.* Judson, 128 Ind. 403, 26 N. E. 563, 28 N. E. 75.

93. In California by statute (Civ. Code, § 1698) a contract in writing cannot be altered otherwise than by a contract in writing or an executed oral agreement. See Benson *v.* Shotwell, 103 Cal. 163, 37 Pac. 147; Erenberg *v.* Peters, 66 Cal. 114, 4 Pac. 1091.

that no modification shall be made except in writing, for this provision itself may be changed by word of mouth.[94]

(B) *Contracts Required by Statute to Be in Writing.* The rule stated in the preceding section is said to apply only where the contract has been put in writing by agreement of the parties and not because of any statutory requirement, and hence that when the original contract was required by the statute of frauds or any other statute to be in writing the new contract must also be in writing.[95] This seems to be supported by the weight of authority where the discharge is not absolute or in full, but is the substitution of a new agreement either in whole or in part;[96] but in some states there are decisions to the contrary.[97] Where the parol discharge is in full and is executed, it is valid and conclusive even as to an agreement within the statute of frauds or any other statute requiring writing.[98]

94. *California.*— McFadden *v.* McDonnell, 18 Cal. 160.

Kentucky.— New York Home Ins. Co. *v.* Gaddis, 3 Ky. L. Rep. 159.

Michigan.—Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143.

Missouri.— Day *v.* Mechanics', etc., Ins. Co., 88 Mo. 325, 57 Am. Rep. 416.

Nebraska.— McLeod *v.* Genius, 31 Nebr. 1, 47 N. W. 473; Erskine *v.* Johnson, 23 Nebr. 261, 36 N. W. 510.

New York.— Carroll *v.* Charter Oak Ins. Co., 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166.

Ohio.— Benedict *v.* Cincinnati, 7 Ohio Dec. (Reprint) 261, 2 Cinc. L. Bul. 33.

South Dakota.— Osborne *v.* Stringham, 4 S. D. 593, 57 N. W. 776.

Texas.— A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1894) 27 S. W. 504.

United States.— Ford *v.* U. S., 17 Ct. Cl. 60.

See 11 Cent. Dig. tit. "Contracts," § 1123.

95. Blood *v.* Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34.

96. *Georgia.*— Rogers *v.* Atkinson, 1 Ga. 12.

Indiana.— Carpenter *v.* Galloway, 73 Ind. 418.

Kentucky.— Wilson *v.* Beam, (1890) 14 S. W. 362.

Michigan.— Abell *v.* Munson, 18 Mich. 306, 100 Am. Dec. 165.

Minnesota.— Burns *v.* Fidelity Real-Estate Co., 52 Minn. 31, 53 N. W. 1017.

Missouri.— Rucker *v.* Harrington, 52 Mo. App. 481.

New York.— Hill *v.* Blake, 97 N. Y. 216; Schultz *v.* Bradley, 57 N. Y. 646; Thomson *v.* Poor, 57 Hun 285, 10 N. Y. Suppl. 597, 32 N. Y. St. 371; Moritz *v.* Koenig, 1 Misc. 186, 21 N. Y. Suppl. 5, 48 N. Y. St. 693; Blood *v.* Goodrich, 9 Wend. 68; Hasbrouk *v.* Tappen, 15 Johns. 200. But see Blanchard *v.* Trim, 38 N. Y. 225.

Pennsylvania.— Musselman *v.* Stoner, 31 Pa. St. 265. But see McClelland *v.* Rush, 150 Pa. St. 57, 24 Atl. 354; Lauer *v.* Lee, 42 Pa. St. 165.

Vermont.— Packer *v.* Steward, 34 Vt. 127; Dana *v.* Hancock, 30 Vt. 616.

England.— Hickman *v.* Haynes, L. R. 10 C. P. 598, 44 L. J. C. P. 358, 32 L. T. Rep. N. S. 873, 23 Wkly. Rep. 871; Noble *v.* Ward, L. R. 2 Exch. 135, 4 H. & C. 149, 36 L. J. Exch. 91, 15 L. T. Rep. N. S. 672, 15 Wkly. Rep. 520; Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34.

See FRAUDS, STATUTE OF.

97. Stearns *v.* Hall, 9 Cush. (Mass.) 31; Cummings *v.* Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Lee *v.* Hawks, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633; Houston *v.* Sledge, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487; Negley *v.* Jeffers, 28 Ohio St. 90.

98. *California.*— Beach *v.* Covillard, 4 Cal. 315.

Georgia.— Howard *v.* Gresham, 27 Ga. 347.

Illinois.— Morrill *v.* Colehour, 82 Ill. 618.

Indiana.— Wulschner *v.* Ward, 115 Ind. 219, 17 N. E. 273; Ward *v.* Walton, 4 Ind. 75.

New Hampshire.— Buel *v.* Miller, 4 N. H. 196.

New Jersey.—Long *v.* Hartwell, 34 N. J. L. 116.

New York.— Hurley *v.* Schring, 17 N. Y. Suppl. 7, 43 N. Y. St. 240; Stevens *v.* Cooper, 1 Johns. Ch. 429, 7 Am. Dec. 499. See Thompson *v.* Poor, 147 N. Y. 402, 409, 42 N. E. 13, where it was said: "We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the nonperformance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for nonperformance induced by an unrecalled consent. The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has not been acted upon, but it would be most inequitable to hold that a default, justified by the consent, happening during its extension, should furnish a ground of action. It makes no difference, as we conceive, what the character of the original contract may be, whether one within or outside the Statute of Frauds."

2. Non-fulfilment of Term in Contract — a. Condition Subsequent. By the very words of the agreement the non-fulfilment of a certain term in it may give to one of the parties a right to treat it as a discharge.[99] Whether conditions are precedent or subsequent is to be determined by the intent of the parties as collected from the contract, whatever may be the order in which they are placed or the manner in which they are expressed.[1] The question whether an agreement is void for breach of condition subsequent is proper for a court of law; and until the question is so determined, equity will not restrain the parties from acting under the agreement.[2]

b. Occurrence of Particular Event. It may be a term in the contract, either express or implied, that the occurrence of some act or event shall discharge the contract.[3] An illustration of this is in case of the excepted risks in a charter-party. In a contract of that nature the ship-owner agrees with the charterer to make the voyage on the terms expressed in the contract, the act of God, fire, collision, and other dangers of the seas, etc., excepted. The occurrence of such an excepted risk releases the ship-owner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and frustrate the entire enterprise, the parties are altogether discharged.[4]

c. Option to Determine Contract. A contract may provide that it shall come to an end at the option of one or either of the parties.[5] Every contract is *prima facie* permanent and irrevocable, and it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself,

Oregon.— Guthie *v.* Thompson, 1 Oreg. 353.
Pennsylvania.— Sauer *v.* Lee, 42 Pa. St. 165.
Virginia.— Phelps *v.* Seely, 22 Gratt. 573.
England.— Sanderson *v.* Graves, L. R. 10 Exch. 234, 44 L. J. Exch. 210, 33 L. T. Rep. N. S. 269, 23 Wkly. Rep. 797; Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34; Goman *v.* Salisbury, 1 Vern. 240.

See Frauds, Statute of.

99. Thus in a contract of sale of personal property it may be a term of the agreement that if the chattels do not answer the description they may be returned to the seller. See Sales. And a contract of hiring may give the master the right to terminate the contract upon the happening or non-performance of a condition subsequent. See Master and Servant.

Performance of a condition subsequent is excused where it is impossible by the act of God. People *v.* Kingston, etc., Tp. Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. See Act of God.

1. Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 241; Gardiner *v.* Corson, 15 Mass. 500; Tileston *v.* Newall, 13 Mass. 406; Johnson *v.* Reed, 9 Mass. 78, 6 Am. Dec. 36; Barruso *v.* Madan, 2 Johns. (N. Y.) 145; Finley *v.* King, 3 Pet. (U. S.) 346, 7 L. ed. 701.

2. Livingston *v.* Tompkins, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598.

3. Geipel *v.* Smith, L. R. 7 Q. B. 404, 1 Aspin. 268, 41 L. J. Q. B. 153, 26 L. T. Rep. N. S. 361, 20 Wkly. Rep. 332.

4. Geipel *v.* Smith, L. R. 7 Q. B. 404, 1 Aspin. 268, 41 L. J. Q. B. 153, 26 L. T. Rep. N. S. 361, 20 Wkly. Rep. 332. And see Graves *v.* The Calvin S. Edwards, 50 Fed. 477, 1 C. C. A. 533. See also Shipping.

Common carriers.— Illustrations of conditions subsequent also occur in the case of common carriers. Bills of lading contain numerous terms on which their liability is to cease; and in the absence of such terms the law implies certain events on the happening of which the carrier is discharged from his agreement to carry safely. See Carriers, 6 Cyc. 352.

Insurance.— So in insurance policies, the occurrence of some event, as leaving the premises vacant or traveling in prohibited places, etc., may discharge the contract. See Insurance.

Landlord and tenant.— Leases are commonly made subject to conditions of forfeiture upon default of the tenant, as for non-payment of rent, not repairing, or other breach of covenant. See Landlord and Tenant.

Sales.— And a contract of sale of goods may be made upon the express condition that in case of a breach of warranty of the goods sold the buyer may rescind the contract and return the goods and recover the price paid. See Sales.

5. Bour *v.* Kimball, 46 Ill. App. 327; Geiger *v.* Western Maryland R. Co., 41 Md. 4; Jenkins *v.* Long, 8 Md. 132; Morrissey *v.* Broomal, 37 Nebr. 766, 56 N. W. 383; Parker *v.* Ibbetson, 4 C. B. N. S. 346, 4 Jur. N. S. 536, 27 L. J. C. P. 236, 6 Wkly. Rep. 519, 93 E. C. L. 346.

Leases of land are frequently determined by notice. See Landlord and Tenant.

Contracts of hiring are often made determinable by notice to be given to either party to put an end to the engagement; and in many kinds of hiring and service certain notices for determining the contract are impliedly imported by usage or rules of law, in the absence of express stipulation to that effect. See Master and Servant.

or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and irrevocable, but was to be in some way or other subject to determination.[6]

C. Discharge by Performance — 1. Promise on Executed Consideration. Where a promise has been given on an executed consideration, performance of the promise by the promisor necessarily discharges the contract, for the obligation existing between the parties is thereupon extinguished.[7]

2. Contract Wholly Executory. But when the contract is wholly executory, that is, where one promise is given in consideration of another,[8] performance by one party does not discharge the contract, although it discharges him from further liability.[9] Neither party to a contract can recover against the other for a breach thereof or put the other in default, without a tender of performance upon his part, or showing a willingness and ability to perform, and that actual performance was prevented or expressly waived by the other.[10]

3. Strict and Substantial Performance — a. At Common Law. By the common-law rule, to discharge a promise by performance, the performance must be in strict accordance with the terms of the contract.[11]

b. In Equity. In equity, on the other hand, it has always been held that

6. In Llanelly R., etc., Co. *v.* London, etc., R. Co., L. R. 8 Ch. 949, 42 L. J. Ch. 884, 29 L. T. Rep. N. S. 357, 21 Wkly. Rep. 889, where a contract was made between two railroad companies for giving to one of them running power over the lines of the other, and making permanent provisions for the exercise of the power, but without mentioning any limit of time or any mode of terminating the power; it was held that, considering the perpetuity of the legal personalty of the contracting parties and of the subject-matter, the contract must have an indefinite duration, according to the *prima facie* construction of its terms, and that there was no implied condition to terminate it by notice or otherwise. In St. Barnabas Hospital *v.* Minneapolis International Electric Co., 68 Minn. 254, 70 N. W. 1126, 40 L. R. A. 388, defendant took one of its employees who had been seriously injured to the plaintiff hospital, and at its request and upon its promise to pay for his care and treatment, plaintiff accepted and received him as a patient for an indefinite period, no length of time being mentioned. Subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger to his life or health, defendant gave notice that thereafter it would not be responsible for his care or treatment. It was held that defendant had no right to thus terminate its liability; that under the circumstances it was an implied condition of the contract that defendant could only terminate it by removing the patient or when he could be dismissed by plaintiff without serious danger to his life or health.

7. See *supra*, I, F; IV, D, 9.

8. See *supra*, I, F; IV, D, 9.

9. Dauchey *v.* Drake, 85 N. Y. 407.

10. Nelson *v.* Plimpton Fireproof Elevating Co., 55 N. Y. 480. See *infra*, IX, F.

11. *Connecticut.*— Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382.

Illinois.— Leopold *v.* Salkey, 89 Ill. 412, 31 Am. Rep. 93.

Indiana.— Lowdry *v.* Cooper, 21 Ind. 269.

Maine.— Allen *v.* Cooper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

New Hampshire.— Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

New Jersey.— Derrickson *v.* Edwards, 29 N. J. L. 468, 80 Am. Dec. 220; Trenton Public Schools *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

New York.— Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442.

North Carolina.— Dula *v.* Cowles, 52 N. C. 290, 75 Am. Dec. 463.

Wisconsin.— Smith *v.* Davis, 1 Wis. 447, 60 Am. Dec. 390.

England.— Duffell *v.* Wilson, 1 Campb. 401; Hibbert *v.* Shee, 1 Campb. 113, 10 Rev. Rep. 649; Farrer *v.* Nightingal, 2 Esp. 639; Lord *v.* Stephens, 1 Y. & C. Exch. 222.

Illustrations.— Thus where a maker of machines agreed with a newspaper advertising agent that the latter should insert the former's advertisement in such papers as would take their pay in machines, and the agent instead of so doing placed the advertisement in papers in which he owned space, it was held a non-compliance with the agreement, which precluded a recovery. Allen *v.* Pierpont, 22 Fed. 582, 23 Blatchf. 33. So where plaintiff contracted to do advertising for defendant in one thousand and seventy-five newspapers, the advertisement to be set up in a certain style, under the head of new advertisements, and the advertisement was inserted in one thousand and twenty-two papers, in two hundred and thirty-three of which the directions as to style and type were not complied with, in two hundred and ninety-one of which they were only partly complied with, and in half of which the insertion was not under the head of new advertisements, and it appeared that the style and position were of importance, it was held that plaintiff had not complied with his contract, and that it was immaterial that the position given to the advertisement was better

where the contract is substantially performed, the party may recover as for a complete performance, less such damages as the other party may have been put to by reason of the matters not performed.[12] The equity doctrine of substantial performance has been generally adopted by the courts of law in the case of building contracts,[13] it being laid down that where the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects.[14] In commercial contracts a strict performance is required.[15]

c. Intentional or Material Departure. In order that the doctrine of substantial performance may apply, even in the case of building contracts, there must be no wilful or intentional departure, and the defects must not pervade the

than that agreed upon. Dauchy *v.* Drake, 85 N. Y. 407, 9 Daly (N. Y.) 31. See Sheffield *v.* Balmer, 1 Mo. App. 176.

12. *Illinois.*— Page *v.* Greeley, 75 Ill. 400; Stewart *v.* Metcalf, 68 Ill. 109.

Iowa.— Van Orman *v.* Merrill, 27 Iowa 476.

Maine.— Portland, etc., R. Co. *v.* Grand Trunk R. Co., 63 Me. 90.

Maryland.— Foley *v.* Crow, 37 Md. 51.

Massachusetts.— Gleason *v.* Smith, 9 Cush. 484, 57 Am. Dec. 62; Hayward *v.* Leonard, 7 Pick. 181, 19 Am. Dec. 269.

Missouri.— Patterson *v.* Judd, 27 Mo. 563; Hovey *v.* Pitcher, 13 Mo. 191.

New York.— Heckmann *v.* Pinkney, 81 N. Y. 211; Woodward *v.* Fuller, 80 N. Y. 312; Phillip *v.* Gallant, 62 N. Y. 256.

Ohio.— Goldsmith *v.* Hand, 26 Ohio St. 101.

Tennessee.— Porter *v.* Woods, 3 Humphr. 56, 39 Am. Dec. 153.

Virginia.— McComas *v.* Easley, 21 Gratt. 23.

Wisconsin.— Meincke *v.* Falk, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157.

England.— Wilkinson *v.* Clements, L. R. 8 Ch. 96, 42 L. J. Ch. 38, 27 L. T. Rep. N. S. 834, 21 Wkly. Rep. 90; Flanagan *v.* Great Western R. Co., L. R. 7 Eq. 116, 38 L. J. Ch. 117; Oxford *v.* Provand, L. R. 1 P. C. 135, 5 Moore P. C. N. S. 150, 16 Eng. Reprint 472; Green *v.* Low, 22 Beav. 625, 2 Jur. N. S. 848, 4 Wkly. Rep. 669; Gervais *v.* Edwards, 1 C. L. R. 242, 2 Dr. & War. 80, 4 Ir. Eq. 555; Cutler *v.* Close, 5 C. & P. 337, 24 E. C. L. 594; Ogden *v.* Fossick, 4 De G. F. & J. 426, 9 Jur. N. S. 288, 32 L. J. Ch. 73, 7 L. T. Rep. N. S. 515, 1 New Rep. 143, 11 Wkly. Rep. 128, 65 Eng. Ch. 331; Roberts *v.* Berry, 3 De G. M. & G. 284, 22 L. J. Ch. 398, 52 Eng. Ch. 222; Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671; Lennon *v.* Napper, 2 Sch. & Lef. 684; Davis *v.* Hone, 2 Sch. & Lef. 341, 9 Rev. Rep. 89; Parkin *v.* Thorold, 2 Sim. N. S. 1, 42 Eng. Ch. 1; Halsey *v.* Grant, 13 Ves. Jr. 73; Mortlock *v.* Buller, 10 Ves. Jr. 292, 7 Rev. Rep. 417; Guest *v.* Homfray, 5 Ves. Jr. 818, 5 Rev. Rep. 176; Lord *v.* Stephens, 1 Y. & C. Exch. 222; Vignolles *v.* Bowen, 12 Ir. Eq. 194.

See 11 Cent. Dig. tit. "Contracts," § 1352 *et seq.*

13. *Maine.*— White *v.* Oliver, 36 Me. 92; Jewett *v.* Weston, 11 Me. 346.

Massachusetts.— Gleason *v.* Smith, 9 Cush. 484, 57 Am. Dec. 62; Hayward *v.* Leonard, 7 Pick. 181, 29 Am. Dec. 269.

Michigan.— Strome *v.* Lyon, 110 Mich. 680, 68 N. W. 983.

Missouri.— Hovey *v.* Pitcher, 13 Mo. 191.

New York.— Nolan *v.* Whitney, 88 N. Y. 648; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388; Sinclair *v.* Talmadge, 35 Barb. 602.

Ohio.— Cullen *v.* Bimm, 37 Ohio St. 236; Goldsmith *v.* Hand, 26 Ohio St. 101; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599.

Pennsylvania.— Chambers *v.* Jaynes, 4 Pa. St. 39.

See BUILDERS AND ARCHITECTS, 6 Cyc. 57 *et seq.*

14. Ketz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 217, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Nolan *v.* Whitney, 88 N. Y. 648; Phillip *v.* Gallant, 62 N. Y. 256; Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; Johnson *v.* De Peyster, 50 N. Y. 666.

Other illustrations.— One who agrees to make a carriage just like a certain model carries out his contract by making a carriage substantially like the model. Meincke *v.* Falk, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157. Where plaintiffs agreed to haul for defendants all the wood cut on a certain tract, and were to be paid a certain amount per cord, about a third of such amount to be held by defendants until completion of the contract, and plaintiffs hauled eight thousand cords, thus literally performing the contract, with the exception of scattered blocks, which had been overlooked, it was held a substantial performance. Drew *v.* Goodhue, (Vt. 1902) 52 Atl. 971. So where a contractor agreed to decorate the walls, ceiling, and woodwork of a room, and equip it with furniture at the agreed price of five thousand two hundred dollars, and defects in the woodwork afterward developed which were shown to be completely remediable at a cost not to exceed five hundred dollars, it was held a substantial performance. Philip Hiss Co. *v.* Pitcairn, 107 Fed. 425.

15. Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366.

Sales of personal property.— In the law of

whole or be so material that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished.[16] The non-performance of a material part of the contract will prevent the performance from amounting to a substantial performance.[17] "Substantial performance," as defined by the cases, permits only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price. So much is allowed in building contracts because of the hardship to the contractor if slight, unintentional deviations should bar his recovery. Substantial performance is a question of fact for the trial court.[18]

d. Recovery For Benefits Received. In some cases a liability to pay is made to arise, not out of the contract, but from a quasi-contractual liability; and it is held that a person may recover for work done under a contract, although not strictly according to it, where the work was beneficial to the other party and the parties cannot be placed *in statu quo*.[19]

4. Time of Performance — a. Where Time Is Fixed by Contract — (i) *In General.* When a contract fixes the time for performance it must be performed

sales of goods the exact quantity and quality is required. See Sales.

16. *Massachusetts.*— Olmstead *v.* Beale, 19 Pick. 528.

Minnesota.— Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

New York.— Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017, 42 N. Y. St. 736; Phillip *v.* Gallant, 62 N. Y. 256.

North Dakota.— Anderson *v.* Todd, 8 N. D. 158, 77 N. W. 599.

Pennsylvania.— Gillespie Tool Co. *v.* Wilson, 123 Pa. St. 19, 16 Atl. 36.

17. *Kentucky.*— McKean *v.* Read, Litt. Sel. Cas. 395, 12 Am. Dec. 318.

Massachusetts.— Jeffries *v.* Jeffries, 117 Mass. 184.

New Jersey.— Dobbs *v.* Norcross, 24 N. J. Eq. 327; Vreeland *v.* Blauvelt, 23 N. J. Eq. 483.

New York.— King *v.* Knapp, 59 N. Y. 462.

North Carolina.— Bryan *v.* Wadsworth, 18 N. C. 384.

Tennessee.— Cunningham *v.* Sharp, 11 Humphr. 116; Buchanan *v.* Alwell, 8 Humphr. 516; Reed *v.* Noe, 9 Yerg. 283.

Virginia.— Hoover *v.* Calhoun, 16 Gratt. 109; Jackson *v.* Ligon, 3 Leigh 161.

United States.— Hepburn *v.* Auld, 5 Cranch 262, 3 L. ed. 96.

Illustrations.— Thus where a person makes a subscription to a railroad on condition that it be built to a particular place or over a particular route, or be completed by a fixed time, it must be so built before there can be a recovery on the subscription. Stevens *v.* Ambler, 39 Fla. 575, 23 So. 10; Persinger *v.* Bevil, 31 Fla. 364, 12 So. 366; Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, 73 Am. Dec. 713. In Harris *v.* Sharples, 202 Pa. St. 243, 51 Atl. 966, defendant negotiated with plaintiffs to lithograph and print for him catalogue covers, stipulating that they should submit a sketch for approval and a satisfactory proof thereof. With a proof embodying changes in the sketch suggested by defendant was a letter stating that plaintiffs trusted "the cover as now made will be entirely satisfactory." Defendant answered, "The print as now made will be satisfactory if the covers furnished will be equal to those in good effect." Plaintiff acknowledged a letter "advising us that the proof of cover as already submitted will be entirely satisfactory, providing the finished work will be equal to same. We will therefore proceed with the printing, . . . and feel sure that the finished result will be entirely satisfactory to you." It was held that the contract was to furnish catalogues in accordance with the proofs, and that plaintiffs, having printed their firm name at the bottom of the last page without permission of defendant, had not complied with it so as to entitle them to recover.

18. Spence *v.* Ham, 27 N. Y. App. Div. 379, 50 N. Y. Suppl. 960 [*reversed* in 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238].

19. *Indiana.*— Chance *v.* Clay County, 5 Blackf. 441, 35 Am. Dec. 131.

Iowa.— Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387.

Maine.— Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182.

Massachusetts.— Hayward *v.* Leonard, 7 Pick. 181, 19 Am. Dec. 269.

Vermont.— Gilman *v.* Hall, 11 Vt. 510, 34 Am. Dec. 700.

United States.— Kauffman *v.* Raeder, 108 Fed. 171, 47 C. C. A. 278, 45 L. R. A. 247.

Illustration.— In Veerkamp *v.* Hulburd Canning, etc., Co., 58 Cal. 229, 41 Am. Rep. 265, defendant agreed to buy all the fruit raised by plaintiff and delivered at its works, at a uniform price per pound. As it ripened, plaintiff delivered and defendant accepted quantities from time to time, but defendant declined to pay for any until the whole was delivered. Plaintiff discontinued delivering and sued for the price of that delivered. It was held that the action was maintainable.

at or within the time fixed, in order to bind the other party, unless time is not of the essence of the contract, as explained in the sections following; and even when performance after that time is accepted by the other party, it is not performance in the eye of the law, but is satisfaction for the breach which has taken place.[20] In determining whether stipulations as to the time of performing a contract are conditions precedent, the court seeks simply to discover what the parties really intended; and if time appears, on a fair construction of the language and under the circumstances, to be of the essence of the contract, the stipulations in regard to it will be held conditions precedent.[21]

(II) *Time of Essence or Not*—(A) *In General.* Where the time of performance is fixed by the contract, the question is whether it is of the essence of the contract or not; and this is a question of construction. Since it is entirely competent for parties to agree upon what shall be the effect of non-compliance with any of the stipulations of their contracts, they may agree that the time of performance shall be treated as essential and the courts will uphold and enforce any clearly expressed intention to that effect.[22] It is generally laid down that where time is of "the essence of the contract," performance after such time will not be a performance of the contract, unless assented to by the other party.[23] But it is otherwise where the contract shows that time was not deemed

20. Bennett *v.* Hyde, 92 Cal. 131, 28 Pac. 104; Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919; Dermott *v.* Jones, 23 How. (U. S.) 220, 16 L. ed. 442; Hull Coal Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213; Leake Contr. 834.

21. Henderson *v.* McFadden, 112 Fed. 389, 50 C. C. A. 304; and other cases in the notes following.

22. Heckard *v.* Sayre, 34 Ill. 142; and other cases in the notes following.

23. *Alabama.*— Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 333; Nesbitt *v.* Pearson, 33 Ala. 668.

Georgia.— Sneed *v.* Wiggins, 3 Ga. 94.

Illinois.—Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Wilson *v.* Roots, 119 Ill. 379, 10 N. E. 204; Morgan *v.* Herrick, 21 Ill. 481; Kemp *v.* Humphreys, 13 Ill. 573.

Indiana.— Cromwell *v.* Wilkinson, 18 Ind. 365; Spencer *v.* Burton, 5 Blackf. 57.

Iowa.— Garretson *v.* Vanloon, 3 Greene 128, 54 Am. Dec. 496.

Kansas.— St. Louis, etc., R. Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443. And see Morrison *v.* Wells, 48 Kan. 494, 29 Pac. 601.

Maine.— Allen *v.* Cooper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316. Where a creditor agreed to surrender his claim against his debtor, in case certain mortgaged property should be redeemed of the mortgagee, "the refusal of which is given till the first day of January next," and the property was redeemed after that day, it was held that the creditor's claim remained in force. Patterson *v.* Augusta Water-Power Co., 30 Me. 91.

Maryland.— McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Watchman *v.* Crook, 5 Gill & J. 239.

Massachusetts.— Carter *v.* Phillips, 144 Mass. 100, 10 N. E. 500; Pickering *v.* Greenwood, 114 Mass. 479; Dana *v.* King, 2 Pick. 155.

Michigan.— Utley *v.* S. N. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488.

Minnesota.— Cannon River Mfg. Assoc. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Cowley *v.* Davidson, 13 Minn. 92.

Mississippi.— Liddell *v.* Sims, 9 Sm. & M. 596; Tyler *v.* McCardle, 9 Sm. & M. 230.

Missouri.— Fitzgerald *v.* Hayward, 50 Mo. 516.

New Jersey.—Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Grigg *v.* Landis, 19 N. J. Eq. 350.

New York.— Rouse *v.* Lewis, 4 Abb. Dec. 121, 2 Keyes 352; Wiswall *v.* McGown, 2 Barb. 270; Booth *v.* Spuyten Duyvil Rolling-Mill Co., 3 Thomps. & C. 368. And see Moot *v.* Business Men's Invest. Assoc., 90 Hun 155, 35 N. Y. Suppl. 737, 70 N. Y. St. 533.

Ohio.— Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

Pennsylvania.— Westerman *v.* Means, 12 Pa. St. 97; Shaw *v.* Lewiston, etc., Turnpike Co., 2 Penr. & W. 454; Bellas *v.* Hays, 5 Serg. & R. 427, 9 Am. Dec. 385.

Rhode Island.— Hicks *v.* Aylsworth, 13 R. I. 562.

Vermont.— Sowles *v.* Hall, 62 Vt. 247, 20 Atl. 810, 22 Am. St. Rep. 101.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

Washington.— Goff *v.* Pacific Coast Steamship Co., 9 Wash. 386, 37 Pac. 418.

Wisconsin.— Warren *v.* Bean, 6 Wis. 120.

United States.— Jennison *v.* Leonard, 21 Wall. 302, 22 L. ed. 539; Dermott *v.* Jones, 23 How. 220, 16 L. ed. 442; Emerson *v.* Slater, 22 How. 28, 16 L. ed. 360; Slater *v.* Emerson, 19 How. 224, 15 L. ed. 626.

See 11 Cent. Dig. tit. "Contracts," § 939.

If a party accepts an agreement from which he is to derive a benefit when he shall have performed any act on or before a certain day, such acceptance is equivalent to an affirmative agreement on his part, to perform

to be of its essence.[24] Time is of the essence of a contract when it is a material object to which the parties looked in the first conception of it. A provision in a contract is said to be of the essence of the contract when compliance with it was known by both parties at the time of entering into the contract to be of such importance that performance of the contract without strict compliance with it might be of no avail.[25] Although time is not made of the essence of a contract, either party may enforce performance by executing or tendering the execution of the contract on his part and demanding the same of the opposite party.[26]

(B) *At Common Law.* At common law time is always of the essence of the contract, that is to say, if a person promises another to do a certain thing by a certain day, in consideration that the latter will do something for him, the thing must be done by the date named or the latter is discharged from his promise.[27]

(C) *In Equity.* Courts of equity, however, look further into the intention of the parties, so as to ascertain whether in fact the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the latter is found to have been the intention, equity will not refuse to enforce the contract if the promise required to be so performed was performed within a reasonable time.[28] By the weight

the act by the time stated. Roberts *v.* Marston, 20 Me. 275, 37 Am. Dec. 52.

Contract fixing hour for performance.— Where it appears that the parties intended to make time of the essence of the contract, the rule that the stipulation as to time must be observed applies to an hour as well as to a day. Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636. But in order to determine the intendment of exactness regard should be had to the character and objects of the contract and the circumstances under which it was made. Punctuality to a minute is not required, unless indispensable. Furlong *v.* Barnes, 8 R. I. 226. Thus where the purchaser of merchandise for cash agreed to call at the seller's office before nine o'clock in the evening to pay a balance, it was held that a tender made a few minutes after nine would have been good. Furlong *v.* Barnes, 8 R. I. 226.

Excuse for delay.— If parties by clear and explicit terms provide that time shall be of the essence of their contract, nothing but the act of God will excuse a failure to perform. Miller *v.* Phillips, 31 Pa. St. 218. Where, under a contract to pay money, time is of the essence of the contract, business losses and deprivation of rents occasioned by the burning of the promisor's buildings do not constitute a sufficient excuse for failure to pay within the agreed time. Stow *v.* Russell, 36 Ill. 18. Under Rev. Civ. Code, art. 1933, providing that a fortuitous event which prevents the execution of a contract shall not shield a party from damages, if the force was preceded by some fault of his own, without which the loss would not have occurred, performance of a contract to deliver corn within twenty days is not excused by the freezing of a river on the eleventh day, when transportation could have been made before that time, and there was reason to expect a freeze. Eugster *v.* West, 35 La. Ann. 119, 48 Am. Rep. 232.

24. Watson *v.* Walker, 67 Tex. 651, 4 S. W. 576; Kirchoff *v.* Voss, 67 Tex. 320, 3 S. W. 548; and cases cited in the notes following.

25. Sweet L. Dict. See *infra*, IX, C, 4, a, (II), (C).

Note payable in services.— Where a contract in form of a promissory note, but payable in services, contained a promise from the payee to the maker to "furnish the work within three years, or the note to be void," it was held that time was material, and the failure of the payee to furnish the work within the time specified relieved the maker. McClelland *v.* Coffin, 93 Ind. 456.

26. Knott *v.* Stephens, 5 Oreg. 235.

27. Cromwell *v.* Wilkinson, 18 Ind. 365; Allen *v.* Copper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; and other cases cited *supra*, IX, C, 4, a, (II), (A), note 23.

28. *California.*—Beverly *v.* Blackwood, 102 Cal. 83, 36 Pac. 378; Ward *v.* Matthews, 73 Cal. 13, 14 Pac. 604.

Georgia.— Taylor *v.* Baldwin, 27 Ga. 438, 73 Am. Dec. 736.

Illinois.— Morgan *v.* Herrick, 21 Ill. 481; Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

Indiana.— Ewing *v.* Crouse, 6 Ind. 312; Brumfield *v.* Palmer, 7 Blackf. 227.

Iowa.— Thurston *v.* Arnold, 43 Iowa 43; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477; Usher *v.* Livermore, 2 Iowa 117; Garretson *v.* Vanloon, 3 Greene 128, 54 Am. Dec. 492.

Maine.— Hill *v.* Fisher, 34 Me. 143.

Maryland.— Ramsburg *v.* McCahan, 3 Gill 341.

Michigan.— Moote *v.* Scriven, 33 Mich. 500.

Mississippi.— Fletcher *v.* Wilson, Sm. & M. Ch. 376.

Nebraska.— Homan *v.* Steele, 18 Nebr. 652, 26 N. W. 472.

of authority, however, it is always open to the parties, even in equity, to make time of the esssence of the contract by express agreement.[29] And where time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been so intended from the nature of the contract.[30] In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally so held.[31] In contracts for the sale of land, for the

New Jersey.— Halsted *v.* Tyng, 18 N. J. Eq. 375; Huffman *v.* Hummer, 17 N. J. Eq. 263.

North Carolina.— Scarlett *v.* Hunter, 56 N. C. 84; Bryson *v.* Peak, 43 N. C. 310.

Oregon.— Knott *v.* Stephens, 5 Oreg. 235.

Pennsylvania.—Haverstick *v.* Erie Gas Co., 29 Pa. St. 254; Bellas *v.* Hays, 5 Serg. & R. 427, 9 Am. Dec. 385; Decamp *v.* Feay, 5 Serg. & R. 323, 9 Am. Dec. 372.

Wisconsin.—Maltby *v.* Austin, 65 Wis. 527, 27 N. W. 162.

United States.— Beck, etc., Lithographing Co. *v.* Colorado Milling, etc., Co., 52 Fed. 700, 3 C. C. A. 248; Longworth *v.* Taylor, 15 Fed. Cas. No. 8,490, 3 McLean 395.

England.— Hearne *v.* Tenant, 13 Ves. Jr. 287.

See 11 Cent. Dig. tit. "Contracts," § 939 *et seq.*

29. *Alabama.*— Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337; Hays *v.* Hall, 4 Port. 374, 30 Am. Dec. 530.

California.— Grey *v.* Tubbs, 43 Cal. 359.

Connecticut.— Potter *v.* Tuttle, 22 Conn. 512.

Illinois.— Wilson *v.* Roots, 119 Ill. 379, 10 N. E. 204; Stow *v.* Russell, 36 Ill. 18; Morgan *v.* Herrick, 21 Ill. 481; Kemp *v.* Humphreys, 13 Ill. 573; Smith *v.* Brown, 10 Ill. 309.

Indiana.— Spencer *v.* Burton, 5 Blackf. 57.

Iowa.— Thurston *v.* Arnold, 43 Iowa 43; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477; Garretson *v.* Vanloon, 3 Greene 128, 54 Am. Dec. 492.

Kansas.— St. Louis, etc., R. Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443.

Maryland.— Watchman *v.* Crook, 5 Gill & J. 239.

Massachusetts.— Carter *v.* Phillips, 144 Mass. 100, 10 N. E. 500; Pickering *v.* Greenwood, 114 Mass. 479; Barnard *v.* Lee, 97 Mass. 92.

Michigan.— Utley *v.* S. N. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488.

Nebraska.—Morgan *v.* Bergen, 3 Nebr. 209.

New Jersey.— King *v.* Ruckman, 21 N. J. Eq. 599; Grigg *v.* Landis, 21 N. J. Eq. 494; Bullock *v.* Adams, 20 N. J. Eq. 367.

New York.— Moot *v.* Business Men's Invest. Assoc., 90 Hun 155, 35 N. Y. Suppl. 737, 70 N. Y. St. 533; Wells *v.* Smith, 7 Paige 22, 31 Am. Dec. 274; Wells *v.* Smith, 2 Edw. 78.

North Carolina.— Falls *v.* Carpenter, 21 N. C. 237, 28 Am. Dec. 592.

Ohio.— Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Scott *v.* Fields, 7 Ohio, Pt. II, 90.

Pennsylvania.—Reed *v.* Breeden, 61 Pa. St. 460; Westerman *v.* Means, 12 Pa. St. 97; Shaw *v.* Lewistown, etc., Turnpike Co., 2 Penr. & W. 454; Bellas *v.* Hays, 5 Serg. & R. 427, 9 Am. Dec. 385.

Rhode Island.— Hicks *v.* Aylsworth, 13 R. I. 562.

Vermont.— Sowles *v.* Hall, 62 Vt. 247, 20 Atl. 810, 22 Am. St. Rep. 101.

United States.— Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Jennison *v.* Leonard, 21 Wall. 302, 22 L. ed. 539; Emerson *v.* Slater, 22 How. 28, 16 L. ed. 360; Slater *v.* Emerson, 19 How. 224, 15 L. ed. 626.

England.— Lennon *v.* Napper, 2 Sch. & Lef. 682.

See 11 Cent. Dig. tit. "Contracts," § 938 *et seq.*

Parol evidence.— While equity presumes that the time of performance named in the contract is not essential, yet this presumption may be rebutted by parol evidence, which is always admissible to show that time was intended to be of the essence of the contract. Thurston *v.* Arnold, 43 Iowa 43.

Decisions to the contrary.— In some of the states, even where time is expressly declared to be of the essence of the contract, courts of equity will disregard the stipulation if its enforcement would be unconscionable. Quinn *v.* Roath, 37 Conn. 16; Cole *v.* Wells, 49 Mich. 450, 13 N. W. 813; Richmond *v.* Robinson, 12 Mich. 193; Austin *v.* Wacks, 30 Minn. 335, 15 N. W. 409; Ballard *v.* Cheney, 19 Nebr. 58, 26 N. W. 587. And in Michigan, it seems, the stipulation will be disregarded in such case without regard to the intention of the parties. Richmond *v.* Robinson, 12 Mich. 193. And see Cole *v.* Wells, 49 Mich. 450, 13 N. W. 813.

30. Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677 (holding that time will be deemed of the essence of the contract, wherever the benefit to accrue from the consideration materially depends on a strict performance in point of time); Westerman *v.* Means, 12 Pa. St. 97 (holding that time will always be regarded as material where there are not mutual remedies); Bellas *v.* Hays, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385 (holding that time becomes material in an agreement where delay diminishes the value of the thing contracted for).

31. *Indiana.*— Cromwell *v.* Wilkinson, 18 Ind. 365.

Maryland.— McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Scarlett *v.* Stein, 40 Md. 512.

Massachusetts.—Dana *v.* King, 2 Pick. 155.

New York.— Booth *v.* Spuyten Duyvil Rolling-Mill Co., 3 Thomps. & C. 368.

United States.— Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed.

performance of services, or the construction of buildings and the like, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended; but generally in such contracts time is not of the essence.[32] A new agreement extending the time

920; Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644; Camden Iron Works *v.* Fox, 34 Fed. 200.

England.— Bowes *v.* Shand, 2 App. Cas. 455.

See 11 Cent. Dig. tit. "Contracts," § 939 *et seq.*; and, generally, SALES.

32. *California.*—Beverly *v.* Blackwood, 102 Cal. 83, 36 Pac. 378; Ward *v.* Matthews, 73 Cal. 13, 14 Pac. 604; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

Iowa.— Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Maryland.— Derrett *v.* Bowman, 61 Md. 526.

Massachusetts.—Goldsmith *v.* Guild, 10 Allen 239.

United States.— Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468; Tayloe *v.* Sandiford, 7 Wheat. 13, 5 L. ed. 384; Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541.

Time not of essence.— In a contract by a lithographing company to furnish, "in the course of the year," designs of certain buildings of a manufacturing company, with sketches of its trade-marks, to execute engravings, and to embody them on large amounts of stationery, to engrave a vignette of one of the firm's plants, and to furnish a certain number of hangers, after approval of proofs, it was held that the stipulation as to time was not of the essence of the contract so as to justify a repudiation thereof because of a delay in delivery till eight days after the close of the year. Beck, etc., Lithographing Co. *v.* Colorado Milling, etc., Co., 52 Fed. 700, 703, 3 C. C. A. 248, where it was said: "In contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation."

Time held of essence.— In Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337, it was held that where one executed an instrument binding herself to convey a right of way to certain persons on condition that they should commence the construction of a railroad within three months, and complete it through certain counties within three years, time was of the essence; and in default in that regard compensation might be recovered for such right of way. In Spencer *v.* Burton, 5 Blackf. (Ind.) 57, it was held that the day fixed in a lease of real estate for years on which the lessee was to have possession was of the essence of the contract. In St. Louis, etc., R. Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443, it was held that where, on obtaining judgment against a railroad company for damages for failure to erect a cattle-guard, plaintiff agreed to accept less than the amount of the judgment, if it should be paid and the defect remedied within thirty days, time was an important element of the agreement; and the thirty days having elapsed without performance plaintiff could enforce the whole amount of his judgment. In Carter *v.* Phillips, 144 Mass. 100, 10 N. E. 500, it was held that in a contract for carrying on the business of manufacturing, purchasing, and selling cloaks and garments, providing that it might be terminated by either party on giving sixty days' notice to the other, and that if terminated by one named the other should have the right to purchase the business within the said sixty days, time was of the essence of the contract to purchase. And in Pickering *v.* Greenwood, 114 Mass. 479, it was held that where a written contract provided expressly for the doing of work before a given time, time was of its essence; and no work having been done before that time a subsequent offer to perform gave no right to compensation. In Utley *v.* Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488, it was held that in a contract between the owner of pine lands and persons who undertook to cut and deliver the timber on shares, the work to be done by a certain season, time was of the essence of the contract. And in Jennison *v.* Leonard, 21 Wall. (U. S.) 302, 22 L. ed. 539, it was held that time was of the essence of a contract to buy timber land, whose chief value was the timber, where the contract was payable in three annual instalments, and required the cutting of sufficient timber each year to pay the instalments, and the making of monthly payments in proportion to the quantity of timber cut. So in Emerson *v.* Slater, 22 How. (U. S.) 28, 16 L. ed. 360, and Slater *v.* Emerson, 19 How. (U. S.) 224, 15 L. ed. 626, where a railroad contractor agreed with a stock-holder of the railroad, in consideration of certain payments to be made by the latter, that the road should be completed by a certain day, it was held that time was of the essence of the agreement; and consequently no recovery could be had on it, where it was not performed at the day prescribed.

In contracts for the payment of money time may be of the essence. Sneed *v.* Wiggins, 3 Ga. 94; Bishop *v.* Lawrence, 85 Ky. 25, 2 S. W. 499, 8 Ky. L. Rep. 643; Ames *v.* Brooks, 143 Mass. 344, 9 N. E. 737; Longley *v.* Cotting, 9 Pick. (Mass.) 329; Hollingsworth *v.* Fry, 4 Dall. 345, 12 Fed. Cas. No.

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of performance of a contract is evidence that the parties considered time material.[33]

(D) *Waiver and Estoppel.* Even where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as for instance where he recognizes the contract as still in force after the time for performance has passed or directs changes making a longer time necessary.[34] If the party prevents performance by the other, he cannot insist on the stipulation.[35]

(III) *CONSTRUCTION OF AGREEMENTS AS TO TIME.* The determination of the time for the performance of particular contracts depends of course upon the language used and the intention of the parties.[36] It has been held in some cases, but not in others, that a contract to pay money or perform any other act "forthwith," "as soon as possible," "when convenient," etc., requires payment or per-

6,619. But this is not necessarily so. Hill *v.* Fisher, 34 Me. 143; Scarlett *v.* Hunter, 56 N. C. 84; Decamp *v.* Feay, 5 Serg. & R. (Pa.) 323, 9 Am. Dec. 372.

Building contracts.— Morrison *v.* Wells, 48 Kan. 494, 29 Pac. 601 (holding that time was of the essence); Ramsburg *v.* McCahan, 3 Gill (Md.) 341 (holding that time was not of the essence). See BUILDERS AND ARCHITECTS, 6 Cyc. 65.

33. Wiswall *v.* McGown, 2 Barb. (N. Y.) 270.

34. Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182; Pickney *v.* Dambmann, 72 Md. 173, 19 Atl. 450; Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468; Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341; Amoskeag Mfg. Co. *v.* U. S., 17 Wall. (U. S.) 592, 21 L. ed. 715.

35. Ward *v.* Matthews, 73 Cal. 13, 14 Pac. 604; Rees *v.* Logsdon, 68 Md. 93, 11 Atl. 708; Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. 815, 31 N. Y. St. 825; King, etc., Mfg. Co. *v.* St. Louis, 43 Fed. 768, 10 L. R. A. 826.

36. Building contracts.— Folsom *v.* McDonough, 6 Cush. (Mass.) 208; Boteler *v.* Roy, 40 Mo. App. 234; Allamon *v.* Albany, 43 Barb. (N. Y.) 33; Smith *v.* Collins, 12 N. Y. Suppl. 53, 35 N. Y. St. 274. See BUILDERS AND ARCHITECTS, 6 Cyc. 65.

Contract to construct dam in a certain year "or as soon thereafter as practicable." Reedy *v.* Smith, 42 Cal. 245.

Contract to construct canal.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151.

Contract to clear and cultivate land.— An agreement executed in January, 1853, to clear certain lands and to cultivate them for two years from March 1, 1853, was held to require the lands to be cleared before March 1, 1853, and their cultivation to commence with the cropping season of 1853. Basler *v.* Nichols, 8 Ind. 260.

Contract with playwright.— Yeamans *v.* Tannehill, 15 N. Y. Suppl. 958.

Allowance of a certain time.— An agreement that the time within which it shall be incumbent on the plaintiff to complete his contract shall not be taken to be less than four years is a covenant by the defendant that he will allow the plaintiff four years to complete it in, and the unlawfully driving him away from the work within that time is a breach of the covenant. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

"The latter part of January."— Under a contract fixing the time of performance as "the latter part of January," the whole of that part is meant; hence a suit for non-performance will not lie until the expiration of the month. Bailey *v.* Ricketts, 4 Ind. 488.

Reasonable time.— Where a manufacturing company offered to remove its plant to another town, and a committee of the inhabitants was appointed to investigate its financial standing, but, on the plea of expense in taking an invoice during the busy season, the directors executed a guaranty that an invoice would show a certain standing "on April 1, 1888" (a future date), it was held that this implied a promise to take an invoice showing the condition on that date within a reasonable time, and a failure to do so was a breach of the contract. Ft. Wayne Electric Light Co. *v.* Miller, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804.

Where the contract sued on was to be performed within the lifetime of plaintiff, it was held proper to refuse to instruct the jury that it must be performed in a reasonable time, and as to what constituted a reasonable time. Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

"In equal annual payments."— A covenant to pay a certain sum, "in equal annual payments," without further specification, was held to be payable in two equal instalments in one and two years from date, with interest only from maturity. Turner *v.* Roby, 7 J. J. Marsh. (Ky.) 209.

"In a short time."— Where there was an agreement to sue another "in a short time," it was held that a delay of ten months was not within the meaning of the words. Murry *v.* Smith, 8 N. C. 41.

A contract to make title to real estate by a judicial sale contemplates no time for its completion inconsistent with the due course of the process of the law. Moorhead *v.* Gibson, 3 Grant (Pa.) 157.

Whether time is of the essence see *supra*, IX, C, 4, a, (II).

formance within a reasonable time under the circumstances.[37] In computing the time within which a contract or condition is to be performed, where it is to be performed within a certain time after date, the day on which the contract is

37. **"As soon as possible," "with all possible despatch," etc.**— In Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343, it was held that a stipulation for the completion of work "as soon as possible" required its completion within a reasonable time, or within such time as was reasonably necessary under the circumstances. And in Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1, it was held that a contract providing for the manufacture and delivery of certain articles "with all possible despatch" meant that the articles should be made and delivered within a reasonable time. So in Hinds *v.* Kellogg, 13 N. Y. Suppl. 922, where plaintiffs agreed to manufacture and deliver a quantity of soap wraps to the defendant "as soon as possible," and fifty days after approval of a design for the circulars they delivered a part of them, which defendant accepted and paid for, and plaintiffs tendered the remainder the next day, but defendant refused to accept them on the ground of non-delivery in time, it was held that the agreement meant within a reasonable time, under particular circumstances, and that acceptance by defendant of a part of the wraps was conclusive upon him that the delivery was within a reasonable time. But in Sentenne *v.* Kelly, 59 Hun (N. Y.) 512, 13 N. Y. Suppl. 529, 37 N. Y. St. 162, it was held that a contract to do a particular thing "as soon as possible" does not mean that it is to be done "within a reasonable time," but that it should be done with all possible expedition. In Rowlett *v.* Lane, 43 Tex. 274, it was held that an obligation to pay a sum of money "at the earliest possible moment" was conditional, and that it was incumbent on plaintiff suing thereon to prove the ability of the maker to pay the debt. And in Snodgrass *v.* Wolf, 11 W. Va. 158, it was held that the expression "as soon as possible," in a contract by one person to convey certain lands to another "as soon as possible," means under the circumstances as soon as it shall be within the vendor's power, or as soon as he has the ability to convey.

"Forthwith."— In Pennsylvania R. Co. *v.* Reichert, 58 Md. 261, it was held that an agreement to do a certain thing "forthwith" means in a reasonable time. And in Adams *v.* Foster, 5 Cush. (Mass.) 156, where the owner of a vessel had covenanted with the mortgagee thereof "forthwith as soon as may be" to sell the vessel "for the largest sum that he could reasonably obtain for her," and to pay the proceeds, deducting certain expenses and charges, to the mortgagee, it was held that the owner was entitled to a reasonable time, such as a man diligent in business would require, within which to make the necessary preparations for and to effect a sale, and that if the vessel was lost in the meantime the covenant was at an end.

"Immediately."— In Streeter *v.* Streeter, 43 Ill. 155, which was an action upon a contract to deliver up possession of certain premises "immediately" in consideration of the execution of certain notes, it was held error to instruct the jury that the word "immediately" meant "as soon as could practically be done."

At once and without delay.— In Sharp *v.* Johnston, 3 Lans. (N. Y.) 520, 41 How. Pr. (N. Y.) 400, it was held that a contract to make three or four models of a machine at once, and without delay, means that the work shall be done as soon as it can reasonably be performed.

When "convenient."— Where a written contract contained a provision that a certain sum should be payable as convenient, it was held that it could not be construed so that it should not be payable at all, but only as an extension of credit. Black *v.* Bachelder, 120 Mass. 171. Thus where a contract for an insertion of an advertisement in plaintiff's publication provided that the consideration should be "payable as convenient," it was held that the phrase "payable as convenient" did not contemplate that the consideration should not be paid until merchandise sold by defendants on orders attributable to the advertisement should yield profits equal to the amount of the consideration, but was merely intended to provide for a reasonable indulgence on the part of plaintiffs. Black *v.* Bachelder, 120 Mass. 171. In Lewis *v.* Tipton, 10 Ohio St. 88, 75 Am. Dec. 498, it was held that where there was a promise to pay when convenient, and a stipulation was added that the note was to bear interest until paid, it was manifest that immediate payment was not contemplated by the parties, and that it was not payable until a reasonable time had elapsed. And in Barnett *v.* Bullett, 11 Ind. 310, it was held that an agreement to pay "as soon as he can, but is not to be pushed nor sued," may be sued whenever the debtor can reasonably afford to pay without sacrificing his property.

As soon as able.— Where plaintiff agreed to sell defendants certain stock, and defendants agreed to take it, and pay plaintiff a specified amount therefor; such payments to be made "as soon and fast as the purchasers were able, financially, to do so, without sacrificing their interests in, or the property of" such company, it was held that defendants were bound to perform such contract within such time as was reasonable for the disposition of their property. Fisher *v.* Hopkins, 4 Wyo. 379, 34 Pac. 899, 62 Am. Rep. 38.

"As soon as practcable." — One contracting to build a dam in a certain year, "or as soon thereafter as practicable," is not necessarily required to build the dam, if it is within the range of human means to do so. Reedy *v.* Smith, 42 Cal. 245.

dated or made is to be excluded.[38] Where the performance is to be on a certain day, or on or before a certain day, the party has the whole of that day to do it in.[39] So where it is to be within a specified time, the party bound has until the last moment of the last day.[40] Under a contract to deliver a thousand tons of bark per year for five years, a party has the whole of each year in which to deliver the thousand tons.[41] A contract to complete a work by or before a particular time, as for example by or before the month of November, means that it shall be done before that time.[42] Where under a contract an act is to be per-

38. Shelton *v.* Gillett, 79 Mich. 173, 44 N. W. 428, holding that in computing the time on a contract which provided for the conditional payment of a sum of money "at any time within five years," and, if the condition should not happen "within five years from the date," then payment should be made absolutely, the day on which the contract was executed must be excluded.

39. *California.*— Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184; McFarland *v.* Pico, 8 Cal. 626.

Georgia.— Perry *v.* Watts, 67 Ga. 602, holding that under a contract by defendant to put plaintiff in possession of a farm "on or before the 25th day of December," plaintiff could not recover for a breach on defendant's refusal to comply with his demand for possession made December 17.

Illinois.— Massie *v.* Belford, 68 Ill. 290, holding that a note payable on or by the 1st of March, "eighteen and sixty-eight," was payable March 1, 1868.

Indiana.— Adams *v.* Dale, 29 Ind. 273, holding that a vendor of lumber on a contract to deliver "on or before August 1st" had the whole 1st day of August to deliver in.

Kansas.— Farmers' Nat. Bank *v.* Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

New Jersey.— Sutcliffe *v.* Humphreys, 58 N. J. L. 42, 32 Atl. 706.

Virginia.— Groves *v.* Graves, 1 Wash. 1, holding that where a person on October 1 promised another to pay him certain money on or before the 1st day of December following, and by the same writing the promisee agreed to receive such final settlement at any time before the 1st day of November, the money was payable on the 1st day of November.

Washington.— Joergenson *v.* Joergenson, 28 Wash. 477, 68 Pac. 913.

United States.— Savary *v.* Goe, 21 Fed. Cas. No. 12,388, 3 Wash. 140, holding that if money is to be paid, or any other act to be done, on a certain day, and at a certain place, the legal time of performance is the last convenient hour of the day for transacting business; but, if the parties meet at any part of the day, a tender and refusal at the time of the meeting are sufficient.

England.— Kennedy *v.* Thomas, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, 71 L. T. Rep. N. S. 144, 9 Reports 564, 42 Wkly. Rep. 641.

Compare Genin *v.* Tompkins, 12 Barb. (N. Y.) 265, holding that where, by the terms of a contract for the sale of stocks, the act of delivery and the payment are to be simultaneous, and the purchaser is not to pay on a particular day, but on the delivery of the stock, if the transfer of the stock is made without the cash being received at the same instant, the right to demand payment is not postponed until the next day, on the theory that a party to a contract to pay money on a certain day has the whole day in which to perform.

Where a lease provides that the lessee shall furnish security for the rent, he has the whole of the day on which the lease is to commence to furnish such security, even though he should have declined to furnish any other security upon the refusal of the lessor to accept what he offered at first. Hard *v.* Brown, 18 Vt. 87.

Time of payment of bill or note see COMMERCIAL PAPER, 7 Cyc. 842.

40. Curtis *v.* Blair, 26 Miss 309, 59 Am. Dec. 257; Startup *v.* Macdonald, 6 M. & G. 593, 622, 12 L. J. Exch. 477, 7 Scott N. R. 269, 46 E. C. L. 593, where the court said: "The general rule, I conceive, is, that wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day, to perform their obligation. The only qualification, that I am aware of, to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act at such a period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed."

41. Curtiss *v.* Howell, 39 N. Y. 211.

42. Rankin *v.* Woodworth, 3 Penr. & W. (Pa.) 48. See Richardson *v.* Ford, 14 Ill. 332 (holding that a contract to pay a sum of money "between now and the 1st of September" was not fulfilled by a tender of payment on the first day of September); Hounsford *v.* Fisher, Wright (Ohio) 580 (holding that a covenant to do an act before a certain day is not performed by doing the act on that day). But see Oatman *v.* Walker, 33 Me. 67, holding that where, by a contract dated November 25, 1848, a person bound himself to pay a certain sum if at the expiration of one year from the date the promisee should perform a certain act, the doing of the act by the promisee on the 26th of November, 1849,

formed within a certain time from the date of the contract, and compensation is to be made therefor as soon as performed, it may be performed immediately, and compensation recovered before the specified time expires.[43] Where a place is fixed for the performance on a certain day, requiring the attendance of both parties there to complete it, in order to avoid an unnecessary attendance of either party, the law appoints the last convenient time of the day for both to attend for the purpose, and the promisor may protect himself from default by being then present at the place, prepared to pay or perform his contract, even if the promisee is not there; but it is also sufficient for him to tender the payment or performance at the place, if the promisee should happen to be there, at any time upon the day appointed.[44] If a place is fixed, but the performance may be at any time, it is for the promisor to give notice to the promisee of the time when he intends to pay or perform his contract.[45] Where a contract is made for the payment of specific articles, such as the payee shall select, at a place designated, but no time is fixed for the payment, such articles are payable on demand.[46] In contracts for the delivery of goods or the performance of labor, where no time or place is designated for the delivery or performance, a demand by the promisee upon the promisor is necessary to fix default upon the latter; but if both time and place be designated, no such demand is necessary.[47]

b. Where No Time Is Fixed by Contract — (1) *In General.* Where no time for performance is fixed by the contract, the law implies that the performance is to take place within a reasonable time.[48] This rule applies to a contract for the

was a seasonable performance, and entitled him to recover the money.

Completion of work within a certain time. — Where by a contract between plaintiff and defendant city the former bound himself, among other things, to put the shell roads of the city in good repair within sixty days thereafter, it was held that the obligation of the contractor was to complete the work within sixty days from the date of the contract, and not from the commencement of the work. Carland *v.* New Orleans, 13 La. Ann. 43.

43. Sibbitt *v.* Stryker, 62 Ind. 41. When a party stipulates to pay "on or before" a certain day, he has a right to pay before the day, and to demand performance of the agreement of the other contracting party. Wall *v.* Simpson, 6 J. J. Marsh. (Ky.) 155, 22 Am. Dec. 72.

44. Case *v.* Green, 5 Watts (Pa.) 262, 30 Am. Dec. 311; Leake Contr. 835.

45. Leake Contr. 835.

46. Russell *v.* Ormsbee, 10 Vt. 274.

47. Morey *v.* Enke, 5 Minn. 392; Smith *v.* Tiffany, 36 Barb. (N. Y.) 23.

48. *Alabama.*— Griffin *v.* Ogletree, 114 Ala. 343, 21 So. 488; Adams *v.* Adams, 26 Ala. 272; Watts *v.* Sheppard, 2 Ala. 425. See also Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; Bonifay *v.* Hassell, 100 Ala. 269, 14 So. 46; Cotton *v.* Cotton, 75 Ala. 345; Fail *v.* McRee, 36 Ala. 61; Henley *v.* Bush, 33 Ala. 636; Drake *v.* Goree, 22 Ala. 409; Wolfe *v.* Parham, 18 Ala. 441; Commissioners *v.* Criswell, 6 Ala. 565.

California.— Brennan *v.* Ford, 46 Cal. 7; Luckhart *v.* Ogden, 30 Cal. 547.

Colorado.— Walling *v.* Warren, 2 Colo. 434.

Connecticut.— Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1.

Illinois.— Hamilton *v.* Scully, 118 Ill. 192, 8 N. E. 767; Driver *v.* Ford, 90 Ill. 595; Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233; Biddison *v.* Johnson, 50 Ill. App. 173; Gruaz *v.* Le Crone, 45 Ill. App. 624; Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532; Kankakee, etc., R. Co. *v.* Fitzgerald, 17 Ill. App. 525; Illinois Land, etc., Co. *v.* Beem, 2 Ill. App. 390.

Indiana.— Wright *v.* Maxwell, 9 Ind. 192. See also Ft. Wayne Electric Light Co. *v.* Miller, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804; Bruce *v.* Smith, 44 Ind. 1.

Iowa.— Curtiss *v.* Waterloo, 38 Iowa 266; Livingston *v.* Iowa Midland R. Co., 35 Iowa 555.

Kentucky.— Philips *v.* Morrison, 3 Bibb 105, 106, 6 Am. Dec. 638, where the court said: "Where there is no time fixed for the performance, if the thing to be done be local, the party who has contracted the obligation to perform it, will have during his life to do it in, unless hastened by request; but if it be transitory, he will be bound to perform it in a convenient and reasonable time; and if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract. This distinction is abundantly established by English authorities, and was recognized by this court in the case of Clay *v.* Huston, 1 Bibb (Ky.) 461. A thing contracted to be done, may be local in its nature, or may be made so by the stipulation of the parties. But the duty which is covenanted to be performed in this case, is neither in its nature local, (for it might be done anywhere), nor is it made local by the covenant of the parties. It results, therefore, that the covenantor was bound to proceed immediately to the execution of the duty which he had covenanted to perform, and to complete the performance of it in a con-

performance of work;[49] a contract to return or account for a note;[50] a contract by a lessor to make repairs;[51] a contract to build a fence;[52] a contract of sale fixing no time for payment;[53] a contract for the sale of bonds or goods specifying,

venient and reasonable time." See also in this connection Blackwell *v.* Fosters, 1 Metc. 88.

Louisiana.— Faries *v.* Ranger, 35 La. Ann. 102; Lindsey *v.* Police Jury, 16 La. Ann. 389.

Maine.— Rhoades *v.* Cotton, 90 Me. 453, 38 Atl. 367; Little *v.* Hobbs, 34 Me. 357; Atkinson *v.* Brown, 20 Me. 67; Howe *v.* Huntington, 15 Me. 350; Sawyer *v.* Hammatt, 15 Me. 40; Attwood *v.* Clark, 2 Me. 249.

Maryland.— Coates *v.* Sangston, 5 Md. 121.

Massachusetts.— Clark *v.* Remington, 11 Metc. 361; Warren *v.* Wheeler, 8 Metc. 97; Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657.

Michigan.— Bolton *v.* Riddle, 35 Mich. 13. See also Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 26; Peabody *v.* Bement, 79 Mich. 47, 44 N. W. 416; Stange *v.* Wilson, 17 Mich. 342. But see Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888.

Minnesota.— Palmer *v.* Breen, 34 Minn. 39, 24 N. W. 322.

Missouri.— Bryant *v.* Saling, 4 Mo. 522; Howe *v.* Bristow, 65 Mo. App. 624; Randolph *v.* Frick, 57 Mo. App. 400.

Nevada.— Virginia City Gas Co. *v.* Virginia City, 3 Nev. 320.

New Hampshire.—Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372. See also Clements *v.* Marston, 52 N. H. 31 (where a party agreed that, if another would come and live with him, he would give him his entire property, and execute proper contracts for that purpose, and it was held that under the contract such party was only entitled to a reasonable time in which to execute such contracts); Tyler *v.* Webster, 43 N. H. 147; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Doe *v.* Thompson, 22 N. H. 217.

New Jersey.— Sea Isle City Lot, etc., Assoc. *v.* McTague, (1895) 31 Atl. 727; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315.

New York.— Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251; Wiswall *v.* McGowan, Hoffm. 125. See also Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. 815, 31 N. Y. St. 825; Pope *v.* Terre Haute Car, etc., Co., 107 N. Y. 61, 13 N. E. 592; Lawson *v.* Bachman, 44 N. Y. Super. Ct. 396; New Haven, etc., Co. *v.* Quintard, 1 Sweeny 89, 6 Abb. Pr. N. S. 128. A contract to make three or four models of a machine at once and without delay means that the work shall be done as soon as it can reasonably be performed. Sharp *v.* Johnston, 3 Lans. 520, 41 How. Pr. 400.

North Carolina.— Waddell *v.* Reddick, 24 N. C. 424.

Pennsylvania.— Shepler *v.* Scott, 85 Pa. St. 329; Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

Rhode Island.— Lynd *v.* Apponaug Bleaching, etc., Co., 20 R. I. 344, 39 Atl. 188; Dawley *v.* Potter, 19 R. I. 372, 36 Atl. 92.

South Carolina.— Butler *v.* O'Hear, 1 Desauss. 382, 1 Am. Dec. 671.

Texas.— Hart *v.* Bullion, 48 Tex. 278; Drumm Seed, etc., Co. *v.* J. Horace McFarland Co., (Civ. App. 1895) 30 S. W. 93; Shepard *v.* Weiss, (Civ. App. 1894) 28 S. W. 355.

Vermont.— Field *v.* Black, 42 Vt. 517; Abbott *v.* Wilmot, 22 Vt. 437; Clifford *v.* Richardson, 18 Vt. 620.

Virginia.— Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531.

Washington.— McCartney *v.* Glassford, 1 Wash. 579, 20 Pac. 423.

Wisconsin.— Waterman *v.* Dutton, 6 Wis. 265. See also Manistee Iron Works Co. *v.* Shores Lumber Co., 92 Wis. 21, 65 N. W. 863; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797; Boyington *v.* Sweeney, 77 Wis. 55, 45 N. W. 938.

Wyoming.— Fisher *v.* Hopkins, 4 Wyo. 379, 34 Pac. 899, 62 Am. Rep. 38.

United States.— Minneapolis Gas-Light Co. *v.* Kerr-Murray Mfg. Co., 122 U. S. 300, 7 S. Ct. 1187, 30 L. ed. 1190; Gill Mfg. Co. *v.* Hurd, 18 Fed. 673; Kendall *v.* Almy, 14 Fed. Cas. No. 7,690, 2 Sumn. 278; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 5 Fed. Cas. No. 2,932, 3 Sumn. 530.

England.— Hales *v.* London, etc., R. Co., 4 B. & S. 66, 32 L. J. Q. B. 292, 8 L. T. Rep. N. S. 421, 11 Wkly. Rep. 856, 116 E. C. L. 66; Greaves *v.* Ashlin, 3 Campb. 426, 14 Rev. Rep. 771; Ellis *v.* Thompson, 1 H. & H. 131, 7 L. J. Exch. 185, 3 M. & W. 445; Startup *v.* Macdonald, 16 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593.

See 11 Cent. Dig. tit. "Contracts," § 944 *et seq.*

Parol evidence.— In most jurisdictions where a contract is silent as to the time of performance, parol evidence is not admissible to show that it was to be performed within a certain time, and thereby contradict the implication that it is to be performed within a reasonable time. Liljengren Furniture, etc., Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306; Morowsky *v.* Rohrig, 4 Misc. (N. Y.) 167, 23 N. Y. Suppl. 880, 53 N. Y. St. 220; Self *v.* King, 28 Tex. 552. In Pennsylvania parol evidence is held admissible in such case, but it must be clear and positive in order that it may overcome the implication. Shepler *v.* Scott, 85 Pa. St. 329. See EVIDENCE.

49. Adams *v.* Adams, 26 Ala. 272; Drake *v.* Goree, 22 Ala. 409; Coates *v.* Sangston, 5 Md. 121.

50. Henley *v.* Bush, 33 Ala. 636.

51. Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233.

52. Kankakee, etc., R. Co. *v.* Fitzgerald, 17 Ill. App. 525.

53. Wright *v.* Maxwell, 9 Ind. 192.

ing no time for delivery;[54] a contract to cut logs;[55] a contract to put machinery in a mill;[56] a contract for the transporation of logs, specifying no time for shipment;[57] building contracts;[58] a contract to dig a well fixing no time for completion;[59] a contract to convey land in consideration of the vendee procuring the removal of a cloud from the title of certain other lands of the vendor, without specifying any time within which the cloud shall be removed;[60] a contract for the payment of money in which it is agreed that security shall be given, without fixing any time for giving the same;[61] or any other contract.[62] Where a party to a contract undertakes to do some particular act, the performance of which depends entirely upon himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time, without reference to extraordinary circumstances.[63] Where no time has been fixed for the performance of a contract, either party may limit a reasonable period within which it must be performed by giving the other party a reasonable notice.[64]

(II) *What Is a Reasonable Time.* The question as to what is a reasonable time for the performance of a contract fixing no time for performance depends upon the nature of the contract and the particular circumstances.[65] In deciding whether an undertaking has been performed within reasonable time, the material difficulties and hazards attending it, and the amount of diligence used, and frus-

54. *Illinois.*— Henkle *v.* Smith, 21 Ill. 238.
New York.— Jones *v.* Fowler, 37 How. Pr. 104.
Texas.—Shepard *v.* Weiss, (Civ. App. 1894) 28 S. W. 355.
Vermont.— Danforth *v.* Walker, 40 Vt. 257.
United States.— Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.
See SALES.

55. Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 26.

56. Clifford *v.* Richardson, 18 Vt. 620.

57. Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797.

58. Walling *v.* Warren, 2 Colo. 434; Fowler *v.* Deakman, 84 Ill. 130; George Lehman, etc., Co. *v.* Clark, 33 Ill. App. 33; Brodek *v.* Farnum, 11 Wash. 565, 40 Pac. 189. See BUILDERS AND ARCHITECTS, 6 Cyc. 65.

59. Wilderman *v.* Pitts, 29 Ill. App. 528.

60. Tyler *v.* Webster, 43 N. H. 147.

61. Little *v.* Hobbs, 34 Me. 357.

62. Agreement to forbear.— An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time. Glasscock *v.* Glasscock, 66 Mo. 627.

63. Hamilton *v.* Scully, 118 Ill. 192, 8 N. E. 767.

Agreement for reconveyance of property.— Magoffin *v.* Holt, 1 Duv. (Ky.) 95; Hill *v.* Mathews, 78 Mich. 377, 44 N. W. 286; Fitzpatrick *v.* Woodruff, 96 N. Y. 561.

64. Wiswall *v.* McGowan, Hoffm. (N. Y.) 125.

65. *Illinois.*— Jackson *v.* Conlin, 50 Ill. App. 538.
Kentucky.— Blackwell *v.* Fosters, 1 Metc. 88, holding that where parties to a contract of sale each stipulated to give security for their performance of the contract, "if at any time required," and the vendor demanded security from the vendee in January, 1852, and he failed to furnish it until March 8, 1852, the security was not presented within a reasonable time; it appearing that the vendor, and also sureties whom the vendee intended to furnish, and did in fact subsequently furnish, lived within a few miles of him.
Maine.— Sewall *v.* Wilkins, 14 Me. 168; Frost *v.* Paine, 12 Me. 111.
Massachusetts.—Warren *v.* Wheeler, 8 Metc. 97.
Michigan.— Coon *v.* Spaulding, 47 Mich. 162, 10 N. W. 183 [*following* Stange *v.* Wilson, 17 Mich. 342], holding that where a contract for the pressing of hay is silent as to the time of performance, but the pressers are informed that they can do the pressing at any time after three weeks, a delay of more than twice that time is unreasonable, and does not entitle them to a performance, especially where it is late in the fall of the year, and the hay has to be drawn and delivered by the owner at a certain place after being pressed. See also Grant *v.* Merchants', etc., Bank, 35 Mich. 515, holding that a reasonable time to supply lumber sufficient to fill a contract for a certain number of feet above that contained in a certain boom would be such time as would be required, in the usual and customary manner of rafting, by the boom company, to obtain and make up the requisite quantity.
Mississippi.— Magee *v.* Catching, 33 Miss. 672, holding that a contract for a repurchase of land, stipulating no time for performance, must be performed within a reasonable time, which means such time as would bar the plaintiff's remedy if the defendant's possession had been from the beginning adverse.
New Hampshire.— Goodall *v.* Streeter, 16 N. H. 97.
Pennsylvania.— Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 33 Wkly. Notes Cas. 60, 27 Atl. 564, holding that a delay of three years in the construction of a railroad after an agreement for a right of way was executed was not unreasonable, in view of

trated attempts at performance, should be considered.[66] Some of the cases hold that the question is one of law for the court,[67] while others hold that it is a question of fact for the jury.[68] The proper view is that what is a reasonable time within which a contract must be performed is a matter of law for the court,

the nature of the work to be done, including the organization of a company, and the raising of money necessary for the enterprise, where time was not declared to be of the essence of the contract.

South Carolina.— Smith *v.* Spratt Mach. Co., 46 S. C. 511, 24 S. E. 376, holding that where, in a contract for the manufacture of material, no time was specified for its performance, in determining what would be a reasonable time, regard must be had to the capacity of the manufacturer's plant, although the other party was unaware of its capacity; and such question was not to be determined from the time in which manufacturers in general would have performed the contract.

Texas.— Hart *v.* Bullion, 48 Tex. 278, holding that in the absence of a stipulation as to the time when an act is contracted to be done, the law allows a reasonable time for its performance, and that what is reasonable time depends upon the nature and character of the thing to be done, the circumstances of the case, and the difficulties attending its accomplishment.

Vermont.— Clifford *v.* Richardson, 18 Vt. 620, holding that where defendant contracted to put certain machinery in plaintiff's mill, and no time was expressly limited, it would be taken that the parties meant the work to be done within a reasonable time in reference to the nature and extent of the work to be done; and if the defendant abandoned his contract, claiming it was completed, he could not afterward claim that a reasonable time in which to complete the work had not elapsed.

United States.— Nunez *v.* Dautel, 19 Wall. 560, 22 L. ed. 161 (holding that five years was more than a reasonable time within which to perform a contract to pay money "as soon as the crop can be sold, or the money raised from any other source"); Frame *v.* The Ella, 48 Fed. 569; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 5 Fed. Cas. No. 2,932, 3 Sumn. 530 (holding that where a written contract does not specify any time of performance, the question of reasonable time is determined by a view of all the circumstances of the case; and parol evidence of the conversations of the parties may be admitted, to show the circumstances under which the contract was made, and what the parties thought was a reasonable time for performing it).

See 11 Cent. Dig. tit. "Contracts," § 955.

66. Goodall *v.* Streeter, 16 N. H. 97.

67. Luckhart *v.* Ogden, 30 Cal. 547; Howe *v.* Huntington, 15 Me. 350; Attwood *v.* Clark, 2 Me. 249; Echols *v.* New Orleans, etc., R. Co., 52 Miss. 610; Bottum *v.* Moore, 13 Daly (N. Y.) 464.

Illustrations.— In the following cases the question was held one for the court, viz.: As to the time allowed a tenant at will to remove his family and goods (Ellis *v.* Paige, 1 Pick. (Mass.) 43); as to the time allowed a patentee to file a disclaimer of an improvement included in his patent, of which he did not claim to be the author (Seymour *v.* McCormick, 19 How. (U. S.) 96, 15 L. ed. 557; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601); whether one entitled to claim letters of administration had lost precedence by delay (Hughes *v.* Pipkin, 61 N. C. 4); whether the executor of a lessee for life had a reasonable time after his death to remove his goods (Stodden *v.* Harvey, Cro. Jac. 204); where the maker of a note deposited goods with the holder to be sold to pay it, whether a sale several years afterward was within a reasonable time (Porter *v.* Blood, 5 Pick. (Mass.) 54); what was a reasonable time in which to terminate a lease and take possession (Doe *v.* Smith, 2 T. R. 436); whether the purchaser of a crate of crockery had furnished a list of broken articles within a reasonable time (Attwood *v.* Clark, 2 Me. 249); and as to what is a reasonable time within which a proposal must be accepted to constitute a contract (Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372).

68. *Alabama.*— Drake *v.* Goree, 22 Ala. 409; Watts *v.* Sheppard, 2 Ala. 425.

California.— Quill *v.* Jacoby, (1894) 37 Pac. 524; Luckhart *v.* Ogden, 30 Cal. 547.

Florida.— Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Kansas.— Morrison *v.* Wells, 48 Kan. 494, 29 Pac. 601.

Kentucky.— Philip *v.* Morrison, 3 Bibb 105, 6 Am. Dec. 638.

New York.— Green *v.* Haines, 1 Hilt. 254.

Oregon.— Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6.

South Carolina.— Hays *v.* Hays, 10 Rich. 419.

Wisconsin.—Boyington *v.* Sweeney, 77 Wis. 55, 45 N. W. 938.

See 11 Cent. Dig. tit. "Contracts," § 956.

Illustrations.— In the following cases the question of reasonable time has been left to the jury, viz.: Whether the vendee of goods sold by sample had returned them within a reasonable time after discovering that they did not correspond with the sample (Parker *v.* Palmer, 4 B. & Ald. 387, 23 Rev. Rep. 313, 6 E. C. L. 529); whether tithe corn was left on the premises a reasonable time for comparison with the whole corn (Facey *v.* Hurdom, 3 B. & C. 213, 10 E. C. L. 105); the time in which to sell goods after distress (Pitt *v.* Shew, 4 B. & Ald. 206, 6 E. C. L. 453); and in defense of an action brought for carrying away the plaintiff against his will, in the defendant's vessel, whether he had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail (Spoor *v.* Spooner, 12 Metc. (Mass.) 281).

when it depends upon the construction of a contract in writing or upon undisputed extrinsic facts,[69] and that it is a question of fact for the jury when it depends upon facts extrinsic to the contract, and which are matters in dispute.[70]

5. Performance of Conditional Promises — a. In General. A promise may be conditional, that is, the performance may be due, not immediately, but only after the lapse of time or the happening of a future event. In such cases as a rule the condition precedent must be exactly performed or fulfilled before the promise can be enforced.[71] But until a party is put in default he may perform a condition for which the contract fixes no time.[72] When the performance of an agreement depends on an act to be done by the plaintiff, the doing of such an act is a condition precedent; and the court will not inquire whether the doing of it be beneficial to the defendant.[73] So whenever the entire consideration of the demand claimed is stipulated to be performed at or previous to the performance of the demand, the performance of the consideration becomes a condition precedent.[74]

b. Conditional Upon Time. A contract may be conditioned to be executed, or a debt may be made payable, at a future time, and here the specified time must elapse before the performance of the contract or the debt becomes absolutely due.[75]

c. Conditional Upon Future Event. Contracts may also be conditional upon the happening of some event, the happening of which is certain, but the time of happening of which is uncertain, or upon the happening of some event or contingency which is altogether uncertain;[76] as in the case of a contract to pay money when a certain residuary share of an estate comes to the hands of the payee, so that the amount thereof can be ascertained;[77] a contract to purchase, "provided titles can be approved and made";[78] a subscription to a particular purpose, provided a certain further sum is subscribed;[79] a sale of goods at auction to be paid for in an approved note at six months;[80] or a sale of goods if the seller has the goods on hand at the time.[81] Where a debt is in fact due, and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, it is held that the law implies a promise to pay within a reasonable time.[82]

69. Cotton *v.* Cotton, 75 Ala. 345; Hill *v.* Hobart, 16 Me. 164; Howe *v.* Huntington, 15 Me. 350; Nunez *v.* Dautel, 19 Wall. (U. S.) 560, 22 L. ed. 161.

70. Cotton *v.* Cotton, 75 Ala. 345; Luckhart *v.* Ogden, 30 Cal. 547; Hill *v.* Hobart, 16 Me. 164.

71. *Illinois.*— Eldridge *v.* Rave, 7 Ill. 91, 43 Am. Dec. 41.

New Hampshire.—Bruce *v.* Snow, 20 N. H. 484.

New York.— Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Wayne, etc., Collegiate Inst. *v.* Smith, 36 Barb. 576.

Virginia.—Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. 447; Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

United States.— Vanhorne *v.* Dorrance, 2 Dall. 304, 1 L. ed. 391, 28 Fed. Cas. No. 16,857.

72. Hall *v.* Lorente, 3 La. Ann. 274.

73. Hunt *v.* Livermore, 5 Pick. (Mass.) 395; Willington *v.* West Boylston, 4 Pick. (Mass.) 101; Jarvis *v.* Rogers, 3 Vt. 336.

74. Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 149. And see *infra*, IX, F.

75. Leake Contr. 634. See Cleveland *v.* Sterrett, 70 Pa. St. 204.

Conditional sale.—Where the vendee is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year only. Reese *v.* Beck, 24 Ala. 651. See Sales; Vendor and Purchaser.

As to time for performance see *supra*, IX, C, 4.

76. Leake Contr. 635.

77. Rogers *v.* Law, 1 Black (U. S.) 253, 17 L. ed. 58.

78. Lacy *v.* Hall, 37 Pa. St. 360.

79. New York Exch. Co. *v.* De Wolf, 31 N. Y. 273. See Subscriptions.

Subscriptions for stock see Corporations.

80. Corlies *v.* Gardner, 2 Hall (N. Y.) 345.

81. Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 121 Cal. 641, 54 Pac. 101. See Sales.

82. *California.*— Williston *v.* Perkins, 51 Cal. 554.

Colorado.—Button *v.* Higgins, 5 Colo. App. 167, 38 Pac. 390.

Iowa.— Works *v.* Hershey, 35 Iowa 340.

Kentucky.— Hicks *v.* Shouse, 17 B. Mon. 483.

Maine.— Crooker *v.* Holmes, 65 Me. 195,

d. Conditional Upon Specified Fund. A contract or promise to pay may be restricted to a particular fund, so as to make the raising or the sufficiency of the fund a condition precedent to the liability; as in the case of a promise or covenant to pay money, if the capital and funds of a company are sufficient, or out of the calls upon the shares of the company;[83] or a promise to pay out of the rents of a certain building;[84] and like cases.[85]

e. Conditional Upon Request or Demand. A contract may be conditioned upon a request or demand of performance. The making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract it must be alleged and proved.[86] An action is not sustainable upon a note payable in specific articles on demand, without proof of a special

20 Am. Rep. 687; De Wolfe *v.* French, 51 Me. 420; Sears *v.* Wright, 24 Me. 278.

Mississippi.— Randall *v.* Johnson, 59 Miss. 317, 42 Am. Rep. 365.

Missouri.— Ubsdell *v.* Cunningham, 22 Mo. 124.

Oregon.— Noland *v.* Bull, 24 Oreg. 479, 33 Pac. 983.

Vermont.— Capron *v.* Capron, 44 Vt. 410.

United States.— Nunez *v.* Dautel, 19 Wall. 560, 22 L. ed. 161.

See 11 Cent. Dig. tit. "Contracts," § 945.

Illustrations.— Thus where the defendant acknowledged that he owed the plaintiff a certain sum, and promised to pay it as soon as a crop should be sold or the money could be raised from any other source, it was held that the money was due within a reasonable time. The court said: "No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulations secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named, or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice." Nunez *v.* Dautel, 19 Wall. (U. S.) 560, 22 L. ed. 161. So where a note given for the price of the rigging of a vessel provided for its payment "ninety days after its first return trip" and the vessel was lost on the voyage, the note was ruled to be payable ninety days after the time usually required for the trip. Randall *v.* Johnson, 59 Miss. 317, 42 Am. Rep. 365. And see Upson *v.* Holmes, 51 Conn. 500.

83. Leake Contr. 636 [*citing* Sunderland Mar. Ins. Co. *v.* Kearney, 16 Q. B. 925, 15 Jur. 1006, 20 L. J. Q. B. 417, 71 E C. L. 925].

84. Staats *v.* Hodges, Lalor (N. Y.) 211.

85. *Alabama.*— Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

California.— Congdon *v.* Chapman, 63 Cal. 357. See also Eaton *v.* Richeri, 83 Cal. 185, 23 Pac. 286.

Michigan.— Smith *v.* Ross, 51 Mich. 116, 16 N. W. 258.

New York.— Murray *v.* Baker, 6 Hun 264; Cartledge *v.* West, 2 Den. 377.

North Carolina.— Joice *v.* Bohanan, 49 N. C. 364.

Vermont.— Vermont Marble Co. *v.* Mann, 36 Vt. 697; Dana *v.* Mason, 4 Vt. 368.

United States.— Lyman *v.* Northern Pac. Elevator Co., 62 Fed. 891.

See 11 Cent. Dig. tit. "Contracts," § 989.

86. Leake Contr. 642; Allen *v.* Allen, 116 Iowa 697, 88 N. W. 1091; Baker *v.* Stoughton, 1 Oreg. 227; West *v.* Murph, 3 Hill (S. C.) 284. See Chase *v.* Flanders, 2 N. H. 417, holding that an agreement to deliver a quantity of staves on a certain turnpike, one part within a certain time if demanded, and the remainder within a certain time thereafter if called for, is not performed by having the staves on the turnpike ready for delivery within the time specified, since they are not deliverable till demanded. In Walton *v.* Maskell, 2 D. & L. 410, 415, 14 L. J. Exch. 54, 13 M. & W. 548, it was said: "A request is quite immaterial, unless the parties to a contract have stipulated that it shall be made; if they have not done so, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him."

"On reasonable request."— A provision in a contract that a payment shall be made by a party "on reasonable request" imports an agreement to pay within a reasonable time after request. Illinois Land, etc., Co. *v.* Beem, 2 Ill. App. 390.

"If at any time required."— Where each party to a contract stipulates to give the other security for performance, "if at any time required" by him, if security is demanded by either the other must furnish it within a reasonable time after demand. Blackwell *v.* Fosters, 1 Metc. (Ky.) 88.

On presentment on a certain day.— A contract to pay a note on presentment on a certain day is not a continuing obligation, under which the person promising to pay is bound to pay the note on its being presented after the time agreed upon. Hynson *v.* Pugh, 38 La. Ann. 68.

On demand in a certain time.— A covenant in a note to pay property "on demand, to be

demand.[87] On a promise to deliver goods, where no time is mentioned, a demand is necessary before beginning suit.[88] Unless the contract so provides the demand need not be in writing.[89]

f. Conditional Upon Notice. A contract may also be conditional upon notice of some matter being given; and notice must be given accordingly, in order to render the promise absolute, and must be alleged and proved in an action brought upon it. A party contracting to do an act upon the happening of some event is not in general entitled to notice of that event as a condition precedent, unless he has expressly stipulated for it; but in some cases it is necessarily implied from the nature of the transaction that notice shall be given, although not expressly stipulated for.[90] No notice is necessary to be given to a defendant of the happening of a contingency, if by the contract he has provided himself with the means of ascertaining the fact.[91] If there is a mutual departure from the terms of a contract, and afterward one of the parties concludes thenceforth to stand on the letter of the contract, he must notify the other.[92] Where it is provided that a contract may be terminated by a written notice for thirty days, the notice if given may be recalled within that time.[93]

g. Conditional Upon Act or Will of Third Person. A promise may be conditional upon the act or will of a third person.[94] A frequent example of such promises occurs in the case of building contracts where the approval of the architect or some third person is required before payment is due.[95] And where it is agreed by the parties that quantity, price, or quality is to be left to the opinion and determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake;[96] although it is otherwise where it is based on wrong

paid in four months after date," means that the obligor may be hastened by a demand to pay in four months, and at the expiration of that time an action accrues without demand. Stucker *v.* Miller, 5 Litt. (Ky.) 235.

87. *Alabama.*—Cobb *v.* Read, 2 Stew. 444; Thaxton *v.* Edwards, 1 Stew. 524.

Connecticut.— Smith *v.* Leavensworth, 1 Root 209; Dean *v.* Woodbridge, 1 Root 191.

Indiana.— Johnson *v.* Baird, 3 Blackf. 153.

Maine.— Stevens *v.* Adams, 45 Me. 611.

Massachusetts.— Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

New York.— Lobdell *v.* Hopkins, 5 Cow. 516.

Vermont.— Seeley *v.* Bisbee, 2 Vt. 105.

Sufficiency of demand.— Demand of payment of a note payable in specific articles may be made at any reasonable hour, at the place of payment, although neither the maker nor any person in his behalf is present. Dunn *v.* Marston, 34 Me. 379.

88. Mitchell *v.* Gregory, 1 Bibb (Ky.) 449, 4 Am. Dec. 655; Benners *v.* Howard, 1 N. C. 93, 1 Am. Dec. 583.

89. Colby *v.* Reed, 99 U. S. 560, 25 L. ed. 484.

90. Johnson *v.* Moore, 1 Blackf. (Ind.) 253; Quarles *v.* George, 23 Pick. (Mass.) 400; Nathan *v.* Lewis, 1 Handy (Ohio) 239, 12 Ohio Dec. (Reprint) 121; Vyse *v.* Wakefield, 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 442.

Statement of the rule.—"Where a party stipulates to do a thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." Vyse *v.* Wakefield, 6 M. & W. 442, 452, 8 Dowl. P. C. 377, 4 Jur. 509.

The reason of the rule is, "that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary." Bramwell, B., in Makin *v.* Watkinson, L. R. 6 Exch. 25, 30, 40 L. J. Exch. 33, 23 L. T. Rep. N. S. 592, 19 Wkly. Rep. 286. And see Birdseye *v.* Davis, 2 McCord (S. C.) 296.

91. Keys *v.* Powell, 2 A. K. Marsh. (Ky.) 253.

92. Eaves *v.* Cherokee Iron Co., 73 Ga. 459.

93. Patrick *v.* Richmond, etc., R. Co., 93 N. C. 422.

94. Blethen *v.* Blake, 44 Cal. 117; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Culley *v.* Hardenbergh, 1 Den. (N. Y.) 508; Morgan *v.* Birnie, 9 Bing. 672, 3 Moore & S. 76, 23 E. C. L. 754; Clarke *v.* Watson, 18 C. B. N. S. 278, 34 L. J. C. P. 148, 11 L. T. Rep. N. S. 679, 13 Wkly. Rep. 345, 114 E. C. L. 278.

95. See BUILDERS AND ARCHITECTS, 6 Cyc. 1.

96. *Maine.*— Crane *v.* Roberts, 5 Me. 419.

Massachusetts.— Palmer *v.* Clark, 106 Mass. 373.

Missouri.— Nofsinger *v.* Ring, 71 Mo. 149, 36 Am. Rep. 456.

New York.—Dustan *v.* McAndrew, 44 N. Y. 72.

Pennsylvania.— O'Reilly *v.* Kerns, 52 Pa. St. 214.

views of the contract,[97] or where he cannot freely exercise his judgment.[98] Where a town voted to allow one of two persons having claims against it growing out of the same transaction seven hundred dollars, provided the other person would accept two hundred dollars, it was held, on the other's refusal to accept two hundred dollars, that the first could not maintain an action against the town for the seven hundred dollars[99] And where a policy of fire insurance was conditioned that the minister of the parish should give a certificate as to the character of the insured and the *bona fide* nature of the loss, it was held that the insured could not recover without such certificate, although the minister unreasonably refused to give it.[1]

h. Conditional Upon Act or Will of Promisor. A promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all. For example agreements for service where the remuneration is left entirely to the employer create no binding contract to pay anything.[2] A covenant by a person to build such a house as he may think fit binds him to nothing; and a grant of land made in consideration of such a covenant has been held to be purely voluntary.[3] So where a person agrees to furnish lumber in such quantities as he may "deem fit and advisable," it has been held that he may cease furnishing the lumber whenever he pleases.[4]

i. Performance to Satisfaction of Promisor — (i) *In General.* Contracts are frequently the subject of litigation in which the promisor agrees to pay for work or goods provided he is satisfied with them. The cases of this character may conveniently be put under two heads: (1) Where the fancy, taste, sensibility, or judgment of the promisor are involved, and (2) where the question is merely one of operative fitness or mechanical utility.[5]

(ii) *Cases of Fancy, Taste, or Judgment.* The personal thread which runs through agreements of this class has caused a unanimity of judicial opinion that here at least the promisee is practically debarred from questioning the

Texas.— Keeble *v.* Black, 4 Tex. 69.

Wisconsin.— Vaughan *v.* Howe, 20 Wis. 497; Baasen *v.* Baehr, 7 Wis. 516.

United States.— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

See Sales.

97. Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49; McAvoy *v.* Long, 13 Ill. 147.

98. Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

99. Morrell *v.* Dixfield, 30 Me. 157.

1. Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 3 Rev. Rep. 323.

Other illustrations.— Where an agreement was made to do work at a measurement price, to be settled by a person named in the agreement, it was held that the settlement of the price was a condition precedent by which the parties were bound. Mills *v.* Bayley, 2 H. & C. 36, 9 Jur. N. S. 499, 32 L. J. Exch. 179, 8 L. T. Rep. N. S. 392, 11 Wkly. Rep. 598. So where a contract was made for the sale of a horse at the price of one shilling, but with the condition that if the horse should trot eighteen miles in an hour to the satisfaction of a person appointed as judge of the performance, the buyer should pay the price of two hundred pounds, and the judge refused to attend, without any default in the buyer, it was held that the seller was bound to deliver the horse at the price of one shilling. Brogden *v.* Marriott, 2 Bing. N. Cas. 473, 29 E. C. L. 623. So where plaintiff sold fruit on the trees, agreeing that the vendee should gather it without molestation, the vendee found that those in possession would let him gather part, but that he could not get the rest without a fight, it was held that the contract was indivisible, and that he might refuse to take any, and recover damages as for a total breach. Dabovich *v.* Emeric, 12 Cal. 171. Where a corporation agreed with plaintiff to purchase from him large quanties of coal to be delivered daily, of a quality to be satisfactory to the master of transportation and master of machinery of the corporation, it was held that plaintiff was entitled to require the exercise of an honest, fair, and just judgment before the coal could be rejected, and that it could not be condemned once for all, plaintiff having the right to tender it under the contract each day. Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318.

2. Tolme *v.* Dean, 1 Wash. Terr. 46. See Master and Servant.

3. Rosher *v.* Williams, L. R. 20 Eq. 210, 44 L. J. Ch. 419, 32 L. T. Rep. N. S. 387, 23 Wkly. Rep. 561.

4. Lougherty *v.* McIlvain, 8 Phila. (Pa.) 278, 1 Leg. Gaz. (Pa.) 239. And see Savage Mfg. Co. *v.* Armstrong, 19 Me. 147.

5. See *infra*, IX, C, 5, i, (II), (III).

ground of decision on the part of the promisor or investigating its propriety. The courts refuse to say that where a man agrees to pay if he is satisfied with a thing of this kind he can be compelled to pay on proof that someone else is satisfied with it. They recognize that in matters of fancy, taste, or judgment there is no absolute standard as to what is good or bad, and leave each man free to act on his ideas or prejudices as the case may be. Hence we find that where the subject-matter of the contract was a suit of clothes,[6] a bust of the defendant's husband,[7] a portrait of the defendant's daughter,[8] a cabinet organ,[9] a set of artificial teeth,[10] a carriage,[11] a steam-heater for a house,[12] a play to be written by an author for an actor,[13] a literary or scientific article for an encyclopedia,[14] a design for a bank-note,[15] and horses,[16] it has been held that the question was not one for court or jury to decide, but for the promisor alone. And so it has been held of a contract giving a master a right to discharge a servant if he is satisfied that the servant is incompetent,[17] of a contract to employ a person so long as he is satisfactory,[18] and of a contract to pay for services if they are satisfactory.[19] The same conclusion was reached in a case where a son agreed to support his father during his life, but stipulated that if at any time the latter should become dissatisfied with living with him, he would pay his board elsewhere.[20]

6. Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463.

7. Zaleski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446.

8. Gibson *v.* Cranage, 39 Mich. 49, 33 Am. Rep. 351.

9. Barry *v.* Rainey, 57 N. Y. Suppl. 766; Pennington *v.* Howland, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774. And see Moore *v.* Goodwin, 43 Hun (N. Y.) 534; Hoffman *v.* Gallaher, 6 Daly (N. Y.) 42.

10. Hartman *v.* Blackburn, 7 Pittsb. Leg. J. (Pa.) 140.

11. Andrews *v.* Belfield, 2 C. B. N. S. 779, 89 E. C. L. 779.

12. Adams Radiator, etc., Works *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893.

13. Haven *v.* Russell, 34 N. Y. Suppl. 292; Glenny *v.* Lacy, 1 N. Y. Suppl. 513, 16 N. Y. St. 798.

14. Walker *v.* Edward Thompson Co., 37 N. Y. App. Div. 536, 539, 56 N. Y. Suppl. 326. In this case the court said: "An article in a legal work is certainly as much a matter of taste as a suit of clothes."

15. Gray *v.* Alabama Nat. Bank, 10 N. Y. Suppl. 5, 30 N. Y. St. 824, 14 N. Y. Suppl. 155, 38 N. Y. St. 169.

16. Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57.

17. See MASTER AND SERVANT.

18. *Alabama.*— Allen *v.* Mutual Compress Co., 101 Ala. 574, 14 So. 362.

Colorado.— Bush *v.* Koll, 2 Colo. App. 48, 29 Pac. 919.

Indiana.— Harder *v.* Marion County, 97 Ind. 455.

Michigan.— Koehler *v.* Buhl, 94 Mich. 496, 500, 54 N. W. 157, where it was said: "It is settled law that, where a person contracts to work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury."

Minnesota.— Frary *v.* American Rubber Co., 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644.

New Jersey.— Gwynne *v.* Hitchner, 66 N. J. L. 97, 48 Atl. 571, 67 N. J. L. 654, 52 Atl. 997.

New York.— Crawford *v.* Mail, etc., Pub. Co., 163 N. Y. 404, 57 N. E. 616 [*reversing* 22 N. Y. App. Div. 54, 47 N. Y. Suppl. 747, and holding that where the plaintiff was employed to write newspaper articles for two years; but it was stipulated that in case his services were not satisfactory to the publishers, he might be discharged at one week's notice, the publishers were the sole judges as to whether the service was satisfactory]; Spring *v.* Ansonia Clock Co., 24 Hun 175; Tyler *v.* Ames, 6 Lans. 280, 281 (where it was said: "If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties").

Vermont.— Rossiter *v.* Cooper, 23 Vt. 522. See MASTER AND SERVANT.

19. Kendall *v.* West, 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317; Gwynne *v.* Hitchner, 66 N. J. L. 97, 48 Atl. 571, 67 N. J. L. 654, 52 Atl. 997; Dermody *v.* Flesher, 22 Misc. (N. Y.) 348, 49 N. Y. Suppl. 150 (holding that where a teacher of the art of millinery agreed with an intending pupil that the instruction to be given should be satisfactory to the latter in every respect, and that if not thus satisfactory he would return the fee paid, he constituted the pupil the sole arbiter of her own satisfaction); Johnson *v.* Bindseil, 8 N. Y. Suppl. 485, 28 N. Y. St. 881; Tennant *v.* Fawcett, 94 Tex. 111, 58 S. W. 824. See MASTER AND SERVANT.

20. Hart *v.* Hart, 22 Barb. (N. Y.) 606, 610, where the court said: "It is a case where the law will not undertake to say for the party he must be satisfied and has no

The rule also applies to a contract providing that security for its performance shall be satisfactory.[21]

(III) *Cases of Operative Fitness or Mechanical Utility*—(A) *In General.* There is no good reason why in cases of operative fitness or mechanical utility the same principle of law should not be applied. Although the thing to be done may not involve the feelings, taste, sensibility, or personal opinion of the promisor, yet he, in making the contract, may not have been willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. And as there is assuredly no law which prevents a person from making contracts of this kind if he chooses, the courts should not hesitate to enforce them. The agreement is in short not to make or do a thing which the promisor ought to be satisfied with, and therefore ought to pay for, but to make or do a thing which he is satisfied with. Such a contract may be one-sided in being dependent upon the caprice of one of the parties; it may be an unwise contract to make; but if it is entered into voluntarily, the promisee is bound, and can have no right to ask a court to alter its terms in his favor. This view of the matter is the only logical one, and has been taken in a number of cases, as for example where the subject-matter of the agreement was the making of a bookcase,[22] the sale of a harvesting machine,[23] a steam fire-engine,[24] a cord binder,[25] a steamboat,[26] an elevator,[27] steam fans for exhausting smoke,[28] a printing-press,[29] a grain-binder,[30] a machine for generating gas,[31] a fanning-mill,[32] and an equipment for melting brass.[33] The sole right to determine has also been held to be vested in the promisor where he has agreed to pay such compensation as he should deem or think right;[34] where he has agreed that if at any time the character of an employee's work, on the increase of business secured by him, should "fairly justify a change of mind on the part of the conductors of defendant's business" his salary should be increased;[35] and in other cases.[36] "Satisfactory" in such cases means satisfac-

right to be dissatisfied with living in his family; for the party by the express terms of his contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family, is a matter which the law will not assume to determine for him. Neither will it do the converse, and say he had no cause to be discontented and dissatisfied and therefore he cannot be regarded as dissatisfied. The agreeableness or disagreeableness of the society and state of things about him in the family are left to his own tastes and feelings to determine."

21. In McGrath *v.* Brown, 66 Barb. (N. Y.) 481, plaintiffs, desiring to rent a store owned by defendant, inquired of him by letter whether he would rent it to them for five years, and defendant replied, saying they could have a lease of the store for five years at a certain rent if the security they offered was satisfactory. Plaintiffs offered a certain person as security, and defendant upon inquiry concluded not to accept him, and so informed them. It was held that no agreement was concluded between the parties whereby defendant was bound to lease the store to plaintiffs.

22. McCarren *v.* McNulty, 7 Gray (Mass.) 139.

23. Wood Reaping, etc., Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57.

24. Silsby Mfg. Co. *v.* Chico, 24 Fed. 893.

25. McCormick Harvesting Mach. Co. *v.* Chesrown, 33 Minn. 32, 21 N. W. 846.

26. Gray *v.* New Jersey Cent. R. Co., 11 Hun (N. Y.) 70.

27. Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207.

28. Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

29. Campbell Printing-Press Co. *v.* Thorp, 36 Fed. 414, 1 L. R. A. 645.

30. Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841; Seeley *v.* Welles, 120 Pa. St. 69, 13 Atl. 736.

31. Aiken *v.* Hyde, 99 Mass. 183.

32. Goodrich *v.* Van Nortwick, 43 Ill. 445.

33. Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356, 53 N. E. 862.

34. Butler *v.* Winona Mill Co., 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277; Tolmie *v.* Dean, 1 Wash. Terr. 46; Taylor *v.* Brewer, 1 M. & S. 290, 21 Rev. Rep. 831.

35. Blaine *v.* Knapp, 140 Mo. 241, 41 S. W. 787.

36. Other cases involving the same principle, but arising under other circumstances than upon a sale, are cases in which a

tory to the promisor if the contract is silent as to the person to whom the work, etc., shall be satisfactory.[37]

(B) *Conflicting Decisions.* There are some cases which are apparently in conflict with the rule stated in the preceding section, but which may perhaps be distinguished on the ground that there was not merely an executory contract of sale, but an executed contract under which material had been furnished and work done,[38] on the ground that there were qualifying words showing that it was not the intention to leave the question of satisfaction entirely to the promisor,[39] on

debtor agrees to pay a sum of money whenever in his opinion his circumstances will enable him to do so. It has been held that the agreement imposes no legal obligation which can be enforced by action, as he is the sole judge of his ability. "Every other person," it has been said, "might swear the circumstances of the debtor make him abundantly able to pay, yet, that did not determine his legal liability." Nelson *v.* Von Bonnhorst, 29 Pa. St. 352. And there are a number of decisions where the provision in a chattel mortgage that the mortgagee may take possession of the chattels whenever he deems himself "insecure" or "unsafe" is held to give him an absolute discretion which does not depend upon whether or not there exists reasonable grounds for his action. Werner *v.* Bergman, 28 Kan. 60, 42 Am. Rep. 152; Allen *v.* Vose, 34 Hun (N. Y.) 57; Barrett *v.* Hart, 42 Ohio St. 41, 51 Am. Rep. 801; Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. St. Rep. 700. This view is, however, opposed in Illinois. Roy *v.* Goings, 96 Ill. 361, 36 Am. Rep. 151. See CHATTEL MORTGAGES, 7 Cyc. 12.

The right view of contracts of this kind is taken by the supreme court of appeals of Virginia in Averett *v.* Lipscombe, 76 Va. 404, 408. Here at an auction sale of real estate it was announced by the auctioneer that any purchaser should have the right to examine the title, and if he was not satisfied with it he would not be required to comply with the terms of the sale. The defendant, to whom the land was knocked down, refused to complete the purchase on the ground that he was not satisfied with the title. Specific performance of the agreement was refused. "It is immaterial," said Burke, J., "that this court now considers that the vendors were and are able to make good title. That is not the question. The contract left it to the purchaser to determine for himself the matter of title. If, on examination, he was not in good faith satisfied with the title, he was not to be bound. The bargain was at end." The court cited Williams *v.* Edwards, 2 Sim. 78, 29 Rev. Rep. 61, 2 Eng. Ch. 78, a very similar case. And see Church *v.* Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207, where it is held that a vendee cannot be compelled to accept a title which is in fact perfect, but which his attorney in good faith refuses to approve, where the contract requires the title to be perfected to the "satisfaction" of such attorney.

37. McCormick Harvesting Mach. Co. *v.* Chesrown, 33 Minn. 32, 21 N. W. 846; Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207. This is surely the only sensible construction of such words. Barry *v.* Rainey, 57 N. Y. Suppl. 766. As was well put by Mr. Justice Brown in a federal case: "When, in common language, we speak of making a thing satisfactory, we mean it shall be satisfactory to the person to whom we furnish it. It would be nonsense to say it should be satisfactory to the vendor. It would be indefinite to say that it should be satisfactory to a third person, without designating the person. It can only be intended that it shall be satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee." Campbell Printing-Press Co. *v.* Thorp, 36 Fed. 414, 418, 1 L. R. A. 645. Otherwise the condition has no meaning at all. If goods ordered for a particular purpose are not reasonably fit for the purpose of which as a question of fact the jury is the judge, then the contract has not been performed on the plaintiff's part and the defendant is not obliged to accept, even had there been no such clause or condition in the contract. Wood Reaping, etc., Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 40 Am. Rep. 57; Hart *v.* Hart, 22 Barb. (N. Y.) 606.

38. The fact that the contractor would lose the fruit of his labor and the value of his material through no fault of his, if payment were left to the will of the defendant, has induced some courts to give a construction to the contract which would probably not have been given in the case of an executory contract, where the seller would simply have been left with the rejected goods on his hands. Thus in Hawkins *v.* Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422, where the agreement was to furnish and set up in complete and first-class working order a system of heating apparatus, the payment to be made in the event of the system proving satisfactory, and conforming with all the requirements, after such acknowledgment should be made by the owner, "or the work demonstrated," it was held that the construction of the contract was that if the work was demonstrated, it was satisfactory, although the owner had not acknowledged it, and that therefore the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measure set forth in the contract; not by the private taste or liking of the defendant.

39. In Doll *v.* Noble, 116 N. Y. 230, 231, 22 N. E. 406, 26 N. Y. St. 629, 15 Am. St. Rep. 398, 5 L. R. A. 554, where the action

the ground that the work had been accepted,[40] or on the ground that the provision

was to recover a balance due on a written contract under which the plaintiff agreed to do polishing, staining, and rubbing on the woodwork of two houses owned by the defendant "in the best workmanlike manner under the supervision of William Packard, superintendent, and to the entire satisfaction of William Noble, the party of the first part, owner," it was ruled that the clause as to the owner's satisfaction was qualified by the provision that it was to be done in a workmanlike manner, and that the latter was thereby made the test of a correct and full performance. And see Russell *v.* Allerton, 108 N. Y. 288, 15 N. E. 391. So also in Clark *v.* Rice, 46 Mich. 308, 9 N. W. 427, where the agreement was to pay for a patent heater "if on trial of 30 days the machine is satisfactory, or does what is claimed for it," it was properly held that the purchaser was bound to pay for the machine if it did what was claimed it would do, even though it was not satisfactory to him. And in McNeil *v.* Armstrong, 81 Fed. 943, 27 C. C. A. 16, where a building contract provided that the work was to be done according to certain plans and specifications, materials furnished to be of the best, and to be to the entire satisfaction of the architect and owner, it was ruled that if it appeared that the materials furnished were satisfactory, and the work was done according to the plans and specifications, the contractor was entitled to recover. The court said that as the contract was drawn up by the defendant, the well-settled rule was applicable, that in case of doubt or ambiguity the words are to be taken most strongly against the party employing them, and such construction adopted as is most favorable to the other party. In Mobile Electric Lighting Co. *v.* Elder, 115 Ala. 138, 153, 21 So. 983, a contract by plaintiffs to sink for defendant an artesian well provided that the well should have a certain flow, and that materials and workmanship should be first-class; that the water should be deep strata water, as water from intermediate strata "is likely to be of such quality as is not adapted to the use" of defendant; that payment should be made after the "satisfactory completion" of the well and compliance with other conditions; and that plaintiffs undertook the work at their own risk, and failing to obtain water in the quantity and on the conditions provided, should receive no pay. The supreme court, before proceeding to the construction of the contract in dispute, announced the general rule of law on the subject: There is, it said in substance, no reason of public policy which prevents parties to a contract for the performance of work from agreeing that the decision of one or the other, or of a third person, as to the sufficiency of the performance shall be conclusive. Having voluntarily assumed the obligations and risks of a contract, their legal rights and liabilities are to be determined solely according to its provisions. This is notably so where the matter is one of taste or fancy, but also where the contract is to furnish a piece of machinery or other article, the suitableness of which involves a question of mechanical fitness to do certain work or accomplish a certain purpose. The only limitation is that the party must fairly and honestly test the work and be dissatisfied in good faith. Continuing, the court said: "There are a few cases which seem to hold that 'that which the law will say a contracting party ought in reason to be satisfied with, the law will say he is satisfied with;' and they submit to judicial triers the question, not whether he is satisfied, but whether as a reasonable man he ought to be satisfied. But in these cases it will be found that there is some peculiarity in the subject-matter of the contract, as in Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709, where the contract was to make certain repairs, which, being made, though not entirely satisfactory, were used and enjoyed by the employer; or the case of Pope Iron, etc., Co. *v.* Best, 14 Mo. App. 502, 503, where also the fruits of the labor of the one party were retained and enjoyed by the other." Turning at last to the construction of the contract, the court held that under its terms the defendant assumed the risk of any deep strata water being suitable for its use, and could not avoid payment on the ground that it was not. "It is," said the court, "not the well with which, by the terms of the contract, defendant is to be satisfied, but the completion of the well by plaintiffs in substantial compliance with their promises. The dissatisfaction, which can be set up as a defense to the action, must not be caused, in whole or in part, by the quality of the water, nor by any considerations other than such as are connected with the sufficiency of plaintiffs' performance of their contractual obligations." And see Hoyle *v.* Stellwagen, 28 Ind. App. 681, 63 N. E. 780; Schliess *v.* Grand Rapids, (Mich. 1902) 90 N. W. 700; Elizabeth *v.* Fitzgerald, 114 Fed. 547, 52 C. C. A. 321.

40. In Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387, 389, 4 N. E. 749, 54 Am. Rep. 709, the plaintiff agreed to alter the defendants' boilers, the price to be paid as soon as the defendants "are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam." The work was completed; the defendants made it available and continued to use it without objection or complaint until being sued for the compensation they set up the plea of dissatisfaction. The facts clearly showed a waiver on their part, and a mere allegation of dissatisfaction was held no answer to the action. See also Logan *v.* Berkshire Apartment Assoc., 18 N. Y. Suppl. 164, 46 N. Y. St. 14, 1 Misc. (N. Y.) 18, 20 N. Y. Suppl. 369, 48 N. Y. St. 36 [*affirmed* in 3 Misc. (N. Y.) 296, 22 N. Y. Suppl. 776, 52 N. Y. St. 132]. In Keeler *v.* Clifford, 165

in the contract had been treated as a warranty.[41] Other cases are in direct conflict with the prevailing rule.[42]

Ill. 544, 549, 46 N. E. 248, a contract for grading provided for the payment of an instalment of the price as each one-fourth part of the work was finished. The contract provided that "all of said grading is to be done to the satisfaction of" the defendant. The plaintiff completed three-fourths of the work, but as the defendant refused to pay he abandoned the contract and sued for the value of what he had done. The supreme court held that he was entitled to recover the price agreed upon for the finished portion of the work, and that an instruction that if the jury should find from the evidence that the work which was performed by the plaintiff, and the grading done by him were not done to the satisfaction of the defendant, then their verdict should be in favor of the defendant, was properly refused. The court gave as the reason for the decision that "where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man." The ruling was probably correct, as three quarters of the work had been done and three payments had been neglected, so that it was rather late for defendant to set up his dissatisfaction, but the principle asserted by the court to sustain its position is not supported by the weight of authority.

41. In Pope Iron, etc., Co. *v.* Best, 14 Mo. App. 502, the action was brought to recover damages for the breach of a contract, whereby the defendant agreed to build a furnace which he guaranteed would work "satisfactorily" in melting iron, and which was to be paid for as soon as the first heat was "satisfactorily run off." The defendant filed a counter-claim for the balance due him in erecting the furnace. A verdict for the defendant on the plaintiff's claim and his own counter-claim was affirmed on appeal. The decision is right, although the legal grounds on which it is really based are not clearly stated. The plaintiff by bringing his action for damages treated the words of the contract "guarantee the said furnace to work satisfactorily" as a warranty, as they really were, and not as a mere suspensory condition. In this view the words must have meant that it should work satisfactorily to a reasonable and fair-minded man who was an expert on such matters.

42. **Cases really discordant.**— In Mullally *v.* Greenwood, 127 Mo. 138, 146, 29 S. W. 1001, 48 Am. St. Rep. 613, the defendant agreed to pay the plaintiff a certain commission if he negotiated a "satisfactory lease" of certain premises. The plaintiff negotiated a lease which the defendant claimed was not satisfactory. The trial court left it to the jury to say whether the lease was a satisfactory lease as a matter of fact; which action was affirmed in the supreme court, Burgess, J., saying: "The court would not have been justified, from the facts and circumstances as disclosed, in holding that the plaintiff intended to submit the result of his labors to the caprice of defendants or any one of them, to be approved or rejected at will, regardless of any just cause or excuse therefor. We are not disposed to construe those words so as to procure a result so disastrous to plaintiff and inconsistent with the ordinary experience of mankind." Yet in the same court, in a subsequent case already referred to (Blaine *v.* Knapp, 140 Mo. 241, 249, 41 S. W. 757) a different view was taken where the agreement was to pay for services as an advertising solicitor of a newspaper. The result was equally "disastrous to plaintiff," but as the same judge very properly put it, "This was his contract, and by its terms the law must be meted out to him." In Folliard *v.* Wallace, 2 Johns. (N. Y.) 395, 402, an early New York case, the action was one of covenant. Land had been sold and conveyed upon a consideration payable three months after the vendee should be well satisfied that they held the said six hundred acres of land undisputed by any person whatsoever. The plea was that the defendants were not satisfied that the said land can be held undisputed by any person whatsoever and a claim in favor of certain third persons was said to exist. The replication set up that the claim said to be outstanding had been decided under an arbitration some time previous. The plea was held bad, Kent, C. J., saying: "Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful encumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, must be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. But here was a real obligation contracted, and the true and sound principle is laid down in Pothier that, if A promises to give something to B in case he should judge it reasonable, it is not left to A's choice to give it or not, since he is obliged to do so, in case it be reasonable. The law in this case will determine for the defendant when he ought to be satisfied." In several other New York cases, nearly all of them in intermediate courts, Folliard *v.* Wallace, *supra*, is followed. Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Sullivan *v.* Frazier, 40 N. Y. App. Div. 288, 57 N. Y. Suppl. 1008; Burns *v.* Munger, 45 Hun (N. Y.) 75; Wetterwulgh *v.* Knickerbocker Bldg. Assoc., 2 Bosw. (N. Y.) 381; Brall *v.* Clausen, 35 Misc. (N. Y.) 129, 71 N. Y. Suppl. 341; Fischer *v.* Conhaim, 35 Misc. (N. Y.) 125, 71 N. Y. Suppl. 315; Hummel *v.* Stern, 15 Misc. (N. Y.) 27, 36 N. Y. Suppl. 443, 71 N. Y. St. 494 [*affirmed* in 21 N. Y. App. Div. 544, 48 N. Y. Suppl. 528]. And see Smith *v.* Robson, 148 N. Y. 252, 42 N. E. 677. And

(iv) *Bad Faith.* In the cases above referred to the promisor must act honestly and in good faith. His dissatisfaction must be actual and not feigned; real and not merely pretended.[43] He must, if a test is necessary to determine fitness, give that test or allow it to be made.[44]

(v) *Condition a Suspensory One.* In the case of a sale of goods to be accepted or paid for, if "satisfactory," the condition is a suspensory one, that is, it suspends the obligations of both parties until the purchaser's satisfaction is gained or waived.[45] Hence the fact that the goods are not satisfactory does not give him a right to reject them and claim damages for breach of contract of the seller, as would be the case if there were a warranty that the goods were fit for the purpose and they were not,[46] nor to keep them and recover damages in an action for the purchase-price.[47]

there is a recent Michigan case where the court appears to have been afraid to put its decision on the true ground. Green *v.* Russell, 103 Mich. 638, 61 N. W. 885.

43. Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207; Daggett *v.* Johnson, 49 Vt. 345; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528. If the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not, the condition is performed. Silsby Mfg. Co. *v.* Chico, 24 Fed. 893. For the purpose, for example, of evading payment of the price, a dishonest declaration of dissatisfaction would be nugatory. Adams Radiator, etc., Works Co. *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893.

44. *Maryland.*— Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318.

Pennsylvania.— Adams Radiator, etc., Works Co. *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893, holding that where the promisor dies before the test is made the right to reject vests in his executor.

Washington.— Van Hook *v.* Burns, 10 Wash. 22, 38 Pac. 763.

Wisconsin.— Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; Manny *v.* Glendinning, 15 Wis. 50.

United States.— Crane Elevator Co. *v.* Clark, 80 Fed. 705, 26 C. C. A. 100.

England.— Mackay *v.* Dick, 6 App. Cas. 251, 29 Wkly. Rep. 541.

Illustrations.— If an employer for example agrees to pay for services if they are satisfactory to him, he will certainly be under an obligation to give the employee a trial. So if a man should order a suit of clothes and agree to pay for them if they suited him he would certainly be obliged to try it on. Daggett *v.* Johnson, 49 Vt. 345. So an article to be manufactured cannot be rejected before it is substantially completed, so that the promisor will be able fairly to determine whether it is or will be satisfactory to him. Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207. But having decided that it is not satisfactory, the buyer is not obliged to give the seller an opportunity of making it so (Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463; Aiken *v.* Hyde, 99 Mass. 183), unless the contract so expressly provides.

Shleicker *v.* United Security L. Ins., etc., Co., 191 Pa. St. 477, 43 Atl. 380.

45. Phelps *v.* Willard, 16 Pick. (Mass.) 29; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257. See Sales.

46. Shupe *v.* Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339.

47. In Campbell Printing Press Co. *v.* Thorp, 36 Fed. 414, 418, 1 L. R. A. 645, Mr. Justice Brown said: "This undoubtedly gave them the power to reject the machines. . . . Had the covenant been that the presses shall work well, we should have no doubt that the defendants might have recouped such damages, and that the referee would have found them capable of estimation. These damages would have been the difference in value between presses which would work reasonably well and those which were actually furnished. But in attempting to apply the same rule in the present case, we encounter a formidable difficulty from the impossibility of fixing the value of machines which shall work to the satisfaction of the defendants. It will not do to say that such value is to be gauged by that of a machine which shall work reasonably well, because such a press might not have been satisfactory to the vendee, or he might have been content with one which would not have worked to the satisfaction of experts in the business." The court overlooked the real state of the case, as shown above, viz., that the condition was merely suspensory, and until it was performed or waived, there was no sale. The difficulty of assessing the damages has nothing to do with the result, the reason preventing the claim for damages being that having elected to retain the machines, they waived the performance of the condition and became liable for the purchase-price. The non-fulfilment of a condition of this kind is in short available only as a defense to the person in whose favor it is made and does not subject the other to any liability. A suspensory condition is to be distinguished from a promissory condition. In the latter case, while it is a condition precedent to the liability of one party, the other is nevertheless under an obligation to perform it, or he will be liable in damages. Hunt *v.* Livermore, 5 Pick. (Mass.) 395. In Savage Mfg. Co. *v.* Armstrong, 19 Me. 147, the defendant

(VI) *WAIVER OF CONDITION.* The condition is waived by retaining the article or by failing within a reasonable time to notify the seller that it is not satisfactory.[48] But if the seller is so notified, the buyer is not required, in the absence of a special agreement, to return it.[49]

6. DISCHARGE BY PAYMENT OR TENDER. A contract to pay money is discharged of course by a valid payment in accordance with its terms.[50] A contract may also be discharged by a tender, which is an offer or attempt to perform. A proper offer to do something promised and its refusal by the promisee discharge the promisor from the contract; but an offer to pay something and its refusal by the promisee do not discharge the debt, but prevent the promisee from recovering more than the amount tendered and in an action by the promisee entitle the promisor to recover his costs.[51]

D. Discharge by Impossibility of Performance — 1. IN GENERAL. A contract is not invalid, nor is the promisor discharged, merely because it turns out to be difficult, unreasonable, dangerous, or burdensome.[52] Thus one who sells goods

agreed to take and pay for certain machines to be made according to a model to be furnished by him. The plaintiff agreed to have them finished and ready for delivery by a certain day. The defendant never furnished a model, whereupon the plaintiff purchased a model, made the machines, and then sued the defendant for the purchase-price. The plaintiff was held not entitled to recover. But the plaintiff, on the defendant's refusal to supply the models, would have had a right of action for damages, for the defendant had promised, in law, to supply the models. The case may be stated thus: A agrees to pay for a machine to be made by B and agrees to furnish a model by which B is to build it. B is not obliged to make the machine unless A furnishes the model, but if A does not do so he breaks one of his promises, and may be sued for the breach by B. If A does furnish the model B must make the machine or pay damages. The case of the suspensory condition may be stated thus: A agrees to make B a "satisfactory" coat. If A makes the coat B is not obliged to perform his promise (i. e., pay for it) unless it is satisfactory to him. B cannot keep the coat and sue A because it is not satisfactory, nor can B reject it and sue A for not making him a satisfactory coat; nor, it would seem, if A fails to make a coat at all can B sue A; for in such a case there is no mutuality, B not being bound to anything. Nothing can be more contradictory to the idea of contractual obligation, than a liability on the part of one of the promisors to perform or not as he pleases. Hunt *v.* Livermore, 5 Pick. (Mass.) 395. See Michigan Stove, etc., Co. *v.* Harris, 81 Fed. 928, 27 C. C. A. 6.

48. Latham *v.* Bausman, 39 Minn. 57, 38 N. W. 776.

49. Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 69 Wis. 454, 34 N. W. 509.

50. See PAYMENT.

51. See TENDER.

52. *Alabama.*— Jones *v.* Anderson, 82 Ala. 302, 2 So. 911 (holding that where a contract imposes on a party a duty not purely personal, as to deliver a quantity of timber within a reasonable time, his inability by reason of accident, want of means, insolvency, or other cause, does not excuse non-performance); Morrow *v.* Campbell, 7 Port. 41, 31 Am. Dec. 794; Stone *v.* Dennis, 3 Port. 231 (holding that where a party covenants to perform certain acts necessary to effect the building of mills on his own land, including the construction of a canal to be cut on adjoining lands, he cannot be released from liability on his contract, even though it appears that its performance had become impossible by reason of the refusal of the proprietors of such adjoining lands to sell them).

Arkansas.— Cassady *v.* Clarke, 7 Ark. 123, holding that inability to perform a covenant, by reason of sickness or otherwise, unless performance is prevented by the act of the covenantee, is no excuse for its non-performance.

California.— Wilmington Transp. Co. *v.* O'Neil, 98 Cal. 1, 32 Pac. 705; Williams *v.* Miller, (1885) 6 Pac. 14 (holding that one who agrees to pasture on the land of another "all the cattle it shall be capable of grazing, . . . in no case less than three thousand head," is liable for the pasturage of three thousand head, although the land be not capable of sustaining more than seven hundred).

Illinois.— Walker *v.* Tucker, 70 Ill. 527 (holding that where the lessee of coal-mines covenants, by the terms of his lease, to work the same during the continuance of his lease in a good and workmanlike manner, he is liable for a breach of his covenant, notwithstanding it may be beyond his power to perform it); Bunn *v.* Prather, 21 Ill. 217; Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581 (holding that it is no excuse for failure to perform a contract that its performance was beyond the power of the person who undertook the same, where it is possible to do the work contracted for); Dean *v.* Lowey, 50 Ill. App. 254 (holding that the inability of the purchaser of land, by reason of poverty, to carry out his contract, is no excuse for his failure to do so).

Indiana.— St. Joseph County *v.* South Bend, etc., R. Co., 118 Ind. 68, 20 N. E. 499.

to be delivered at a certain time cannot excuse himself by saying that he expected to buy the goods, but could not.[53] And where a party purchasing a coal-mine agrees to diligently and constantly work it, he is not excused therefrom by stagnation of business and general stoppage of coal operations.[54] So also it is no excuse for a failure to deliver whisky according to contract that there was war, and the whisky would have been likely to be seized.[55] Temporary incapacity of a judge from gross intoxication does not excuse the performance of an agreement to

Kansas.— Graham *v.* Trimmer, 6 Kan. 230.

Michigan.— Britten *v.* Dunning, 55 Mich. 158, 20 N. W. 883 (holding that where adjacent landowners agreed each to construct and maintain certain portions of a drain, one of them was liable for failure to perform his part of the contract, although the work could not be done because of the insufficiency of an outlet for the water, where such outlet was on his land, and could have been readily enlarged); Dewey *v.* Alpena School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206 (holding that where school trustees had agreed to hire a teacher for a certain term, the subsequent outbreak of smallpox in the neighborhood making it necessary for the trustees to close the schools, did not discharge them from the contract).

New Jersey.— Trenton Public Schools *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

New York.—Tobias *v.* Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509. In this case defendant, of New York, contracted with plaintiffs on February 2 for the prompt shipment of a lot of old iron from Europe. The shipment was made on the next day from a German port, but the river below was frozen over, and remained closed to navigation until April, and defendant refused to accept the iron when tendered to him in June. Similar iron could have been shipped promptly from other ports. It was held that defendant was justified in his refusal to accept. See also Devlin *v.* New York, 4 Duer 337, where plaintiff contracted "to excavate and build a good, firm, and substantial sewer," specifying particularly the prices to be paid for "all the excavation, whether hard-pan, quicksand, caves, or otherwise," and "for the blasting and removing of rocks," and claimed extra payment above the contract price. It was held that no evidence was admissible to show that extra work had been done, or to show that it was rendered necessary by the discovery on the line of the sewer of a kind of rock not before known in New York, and much more difficult of removal than those usually found, and of a quality which could not possibly have been contemplated in making the contract. And see Sherman *v.* New York, 1 N. Y. 316; Beebe *v.* Johnson, 19 Wend. 500, 32 Am. Dec. 518 (holding that a citizen of the United States was liable for a breach of his contract to obtain a patent in England to give the patentee the exclusive right to sell an article in Canada, although under the existing laws of England and Canada such a patent could not be obtained in England, and could be obtained in Canada only by British subjects, as the fulfilment of the contract was not impossible).

Oregon.— Hanthorn *v.* Quinn, (1902) 69 Pac. 817.

Tennessee.— Bryan *v.* Spurgin, 5 Sneed 681, holding that where the performance of a contract becomes impossible, and the cause of this impossibility was a contingency which a man of reasonable prudence should have seen and guarded against, the non-performance will not be excused.

Wisconsin.— McDonald *v.* Gardner, 56 Wis. 35, 13 N. W. 689.

United States.— U. S. *v.* Smoot, 15 Wall. 36, 21 L. ed. 107 (where plaintiff entered into an agreement to furnish a certain number of horses to the government, and before the horses were deliverable the bureau of cavalry adopted new regulations in regard to the inspection and acceptance of horses, and the plaintiff, claiming that the new rules made it impossible for him to obtain horses, abandoned his contract without bringing or tendering any horses for inspection and sued the government for the profits he might have made, and it was held that he could recover nothing); Dermott *v.* Jones, 2 Wall. 1, 17 L. ed. 762; Robson *v.* Mississippi River Logging Co., 61 Fed. 893; West *v.* The Uncle Sam, 29 Fed. Cas. No. 17,427, McAll. 505.

England.— Vyse *v.* Wakefield, 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 456 (where the court said in substance: When a person enters into a contract, he is bound to perform it, whether reasonable or not. An obligation imposed by law is necessarily both reasonable and practicable, but a person may undertake by agreement to do any particular act, and if it is not reasonable, it is his own fault for entering into such a contract); Hall *v.* Wright, E. B. & E. 746, 6 Jur. N. S. 193, 29 L. J. Q. B. 43, 1 L. T. Rep. N. S. 230, 8 Wkly. Rep. 160, 96 E. C. L. 746 (holding that in an action for breach of promise to marry, a plea by defendant that after making the promise he became afflicted with a disease which rendered him incapable of marriage without danger to his life, set up no defense); Thornborow *v.* Whitacre, 2 Ld. Raym. 1164.

See 11 Cent. Dig. tit. "Contracts," §§ 1409, 1444.

53. Phillips *v.* Taylor, 49 N. Y. Super. Ct. 318; Gipins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Youqua *v.* Nixon, 30 Fed. Cas. No. 18,189, Pet. C. C. 221.

54. Anspach *v.* Bast, 52 Pa. St. 356. *Compare* Walker *v.* Tucker, 70 Ill. 527.

55. Elsey *v.* Stamps, 10 Lea (Tenn.) 709.

bring a case to trial before that judge.[56] And a failure to perform a contract to dig a well will not be excused by accident making it difficult or dangerous.[57]

2. IMPOSSIBILITY KNOWN TO BOTH PARTIES AT TIME OF CONTRACTING. Where the impossibility is known to both of the parties at the time of making the agreement, there can be no intention of performing it on the one side, and no expectation of its being performed on the other, and therefore one of the essentials of a valid promise, viz., a legal consideration, is wanting.[58]

3. IMPOSSIBILITY AT TIME OF CONTRACTING NOT KNOWN TO EITHER PARTY. Where parties make an agreement, and they are ignorant at the time that performance of the contract is impossible, there is no contract, if it appears, upon the construction of the agreement, that it was intended to be conditional upon the supposed possibility of performance. There is a mistake here which renders the agreement void. But if there was an absolute unconditional contract not showing any intention that the possibility of performance was an implied condition, here the parties are bound, notwithstanding that at the time the performance was impossible.[59]

4. IMPOSSIBILITY AT TIME OF CONTRACTING KNOWN TO ONE PARTY ONLY. Where the impossibility is known to the promisor at the time of making his promise, but not known to the promisee, he must be taken to have intended to make himself absolutely liable.[60] Thus a covenant to pay a sum of money, "when I collect the money on a bond on which suit is pending," is broken if there is no such bond or suit pending.[61] So where a married man promises to marry a woman who is unaware of his being married, he is liable in damages for breach of his promise.[62] And where by a charter-party the freighter undertakes to load "with the usual despatch of the port," which he knows he is then incapable of doing by reason of his previous engagements with other vessels that have precedence by the rules of the port, it is held that he is absolutely bound by his contract to load and responsible for the delay.[63] So where a subsequent impossibility of performance might have been foreseen by the promisor and he chooses to bind himself absolutely he is not excused.[64] If the impossibility of performance were known to the promisee, although not known to the promisor, it could not be accepted by the promisee with the understanding or expectation that it would be carried out, and therefore would not be binding.[65]

5. SUBSEQUENT IMPOSSIBILITY OF PERFORMANCE — a. In General. Where the performance becomes impossible subsequent to the making of the contract, the general rule is that the promisor is not therefore discharged.[66] As said in an old

56. Cobb *v.* Harmon, 23 N. Y. 148.

57. Janes *v.* Scott, 59 Pa. St. 178, 98 Am. Dec. 328.

58. See *supra*, IV, D, 10, f.

59. See *supra*, VI, B, 8.

60. Leake Contr. 602.

As to impossibility created by law see Rosenbaum *v.* U. S. Credit-System Co., 64 N. J. L. 34, 44 Atl. 966.

61. Bullock *v.* Pottinger, 3 J. J. Marsh. (Ky.) 94, 19 Am. Dec. 164.

62. Wild *v.* Harris, 7 C. B. 999, 7 D. & L. 114, 13 Jur. 961, 18 L. J. C. P. 297, 62 E. C. L. 999; Millward *v.* Littlewood, 5 Exch. 775. See BREACH OF PROMISE TO MARRY, 5 Cyc. 1004.

63. Ashcroft *v.* Crow Orchard Colliery Co., L. R. 9 Q. B. 540, 2 Aspin. 397, 43 L. J. Q. B. 194, 31 L. T. Rep. N. S. 266, 22 Wkly. Rep. 825. See SHIPPING.

64. Bryan *v.* Spurgin, 5 Sneed (Tenn.) 681. In Jennings *v.* Lyon, 39 Wis. 553, 558, 20 Am. Rep. 57, the plaintiff agreed that he and his wife would work for the defendant for a year for a gross sum, but four months afterward the wife, being about to give birth to a child, left the service and the contract was broken. The court, while admitting that as a general rule sickness furnishes a valid excuse for the failure to perform a personal contract, held that the knowledge of the plaintiff of the anticipated sickness altered the case. "It is said that it was the plaintiff's own fault under such circumstances to undertake and agree that he and his wife would work for a year, because he must have known that it would be impossible for him to perform his contract. . . . He must have known that it would be impossible for her to work at the period of her confinement and for some time thereafter. There seems no reason why he should not be held liable for a breach of his contract, absolute in its terms; 'not, in fact, for not doing what cannot be done, but for undertaking and promising to do it.'"

65. Leake Contr. 692.

66. *Alabama.*— Brumby *v.* Smith, 3 Ala. 123.

case, "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, there the law will excuse him; . . . but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." [67] Thus an unquali-

Arkansas.— Cassady *v.* Clarke, 7 Ark. 123.
Connecticut.— Worthington *v.* Charter Oak Ins. Co., 41 Conn. 401, 19 Am. Rep. 495.
Illinois.—Schwartz *v.* Saunders, 46 Ill. 18; Bacon *v.* Cobb, 45 Ill. 47. And see Dehler *v.* Held, 50 Ill. 491.
Iowa.— Union Dist. Tp. *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39.
Kentucky.— Singleton *v.* Carroll, 6 J. J. Marsh. 527, 22 Am. Dec. 95; Stephens *v.* Vaughan, 4 J. J. Marsh. 206, 20 Am. Dec. 216.
Massachusetts.— Wells *v.* Calnan, 107 Mass. 514, 9 Am. Rep. 65; Boyle *v.* Agawam Canal Co., 22 Pick. 381, 33 Am. Dec. 749.
Minnesota.— Stees *v.* Leonard, 20 Minn. 494.
Nebraska.— Sherman *v.* Bates, 15 Nebr. 18, 16 N. W. 831. But see Wattles *v.* South Omaha Ice, etc., Co., 90 Nebr. 251, 69 N. W. 785, 61 Am. St. Rep. 554, 36 L. R. A. 424.
New Jersey.— Trenton Public Schools *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.
New York.— Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Van Buskirk *v.* Roberts, 31 N. Y. 661; Thompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Cobb *v.* Harmon, 29 Barb. 472; Graves *v.* Berdan, 29 Barb. 100. But see Buffalo, etc., Land Co. *v.* Bellevue Land, etc., Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951.
United States.— Dermott *v.* Jones, 2 Wall. 1, 17 L. ed. 762.
England.— Paradine *v.* Jane, Aleyn 26.

67. Paradine *v.* Jane, Aleyn 26. In School Dist. No. 1 *v.* Dauchy, 25 Conn. 530, 535, 68 Am. Dec. 371, the court said: "We believe the law is well settled, that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful at the time, of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful. Any seeming departure from this principle of law, (and there are some instances that at first view appear to be of that character,) will be found we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself. Such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives, the horse dies; in which case, the parties are held to have contracted in view of that contingency. In these and like cases, the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract. These and a few other exceptions of a similar character, are to be found in the books, but they are not so much exceptions after all as cases where the intention of the parties is presumed or inferred, though not expressed, from their peculiar situation, or from the subject-matter itself. It is said, however, that there is one real exception to the rule, viz., where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists, that where the thing contracted to be done, becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law. It is further said, that the books declare, that where the condition of a bond becomes impossible by the act of God, or is prohibited by the law, the condition becomes void, and the bond is absolute, or if it be a subsequent condition for the devesting of title, that the condition becomes void, and the title remains good. Whether even this is true, without some qualification, we are not quite confident, nor will we stop to consider; but if so, still, the doctrine of that class of cases does not reach the present one, as the same books abundantly declare. In Platt Covenants, p. 582, it is said that the rule laid down in Paradine *v.* Jane, Aleyn 27, has often been recognized in courts, as a sound one, viz.: where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore if a lessee covenants to repair, the circumstance of the premises being consumed by lightning, or thrown down by an inevitable flood of water, or an irresistible tornado, will not effect his discharge. But where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, as in the case of waste where

fied contract of a sale of goods generally does not contain an implied condition relieving the seller from performance if his machinery breaks down without his fault and disables him from manufacturing them.[68] The principle has also been applied where a ship owner agreed to proceed to the port of lading by a certain date, and it was rendered impossible by contrary winds and bad weather, which were not expressly excepted events in the charter-party;[69] where a person agreed and covenanted to pay rent for a house for a certain term, and before the end of the term the house was destroyed by fire;[70] where a person covenanted to build a bridge, and keep it in repair for a certain time, and the bridge was broken down by an extraordinary flood;[71] where a bond was conditioned for the building of a bridge on a certain site, and to maintain it for seven years, and its maintenance on the site was found to be impossible;[72] where an insurance company undertook, having the option to do so, to reinstate insured premises which had been damaged by fire, and the public authorities subsequently took down the premises as dangerous, although on account of defects not caused by the fire;[73] where a person contracted to take another into a firm of which he was a member, but could not do so because of inability to obtain the consent of the other partners;[74] where a person agreed to build a house for another on his land, and the house, before it was finished, was burned down;[75] where a person agreed to deliver a specified quantity of corn "as early next fall as the same will be dry enough to house, unavoidable accidents only excepted," and the crop failed on account of a drought;[76] where a person contracted to deliver corn within twenty days, and performance was rendered impossible by the freezing on the eleventh day of a river on which it is being transported;[77] and in many other cases.[78]

b. Impossibility Created by Law. To the general rule that a party to a con-

the house is destroyed by a tempest. In some cases where the act of God renders performance absolutely impossible, the covenants shall be discharged *quia impotentia excusat legem*; as if a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterward the trees are blown down by tempest; or if one covenants to serve another for seven years, and he dies before the expiration of the seven years, the covenant is discharged, because the act of God defeats the possibility of performance. I should rather say, because it is implied that the thing shall exist or life be prolonged, or else the contract of course cannot be broken."

68. Summers *v.* Hibbard, 152 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872. See SALES.

69. Shubrick *v.* Salmond, 3 Burr. 1637. See SHIPPING.

70. Hallett *v.* Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457. As to this, however, there are conflicting decisions, and in some states the contrary rule is established by statute. See LANDLORD AND TENANT.

71. Brecknock, etc., Canal Nav. Co. *v.* Pritchard, 6 T. R. 750, 3 Rev. Rep. 335.

72. Errington *v.* Aynesey, 2 Bro. Ch. 341, Dick. 692, 29 Eng. Reprint 191.

73. Brown *v.* Royal Ins. Co., 1 E. & E. 853, 5 Jur. N. S. 1253, 28 L. J. Q. B. 275, 7 Wkly. Rep. 479, 102 E. C. L. 853.

74. McNeill *v.* Reid, 9 Bing. 68, 1 L. J. C. P. 162, 2 Moore & S. 89, 23 E. C. L. 489.

75. Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Fildew *v.* Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433.

76. McGehee *v.* Hill, 4 Port. (Ala.) 170, 29 Am. Dec. 277.

77. Eugster *v.* West, 35 La. Ann. 119, 48 Am. Rep. 232.

78. Other illustrations.— Thus in Jones *v.* St. John's College, L. R. 6 Q. B. 115, 40 L. J. Q. B. 80, where a builder contracted to do certain specific work within a fixed time, including such alterations as might be ordered according to the contract, unless an extension of time were allowed for them, under penalties for delay, it was held that he was bound to complete within the time, or to pay the penalties; and it was held no excuse that alterations duly ordered without allowing an extension of time rendered performance impossible; and that no condition could be implied at variance with the contract for such a contingency. And in Stonam *v.* Waldo, 17 Mo. 489, where plaintiff bound himself to winter a certain number of cattle for defendant, and defendant obligated himself to pay a stipulated sum for every head delivered in the spring "in good, thrifty order and condition," it was held that plaintiff could not recover for the keeping of any cattle that died, or were not delivered in good, thrifty order and condition, although their death or bad condition might not have resulted from any want of care on his part. So in Bartlett *v.* Bisbey, 27 Tex. Civ. App. 405, 66 S. W. 70, where the sole limitation on the absolute character of a building contract was that if completion was delayed by damages caused by fire, lightning, earthquake, cyclone, etc., the time fixed for completion should be extended, it was held that where an unprecedented storm destroyed the building before completion, the loss would fall on the contractors, although the payments were to be

tract is not discharged by subsequent impossibility of performance there is an exception where the performanee becomes impossible by law, either by reason of (1) a change in the law, or (2) by some action by or under the authority of the government. In such cases the promisor is discharged.[79] No contract can be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law.[80] This principle applies for example where performance of a charter-party for the loading of a cargo at a foreign port is prevented by a declaration of war with that country rendering it impossible to provide or ship the cargo without an illegal act of trading with the enemy;[81] where a lessor covenants that neither he nor his assigns will permit any building upon a piece of land adjoining the demised premises, and performance of the covenant is prevented by a railroad company subsequently taking the land under compulsory powers given by statute and building a railroad station upon it;[82] where a person promises to pay another a certain sum, provided the latter shall perform military duty for the former for six months, and before the expiration of the six months peace is proclaimed;[83] where, after a lease of a wooden building containing a covenant that it shall be rebuilt if burned down, a law is passed prohibiting the erection of wooden buildings in that place;[84] and in other like cases.[85] In like manner any prohibitory action taken by the public authorities

made as the work progressed. And in Middlesex Water Co. *v.* Knappmann Whiting Co., 64 N. J. L. 240, 45 Atl. 692, 81 Am. St. Rep. 467, 49 L. R. A. 572, where a water company unconditionally contracted to supply to a consumer water with pressure sufficient for fire purposes, it was held liable for damages sustained by the consumer from fire in consequence of a failure in the water pressure, although the failure was due to a break in the pipes without the water company's fault.

Where impossibility might have been foreseen see *supra*, IX, D, 4.

79. See the cases in the notes following.

80. *Louisiana.*— Jnlienne *v.* Touriac, 13 La. Ann. 599. See Wilberding *v.* Maher, 35 La. Ann. 1182.

Massachusetts.— Wade *v.* Mason, 12 Gray 335, 74 Am. Dec. 597; Baylies *v.* Fettyplace, 7 Mass. 325.

Michigan.— Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430.

Missouri.— Sauner *v.* Phœnix Ins. Co., 41 Mo. App. 480.

New York.— Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. 63, 19 N. Y. St. 574, 2 L. R. A. 284; People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174; Baker *v.* Johnson, 42 N. Y. 126; Jones *v.* Judd, 4 N. Y. 411; Brick Presb. Church Corp. *v.* New York, 5 Cow. 538; Livingston *v.* Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598.

Tennessee.— Mississippi, etc., R. Co. *v.* Green, 9 Heisk. 588.

United States.— Semmes *v.* Hartford City F. Ins. Co., 13 Wall. 158, 20 L. ed. 490.

England.— Baily *v.* De Crespigny, L. R. 4 Q. B. 180; Atkinson *v.* Ritchie, 10 East 530, 10 Rev. Rep. 372.

See 11 Cent. Dig. tit. "Contracts," § 1417.

81. Esposito *v.* Bowden, 7 E. & B. 763, 3 Jur. N. S. 1209, 27 L. J. Q. B. 17, 5 Wkly. Rep. 732, 90 E. C. L. 763; Reid *v.* Hoskins, 6 E. & B. 953, 3 Jur. N. S. 238, 26 L. J. Q. B. 5, 5 Wkly. Rep. 45, 88 E. C. L. 953. See WAR.

82. Baily *v.* De Crespigny, L. R. 4 Q. B. 180.

83. Jewell *v.* Thompson, 2 Litt. (Ky.) 52.

84. Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430.

85. Thus in O'Neil *v.* Armstrong, [1895] 2 Q. B. 70, where an Englishman was engaged by the captain of a war-ship owned by the Japanese government to act as fireman on a voyage from Tyne to Yokohama, and in the course of the voyage the Japanese government declared war with China, and the Englishman was informed that a performance of the contract would bring him under the penalties of the Foreign Enlistment Act, it was held that he was entitled to leave the ship and sue for the wages agreed upon, since the act of the Japanese government had made his performance of the contract legally impossible. But in Tweedie Trading Co. *v.* James P. McDonald Co., 114 Fed. 985, where plaintiff had entered into a contract with defendant in the United States by which the former agreed to make four trips with his steamship from Barbadoes to Colon to transport laborers for the latter, who contracted to pay a stated sum for each trip, and the contract when made was legal and valid where made, and also at the places of performance; but after two trips had been made a regulation of the colonial government of the Barbadoes was promulgated forbidding the future embarkation of laborers, by reason of which defendant was unable to furnish any more for transportation, it was held that such fact, which did not affect the legality of the contract where made, did not constitute a defense to an action to recover the hire of the ship for the remaining voyages at the contract price.

will discharge a promise,[86] as where a servant agrees with his master that he will give two weeks' notice before leaving his service, and the servant is arrested for crime;[87] where a general agent of a life-insurance company is engaged for five years at a stipulated salary, but before the expiration of the five years the company is enjoined from doing business and a receiver is appointed, the proceedings being instituted by the superintendent of the insurance department and prosecuted by the attorney-general;[88] and like cases.[89] A contract made in contemplation of the passage of legislative acts which were essential to the object of the contract, and the passage of which was confidently expected by both parties, cannot be enforced where the legislature refuses to pass those acts, and adopts other measures entirely defeating the object of the parties in making the contract.[90] The exception does not apply, however, where the impossibility created by the law is only temporary,[91] where the change merely makes performance more burdensome,[92] or where the law in question is that of a foreign country and not a domestic law.[93]

c. Existence or Capacity of Specific Person or Thing. Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance.[94] Thus where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract.[95] So contracts to perform personal acts are considered as made on the

86. See cases above cited.

87. Hughes *v.* Wamsutta Mills, 11 Allen (Mass.) 201. See Leopole *v.* Salkey, 89 Ill. 412, 31 Am. Rep. 93.

88. People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174, holding that the agent had no claim upon the fund in the receiver's hands for damages for an alleged breach of contract.

89. Thus where defendant agreed to pay plaintiff a certain price per bushel for hauling all coal sold by defendant to a third person, and the latter's business passed into the hands of a receiver, who purchased coal of defendant under order of court, and employed defendant to haul it, it was held that plaintiff could not maintain an action against defendant for breach of contract. Atkinson *v.* Schoonmaker, 12 Mo. App. 425. See also Malcomson *v.* Wappoo Mills, 88 Fed. 680. And where pending a suit the court placed a manager in charge of the business of delivering ore to defendant, under the contract which gave rise to the suit, and of receiving payment for plaintiff, and a creditor of plaintiff attached, in defendant's hands, money due plaintiff, who thereupon stopped payment, and the manager accordingly stopped delivery, it was held that defendant could not afterward be compelled to receive the ore thus detained, the original contract calling for the delivery of a certain quantity each month. Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678, 9 Atl. 691.

90. Miles *v.* Stevens, 3 Pa. L. J. Rep. 434.

91. Baylies *v.* Fettyplace, 7 Mass. 325; Hadley *v.* Clarke, 8 T. R. 259, 4 Rev. Rep. 641.

92. Baker *v.* Johnson, 42 N. Y. 126.

93. Leake Contr. 713. See Splidt *v.* Heath, 2 Campb. 57, note *a*, 11 Rev. Rep. 663; Bright *v.* Page, 3 B. & P. 295, note *a*, 6 Rev. Rep. 795 note; Barker *v.* Hodgson, 3 M. & S. 267, 270, 15 Rev. Rep. 485, in the last of which cases the court said: "If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, . . . would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused from performing it, but must answer in damages."

94. Singleton *v.* Carroll, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95; Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415.

95. *Alabama.*— Greene *v.* Linton, 7 Port. 133, 31 Am. Dec. 707. See Perry *v.* Hewlett, 5 Port. 318, holding that a covenant of the hirer of a slave to return him at the expiration of the term was discharged by the death of the slave.

Illinois.— Walker *v.* Tucker, 70 Ill. 527.

Maine.— Gould *v.* Murch, 70 Me. 288, 35 Am. Rep. 325.

Massachusetts.— Wells *v.* Calnan, 107 Mass. 514, 9 Am. Rep. 65; Lord *v.* Wheeler, 1 Gray 282; Thompson *v.* Gould, 20 Pick. 134.

Michigan.— Nicol *v.* Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542.

Missouri.— Livingston County *v.* Graves,

implied condition that the party shall be alive and shall be capable of performing the contract, so that death or disability will operate as a discharge,[96] as in the case

32 Mo. 479, holding that where defendant contracted with plaintiff to build a bridge in accordance with certain plans and specifications, and bound himself to keep such bridge in repair for the term of three years, he was not liable to rebuild if the bridge was destroyed by fire. But see *supra*, IX, D, 5, a.

New York.— Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415.

Oregon.— Powell *v.* Dayton, etc., R. Co., 12 Oreg. 488, 8 Pac. 544.

Pennsylvania.— Ward *v.* Vance, 93 Pa. St. 499; Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291, where a company contracted to deliver from their mines a certain quantity of coal, and at the date of entering into the contract they had the necessary facilities to enable them to comply with the contract, but before the time for delivery of a large portion of the coal a flood swept away the means of transportation, so that the company could not fulfil their contract. It was held that they were excused from a compliance while they were thus prevented.

Virginia.— Clark *v.* Franklin, 7 Leigh 1.

Wisconsin.— McMillan *v.* Fox, 90 Wis. 173, 62 N. W. 1052.

United States.— The Tornado, 108 U. S. 342, 2 S. Ct. 746, 27 L. ed. 747.

England.—Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 44 L. J. C. P. 130, 32 L. T. Rep. N. S. 467, 23 Wkly. Rep. 626 (where a contract was made for the construction and fitting of engines upon a ship then on a voyage, to be paid for by instalments from time to time, according to the certified progress of the work, and the work was commenced and payment made accordingly, but before the engines were completed ready for fitting the ship was lost at sea. It was held that both parties were excused from further performance of the contract); Howell *v.* Coupland, L. R. 9 Q. B. 462 (holding that where a person contracted to deliver a certain quantity of a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight, the case came within the rule that where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the party's fault); Taylor *v.* Coldwell, 3 B. & S. 826, 838, 32 L. J. Q. B. 164, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826 (where an agreement was made for giving a series of concerts at a music-hall, by which one of the parties was to let the use of the hall for a stated daily payment, and to provide certain other requirements, and the other party was to provide the performers and to take the money, and before the time arrived the hall was accidentally destroyed by fire. It was held that the agreement was impliedly conditional upon the continued existence of the hall, and was put an end to by its destruction, and that no claim could be made under it for not letting the hall); Garniss *v.* Heinke, 40 L. J. Ch. 306 (where a covenant by a debtor with his creditor to pay the premiums on a policy of insurance effected with a certain insurance company was held to be impliedly conditional upon the continued existence of the company).

But see Anderson *v.* May, 50 Minn. 280, 284, 52 N. W. 530, 36 Am. St. Rep. 642, 17 L. R. A. 555, where on a contract to raise, sell, and deliver a specified quantity of beans of various kinds, no particular land on which they were to be raised being specified, the court held that the fact that unexpected early frost so far destroyed the party's crops that he could not complete his contract was no excuse. "Where such causes," it was said, "may intervene to prevent a party performing, he should guard against them in his contract." And see *supra*, IX, D, 5, a.

96. *Kentucky.*—Shultz *v.* Johnson, 5 B. Mon. 497.

Maine.— Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77; Knight *v.* Bean, 22 Me. 531.

Massachusetts.— Harrington *v.* Fall River Iron Works Co., 119 Mass. 82; Stewart *v.* Loring, 5 Allen 306, 81 Am. Dec. 747; Fuller *v.* Brown, 11 Metc. 440.

New York.— Spalding *v.* Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Clark *v.* Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388.

Pennsylvania.— Blakely *v.* Sousa, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. Rep. 821; Scully *v.* Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

Rhode Island.— Yerrington *v.* Greene, 7 R. I. 589, 84 Am. Dec. 578.

Wisconsin.— Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57; Green *v.* Gilbert, 21 Wis. 395.

England.— Boast *v.* Firth, L. R. 4 C. P. 1, 38 L. J. C. P. 1, 19 L. T. Rep. N. S. 264, 17 Wkly. Rep. 29; Robinson *v.* Davidson, L. R. 6 Exch. 269, 40 L. J. Exch. 172, 24 L. T. Rep. N. S. 755, 19 Wkly. Rep. 1036. And see Taylor *v.* Caldwell, 3 B. & S. 826, 835, 32 L. J. Q. B. 164, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826, where it was said: "There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e. g., promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable: . . . In those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor."

where an artist agrees to perform at a concert on a certain day, and when the day arrives, he is sick and unable to perform;[97] where a person agrees to pay another a certain sum for tuition during a certain term, and during all the term he is too ill to attend;[98] and like cases.[99] But the rule that the death of a person discharges his contract to render personal services does not apply where the services are of such a character that they may be as well performed by his personal representative.[1]

6. Impossibility in Case of Alternative Promises. If a person contracts to do one of two or more things in the alternative, and at the time of making the contract one of them is possible and the other impossible, it seems to be a general rule that he must perform that which is possible.[2] Where both alternatives are possible at the time of making the contract, and one of them subsequently becomes impossible, the question whether the other remains binding depends upon the construction of the contract as to the intention of the parties under the circumstances.[3]

E. Discharge by Operation of Law — 1. In General. There are certain rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, as in the case of (1) merger; (2) alteration of a written instrument; and (3) discharge in bankruptcy or insolvency.[4]

2. Merger. The acceptance of a higher security in the place of a lower merges or extinguishes the lower. The merger in such a case does not depend on the intention of the parties at all, but the mere acceptance of the higher security *ipso facto* extinguishes the lower as a matter of law.[5] Thus if a contract under

See 11 Cent. Dig. tit. "Contracts," § 1448 *et seq.*; and, generally, Master and Servant.

97. Robinson *v.* Davison, L. R. 6 Exch. 269, 40 L. J. Exch. 172, 24 L. T. Rep. N. S. 755, 19 Wkly. Rep. 1036.

98. Stewart *v.* Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747.

99. In Spalding *v.* Rosa, 71 N. Y. 40, 27 Am. Rep. 7, defendants agreed with plaintiffs, proprietors of a theater, to furnish the Wachtel Opera Troupe to give a number of performances in their theater, the receipts to be divided in a specified manner. Wachtel, from whom the company took its name, and by whose name it was known, was the leader and chief attraction, and his connection with the company was the inducement that led the plaintiffs to make the agreement. Wachtel became unable to sing in consequence of illness, and the defendants did not consequently furnish the troupe. In an action for breach of agreement, it was held that Wachtel's appearance was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the company without him; and that his sickness and inability to sing constituted a good excuse for non-performance of the agreement.

1. *California.*— Janin *v.* Browne, 59 Cal. 37.

Kentucky.— Hawkins *v.* Ball, 18 B. Mon. 816, 68 Am. Dec. 755; Shultz *v.* Johnson, 5 B. Mon. 497.

North Carolina.— Siler *v.* Gray, 86 N. C. 566.

Pennsylvania.— Billing's Appeal, 106 Pa. St. 558.

United States.— Howe Sewing-Mach. Co. *v.* Rosensteel, 24 Fed. 583.

See 11 Cent. Dig. tit. "Contracts." § 1448.

2. Board of Education *v.* Townsend, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868; Leake Contr. 716.

3. In Barkworth *v.* Young, 4 Drew. 7, 24, 3 Jur. N. S. 34, 26 L. J. Ch. 153, 5 Wkly. Rep. 156, it was said: "It is impossible to lay down any universal proposition either way, but that the principle to be applied in each case is, that it must depend on the intention of the parties to the bond or covenant or agreement, such intention to be collected from the nature and circumstances of the transaction, and the terms of the instrument. And this, at least, I think will hardly admit of contradiction that if the Court is satisfied, that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of those modes becomes impossible by the act of God, he is still bound to perform it in the other mode." But in New Hampshire it has been laid down that the obligor is excused from the performance of a disjunctive condition, if one of the alternative things becomes impossible of performance by the act of God or the fault of the other party. Other courts have held the contrary. Jacquinet *v.* Boutron, 19 La. Ann. 30; Drake *v.* White, 117 Mass. 10; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; State *v.* Worthington, 7 Ohio 171.

4. Anson Contr. 326; and cases cited in notes following.

5. *Illinois.*— Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Maryland.— Keefer *v.* Zimmerman, 22 Md. 274; Moale *v.* Hollins, 11 Gill & J. 11, 33 Am. Dec. 684.

seal is accepted in the place of a simple contract, whether oral or in writing, the simple contract is discharged.[6] In order to effect a merger the two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity unless there be a discharge by substituted agreement.[7] It is also necessary that the subject-matter of the two securities shall be identical, and the parties the same.[8] Even security of a higher nature will not extinguish the lower, if the higher security is expressly received as collateral, or if it merely recognizes the debt and fixes the mode of ascertaining its amount.[9] It is sometimes said that an oral contract when reduced to writing is merged in the written contract, but this is an inaccurate use of the term "merger." It merely means that where a simple contract is reduced to writing it cannot be contradicted or added to by evidence of a prior or contemporaneous oral agreement.[10] The term

Massachusetts.—Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

New York.— Butler *v.* Miller, 1 Den. 407.

Pennsylvania.— Jones *v.* Johnson, 3 Watts & S. 276, 38 Am. Dec. 760.

England.— Price *v.* Moulton, 10 C. B. 561, 15 Jur. 228, 20 L. J. C. P. 102, 70 E. C. L. 561.

5. *Indiana.*— Rhoads *v.* Jones, 92 Ind. 328; Coleman *v.* Hart, 25 Ind. 256; Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Iowa.— Tama City First Nat. Bank *v.* Schlichting, 40 Iowa 51. But see Saville *v.* Chalmers, 76 Iowa 325, 41 N. W. 30.

Maryland.— Leonard *v.* Hugblett, 41 Md. 380.

Massachusetts.—Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Michigan.— Martin *v.* Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

Minnesota.—Griswold *v.* Eastman, 51 Minn. 189, 53 N. W. 542; Clark *v.* Lindeke, 44 Minn. 112, 46 N. W. 326.

Mississippi.—Berry *v.* Bacon, 28 Miss. 318; Myers *v.* Oglesby, 6 How. 46.

Missouri.— Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Vaughn *v.* Lynn, 9 Mo. 770; Settle *v.* Davidson, 7 Mo. 604. But see Maddin *v.* Edmondson, 10 Mo. 643.

New Jersey.—Van Vleit *v.* Jones, 20 N. J. L. 340, 43 Am. Dec. 633; Hargrave *v.* Conroy, 19 N. J. Eq. 281.

New York.— Howes *v.* Barker, 3 Johns. 506, 3 Am. Dec. 526; Curson *v.* Monteiro, 2 Johns. 308.

North Carolina.—Burnes *v.* Allen, 31 N. C. 370. *Compare* Daughtry *v.* Boothe, 49 N. C. 87.

Ohio.— McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731.

Pennsylvania.—Anderson *v.* Levan, 1 Watts & S. 334; Charles *v.* Scott, 1 Serg. & R. 294.

South Carolina.— Gardner *v.* Hust, 2 Rich. 601.

Tennessee.— Nichol *v.* Thompson, 1 Yerg. 151.

Vermont.— Smith *v.* Highbee, 12 Vt. 113.

Virginia.— Shenandoah Valley R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239; Ward *v.* Motter, 2 Rob. 536. *Compare* Meade *v.* Grigsby, 26 Gratt. 612.

West Virginia.— Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

England.— Price *v.* Moulton, 10 C. B. 561, 15 Jur. 228, 20 L. J. C. P. 102, 70 E. C. L. 561.

See 11 Cent. Dig. tit. "Contracts," § 1130.

7. Bill *v.* Porter, 9 Conn. 23; Keefer *v.* Zimmerman, 22 Md. 274; Gregorn *v.* Thomas, 20 Wend. (N. Y.) 17; Andrews *v.* Smith, 9 Wend. (N. Y.) 53; Higgens' Case, 6 Coke 44*b*. One simple contract does not merge or extinguish another. Wylly *v.* Collins, 9 Ga. 223.

Where a sealed contract is followed by one not under seal relating to the same subject-matter, if both can be executed together, the one is not substituted for the other. Lawall *v.* Rader, 2 Grant (Pa.) 426.

8. *Illinois.*— Shelby *v.* Chicago, etc., R. Co., 143 Ill. 385, 32 N. E. 438.

Massachusetts.— Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Michigan.— Doty *v.* Martin, 32 Mich. 462.

New York.— Hutchins *v.* Hebbard, 34 N. Y. 24; Witbeck *v.* Waine, 16 N. Y. 532. See Dickinson *v.* Vace, 31 N. Y. App. Div. 464, 53 N. Y. Suppl. 619.

England.— Hooper's Case, 2 Leon. 110; Holmes *v.* Bell, 3 M. & G. 213, 3 Scott N. R. 479, 42 E. C. L. 118.

9. *Maine.*— Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232.

Maryland.— Rees *v.* Logsdon, 68 Md. 93, 11 Atl. 708; Brengle *v.* Bushey, 40 Md. 141, 17 Am. Rep. 586.

Massachusetts.— Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Michigan.— Doty *v.* Martin, 32 Mich. 462.

New Jersey.— Van Vleit *v.* Jones, 20 N. J. L. 340, 43 Am. Dec. 633.

New York.— Butler *v.* Miller, 1 Den. 407; Day *v.* Leal, 14 Johns. 404.

Pennsylvania.— Charles *v.* Scott, 1 Serg. & R. 294.

Texas.— Stamper *v.* Johnson, 3 Tex. 1.

Virginia.— Taylor *v.* Alexandria Bank, 5 Leigh 471.

England.— Marryat *v.* Marryat, 28 Beav. 224, 6 Jur. N. S. 572, 29 L. J. Ch. 665, 2 L. T. Rep. N. S. 531; Hooper's Case, 2 Leon. 110.

10. Wemple *v.* Hauenstein, 19 N. Y. App. Div. 552, 46 N. Y. Suppl. 288; Wolfe *v.* Potts, (Tenn. Ch. App. 1897) 42 S. W. 188; Michels *v.* Rustemeyer, 20 Wash. 597, 56 Pac. 380. See EVIDENCE.

"merger" is also sometimes applied to the substitution of one simple contract for another. Here, however, there is no discharge by operation of law, but the substitution depends upon the intention of the parties.[11]

3. ALTERATION OF WRITTEN INSTRUMENT. If a deed or simple contract in writing is altered by addition or erasure, it is discharged, if the alteration is made in a material part, so as to change the legal effect of the instrument, by a party to the contract, or by a stranger with his consent, and if it is made intentionally and without the consent of the other party.[12]

4. DISCHARGE IN BANKRUPTCY. Bankruptcy effects a statutory release from debts and liabilities provable in the bankruptcy proceedings when the bankrupt has obtained from the court an order of discharge.[13]

F. Discharge by Breach — 1. IN GENERAL. The breach of a contract by one of the parties gives to the other a right of action for the injury suffered by him from such breach,[14] but it does not in all cases discharge him from performance on his part. The contract may be broken wholly or in part, and if in part the breach may or may not be sufficiently important to operate as a discharge;[15] or if it is of such importance the injured party may choose not to regard it as a discharge, preferring to continue to carry out the contract, reserving to himself the right to sue for such damages as he may have sustained by the breach.[16] It is often very difficult to determine whether or not a breach of one of the terms of a contract discharges the party injured.

2. MODES OF DISCHARGE BY BREACH. A contract may be discharged by breach in three ways, namely: (1) By one party renouncing his liabilities under it; (2) by his making it impossible that he can perform his promise; or (3) by his totally or partially failing to perform his promise. Breach by renunciation and breach by acts rendering performance impossible may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise.[17] Breach by failure to perform can only take place at or during the time for performance.[18]

3. RENUNCIATION OF LIABILITY — a. Before Performance Is Due — (1) *IN GENERAL.* The parties to an executory contract have a right to something more than that it shall be performed when the time arrives; they have a right to the maintenance of the contractual relation up to that time, as well as to the performance of the contract when due, and by the weight of authority, if one of the parties

11. Pike *v.* Pike, 69 Vt. 535, 38 Atl. 265; Housekeeper Pub. Co. *v.* Swift, 97 Fed. 290, 38 C. C. A. 187. See *supra*, IX, B, 1, c.

12. *Connecticut.*—Ætna Bank *v.* Winchester, 43 Conn. 391.

Illinois.— Montag *v.* Linn, 23 Ill. 551; Gardiner *v.* Harback, 21 Ill. 128; Gillett *v.* Sweat, 6 Ill. 475.

Indiana.— Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229; Schnewind *v.* Hacket, 54 Ind. 248.

Iowa.— Woodworth *v.* Anderson, 63 Iowa 503, 19 N. W. 296; Marsh *v.* Griffin, 42 Iowa 403.

Kansas.— Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406.

Massachusetts.— Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92.

Michigan.— Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661; Wait *v.* Pomeroy, 20 Mich. 425, 4 Am. Rep. 395.

Missouri.— Morrison *v.* Garth, 78 Mo. 434.

New York.— McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372; Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Davis *v.* Bauer, 41 Ohio St. 257; Harsh *v.* Klepper, 28 Ohio St. 200.

Pennsylvania.— Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

Wisconsin.— Kilkelly *v.* Martin, 34 Wis. 525.

United States.— Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641; Angle *v.* Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Wood *v.* Steele, 6 Wall. 80, 18 L. ed. 725.

England.— Suffell *v.* Bank of England, 9 Q. B. D. 555, 46 J. P. 500, 51 L. J. Q. B. 401, 47 L. T. Rep. N. S. 146, 30 Wkly. Rep. 932.

See ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137.

13. See BANKRUPTCY, 5 Cyc. 390 *et seq.*

14. See *infra*, XII.

15. See *infra*, IX, F, 5, f, g.

16. See *infra*, IX, F, 5, d.

17. See *infra*, IX, F, 3, 4.

18. See *infra*, IX, F, 5.

renounces it before that time, the other is entitled to sue at once for the breach.[19] In the leading English case the court based the doctrine on the ground that where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation.[20] In a later case it was said: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests."[21] The leading cases illustrating the principle are where a person engaged another to act as his courier, the employment to commence three months from that time, but two months before the service was due notified him that he would not require his services,[22] and where a person promised to marry a woman upon his father's death, but during his father's lifetime renounced the agreement.[23] In both cases it was held that the other might sue at once. In Massachusetts this rule is not recognized. It is there held that a renunciation before the time for performance has arrived does not amount to a breach; that, to render a person liable "for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance."[24]

(II) *Limitations to Rule*—(A) *Renunciation Must Be Entire.* In order that the rule may apply, the renunciation must cover the entire performance to which the contract binds the promisor.[25] Thus where a landlord covenanted to

19. *Illinois.*—Kadish *v.* Young, 108 Ill. 170, 43 Am. Rep. 548; Fox *v.* Kitton, 19 Ill. 519.

Indiana.—Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275.

Iowa.—McCormick *v.* Basal, 46 Iowa 235; Crabtree *v.* Messersmith, 19 Iowa 179.

Kansas.—Kennedy *v.* Rodgers, 2 Kan. 764, 44 Pac. 47.

Maryland.—Eckenrode *v.* Canton Chemical Co., 55 Md. 51.

Michigan.—Platt *v.* Brand, 26 Mich. 173; Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

Missouri.—Claes, etc., Mfg. Co. *v.* McCord, 65 Mo. App. 507; Gabriel *v.* Akinsville Pressed Brick Co., 57 Mo. App. 520.

New York.—Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Ferris *v.* Spooner, 102 N. Y. 10, 5 N. E. 773; Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Bunge *v.* Koop, 48 N. Y. 225, 8 Am. Rep. 546; Dillon *v.* Anderson, 43 N. Y. 231; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516.

Pennsylvania.—Zuck *v.* McClure, 98 Pa. St. 541.

West Virginia.—Davis *v.* Grand Rapids School-Furniture Co., 41 W. Va. 717, 24 S. E. 630; James *v.* Adams, 16 W. Va. 245.

United States.—Roehm *v.* Host, 91 Fed. 345, 33 C. C. A. 550; Dingley *v.* Oler, 11 Fed. 372, 117 U. S. 490, 6 S. Ct. 850, 29 L. ed. 984; Grau *v.* McVicker, 10 Fed. Cas. No. 5,708, 8 Biss. 13.

England.—Roper *v.* Johnson, L. R. 8 C. P. 167, 42 L. J. C. P. 65, 28 L. T. Rep. N. S. 296, 21 Wkly. Rep. 384; Frost *v.* Knight, L. R. 7 Exch. 111, 114, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678.

20. Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678.

21. Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471. Anson indorses this reasoning because "it would seem needless to imply a promise in order to give the plaintiff a right of action. A contract is a contract from the time it is made, and not from the time that performance of it is due; if this is so, it is needless and clumsy to introduce into every contract an implied promise that, up to a certain period of its existence, it shall not be broken." Anson Contr. 290.

22. Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678.

23. Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471. And see Kurtz *v.* Frank, 76 Ind. 594, 40 Am. Rep. 275; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516.

24. Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384. And see Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760.

25. *Illinois.*—Roebling *v.* Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 615.

North Dakota.—Davis *v.* Bronson, 2 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655.

Pennsylvania.—Obermyer *v.* Nichols, 6 Binn. 159, 6 Am. Dec. 439.

United States.—Dingley *v.* Oler, 117 U. S. 490, 6 S. Ct. 850, 29 L. ed. 984.

repair the premises at a certain period of the tenancy, and before that period arrived he repudiated the covenant and the tenant at once claimed damages for the breach, it was held that the contract was the whole lease and that the anticipatory breach of a particular covenant in it did not entitle the tenant to sue.[26]

(B) *Must Be Distinct and Unequivocal.* The renunciation must also be distinct and unequivocal. A mere expression of intention not to perform is not enough.[27] But no precise form of words is necessary. The obligation of the contract being created, a denial of its existence is equivalent to a repudiation or renunciation of liability under it.[28]

(C) *Contract Must Be Bilateral.* The contract must not be a unilateral one. A man for example may say to the holder of his note, "I am not going to pay it when it is due," but until payment is refused when it falls due, no legal right of the holder has been violated by the maker.[29]

(D) *Renunciation May Be Rejected.* If the promisee elects not to accept the renunciation, and continues to insist on the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur to discharge it from other causes, the promisor may take advantage of such discharge.[30] A contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal and go on with the contract, and is not cut off from so doing by the service upon him of a notice to the effect that the contractor will hold such refusal to be a default, and will sue to dissolve the contract.[31]

(E) *Renouncing Party Cannot Force Acceptance.* The renouncing party cannot force the other, nor is the other bound, to sue for a breach of the contract before the day fixed for performance arrives, and have the damages assessed as of the time of the renunciation. The party keeping the contract, in other words, need not mitigate the damages by treating as final the premature repudiation.[32]

England.—Johnstone *v.* Milling, 16 Q. B. D. 460, 50 J. P. 694, 55 L. J. Q. B. 162, 54 L. T. Rep. N. S. 629, 34 Wkly. Rep. 238.

26. Johnstone *v.* Milling, 16 Q. B. D. 460, 50 J. P. 694, 55 L. J. Q. B. 162, 54 L. T. Rep. N. S. 629, 34 Wkly. Rep. 238.

27. *Michigan.*— Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

New York.— McIntosh *v.* Miner, 37 N. Y. App. Div. 483, 55 N. Y. Suppl. 1074.

Pennsylvania.— Zuch *v.* McClure, 98 Pa. St. 511.

Texas.— Kilgore *v.* Northwest Texas Baptist Educational Soc., (Civ. App. 1896) 37 S. W. 473 [*reversed* in (Sup. 1896) 37 S. W. 598].

Vermont.— Vittum *v.* Estey, 67 Vt. 158, 31 Atl. 144.

United States.— Dingley *v.* Oler, 117 U. S. 490, 6 S. Ct. 850, 29 L. ed. 984; U. S. *v.* Smoot, 15 Wall. 36, 21 L. ed. 107; Marks *v.* Van Eeghen, 85 Fed. 853, 30 C. C. A. 208.

28. Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

29. Lawson Contr. § 440; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516.

30. Smith *v.* Georgia Loan, etc., Co., 113 Ga. 975, 39 S. E. 410; Kadish *v.* Young, 108 Ill. 170, 43 Am. Rep. 548; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Avery *v.* Bowden, 5 E. & B. 714, 85 E. C. L. 714.

In the leading case of Avery *v.* Bowden, 5 E. & B. 714, 85 E. C. L. 714, defendant agreed with plaintiff by charter-party that plaintiff's ship should sail to Odessa, and there take a cargo from defendant's agent, which was to be loaded within a certain number of days. The vessel reached Odessa and her master demanded a cargo, but defendant's agent refused to supply one. Although the days within which plaintiff was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. Plaintiff would then have had a right to sue upon the contract. But the master of the ship continued to demand a cargo, and before the running days were out, and therefore before a breach by non-performance had occurred, a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterward plaintiff sued for breach of the charter-party. It was held that as there had been no actual failure of performance before the war broke out, as the running days had not then expired, and as plaintiff's agent had not accepted the renunciation as a breach, defendant was entitled to the discharge of the contract which took place upon the declaration of war.

31. Perkins *v.* Frazer, 107 La. 390, 31 So. 773.

32. In Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548, the plaintiffs on Dec. 15, 1880, sold to defendants to be delivered to them during January, 1881, one hundred thousand

It is, however, to be observed that there is a decision to the contrary effect in equity.[33]

(F) *Other Party Cannot Proceed and Complete Contract.* But after notice of such repudiation the other party cannot go on and complete an executory contract, and then sue for the full contract price or for any increased damages caused by his continuing to perform.[34] This principle has been applied in a number of cases to contracts of employment, the rule being that an employer may order the discontinuance of work which he has contracted with or employed another to perform, subject to proper compensation in damages to the employee; and that the latter cannot then go on with the work and recover the contract price.[35] But

bushels of barley. On the 16th, the day after the sale, defendants notified plaintiffs that they did not consider themselves bound by the contract, and that they would not carry it out. It was held that plaintiffs had a right, notwithstanding such notice, to wait until the day of delivery under the contract arrived, and then resell in the market and recover from defendants the difference between the contract price of the barley and its market price at the day it was to have been delivered; and that there was no duty upon plaintiff to sell the barley on the day of or a reasonable time after the notice, although by a sale at such time the damages would have been greatly reduced, barley having gone down in price in the meantime. See also Davis *v.* Bronson, 3 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655.

33. In Truax *v.* Estes, 92 Fed. 529, it was held that a court of equity, in a suit brought to reform a contract for the purchase of cattle, which were not to be delivered for several months after the date of the contract, and to recover damages for its breach, would not enforce the strict rule of law which permits a party to disregard notice that a contract will not be performed, and to wait until the time for performance and recover damages as of that date, where plaintiff was notified by defendant within a week from the making of the contract and before he had suffered any damage that it would be impossible to furnish the cattle at the prices named, of which fact plaintiff was aware when the contract was made, but defendant was not.

34. *Iowa.*— Moline Scale Co. *v.* Beed, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272.

Maryland.— Heaver *v.* Lenahan, 74 Md. 493, 22 Atl. 263.

Minnesota.— Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 6 L. R. A. 80.

Nebraska.— Nebraska *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870.

New York.— Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648.

North Dakota.— Davis *v.* Bronson, 3 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655.

Rhode Island.— Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Vermont.— Danforth *v.* Walker, 37 Vt. 239, 244, 40 Vt. 257. In this case defendant agreed to purchase of plaintiffs five car-loads of potatoes to be delivered as called for by him. After the first car-load was received, potatoes fell in price in the market and defendant thereupon wrote to plaintiffs not to purchase any more until they should hear from him. It was held that after they received this notice they had no right to purchase on plaintiffs' account any more potatoes. "While a contract is executory," said the court, "a party has the power to stop the performance on the other side, by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party."

35. *California.*— Owen *v.* Frink, 24 Cal. 171.

Illinois.— Roebling Sons Co. *v.* Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518.

Missouri.—Peck *v.* Kansas City Metal Roofing, etc., Co., (App. 1902) 70 S. W. 169, holding that where an advertising contract binding the advertiser to furnish copy, etc., to the publisher, was broken immediately after its execution by the advertiser countermanding the same, the publisher had no right to prepare and insert in the space contracted for matter composed by him, tending to advertise defendant's business, and then sue for the contract price.

New York.—Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648; Lord *v.* Thomas, 64 N. Y. 107; Dillon *v.* Anderson, 43 N. Y. 231. In Clark *v.* Marsiglia, 1 Den. 317, 318, 43 Am. Dec. 670, defendant employed plaintiff to clean and repair certain pictures for an agreed price, but before the work was completed countermanded the order. Plaintiff, however, went on and finished the work and sued for the price agreed upon, claiming that defendant could not countermand the order after the work was begun. He recovered judgment which was reversed on appeal, the court saying: "The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materi-

this rule has been held not to apply where the damages are not an adequate remedy for the breach, that is, where the contract is a proper one for specific performance.[36] And in some jurisdictions an absolute promise to pay a certain sum of money on the performance of a condition, such as a promise to pay a subscription to some projected undertaking, cannot be withdrawn by the promisor so as to force the promisee to cease performance.[37]

b. Renunciation of Liability in Course of Performance. The rules stated in the above sections apply also when the renunciation is made in the course of performance, for renunciation of a contract by one of the parties in the course of performance discharges the other party from a continued performance of his promise, and entitles him to sue at once for the breach, or on a *quantum meruit*.[38]

4. IMPOSSIBILITY OF PERFORMANCE CREATED BY PARTY. Where one of the parties to a contract, either before the time for performance or in the course of performance, makes performance or further performance by him impossible, the other party is discharged and may sue at once for the breach, as in the case of renunciation of liability.[39] Illustrations of this rule are where one agrees to sell and

als used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been. To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted."

North Dakota.— Davis *v.* Bronson, 3 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655.

36. In Marsh *v.* Blackman, 50 Barb. (N. Y.) 329, the plaintiff had agreed in writing with defendants to support and maintain their father during his natural life for a specified sum per week, but after performance had commenced they notified him not to continue performing his agreement, as they would make no further payments. Plaintiff nevertheless continued to furnish the maintenance, and in an action to recover the weekly payments after the notice, it was held that the renunciation by defendant was no defense. And in Watson *v.* Smith, 7 Oreg. 448, an agreement to support was held a proper one of which to decree specific performance.

37. In Buchel *v.* Lott, (Tex. 1890) 15 S. W. 413, the defendant with others signed a subscription list intended as a bonus to a company to construct a certain line of railroad within a certain time. It was held that the defendant could not withdraw his subscription, the court saying: "He became bound upon said contract the moment he signed it, for the amount subscribed by him, subject only to the condition that the railway should be constructed according to the terms of the contract." See also Davis *v.* Bronson, 3 N. D. 300, 50 N. W. 836, 33 Am. St. Rep. 783, 16 L. R. A. 655. This view of the case would not obtain, however, in those jurisdictions where a subscription is held to be without consideration and revocable until the party for whose benefit it is made has done something, as for example made contracts or incurred obligations, on the faith of such subscription. See *supra*, IV, D, 10, h, (II).

38. Spaulding *v.* Cœur D'Alene R., etc., Co., (Ida. 1897) 51 Pac. 408.

Sales.— This rule is frequently illustrated in the law of sales of goods, and is well stated in an English case thus: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the manufacturer having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." Cort *v.* Ambergate, etc., R. Co., 17 Q. B. 127, 15 Jur. 877, 20 L. J. Q. B. 460, 79 E. C. L. 127. For further illustrations of the rule see SALES.

39. *California.*— Wolf *v.* Marsh, 54 Cal. 228.

deliver goods or to sell and convey land on a certain day and before that day arrives sells and delivers the goods to another, or consumes them, or sells and conveys the land to another, as the case may be;[40] where a person promises to marry, and before the time for performance arrives marries another than the promisee;[41] where an incoming tenant agrees to buy the straw upon a farm at a price to be fixed by valuation, and then consumes the straw before a valuation can be made, and so renders performance impossible;[42] where one sells a busi-

Connecticut.— Miller *v.* Ward, 2 Conn. 494. And see Stanton *v.* New York, etc., R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110.

Indiana.— Dare *v.* Spencer, 5 Blackf. 491.

Iowa.— Crabtree *v.* Messersmith, 19 Iowa 179.

Kentucky.— Jones *v.* Walker, 13 B. Mon. 163, 56 Am. Dec. 557; Morford *v.* Ambrose, 3 J. J. Marsh. 688; Summers *v.* Saunders, Litt. Sel. Cas. 329; Kennedy *v.* Kennedy, 2 Bibb 464, 5 Am. Dec. 629; Carroll *v.* Collins, 2 Bibb 429; Majors *v.* Hickman, 2 Bibb 217; Marshall *v.* Craig, 1 Bibb 379, 4 Am. Dec. 647. See also Bullock *v.* Beemis, 1 A. K. Marsh. 433.

Maine.— Bassett *v.* Bassett, 55 Me. 127.

Maryland.— Western Union Tel. Co. *v.* Semmes, 73 Md. 9, 20 Atl. 127; Black *v.* Woodrow, 39 Md. 194.

Massachusetts.— Canada *v.* Canada, 6 Cush. 15; Clark *v.* Moody, 17 Mass. 145; Cooper *v.* Mowry, 16 Mass. 5; Seymour *v.* Bennet, 14 Mass. 266; Webster *v.* Coffin, 14 Mass. 196; Hopkins *v.* Young, 11 Mass. 302.

Michigan.— Grice *v.* Noble, 59 Mich. 515, 26 N. W. 688; Sheahan *v.* Barry, 27 Mich. 217. See McCreery *v.* Green, 38 Mich. 172.

Minnesota.— Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862; Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Dodge *v.* Rogers, 9 Minn. 223.

Missouri.— Hammer *v.* Breidenbach, 31 Mo. 49; Crump *v.* Mead, 3 Mo. 233; Clendennen *v.* Paulsel, 3 Mo. 230, 25 Am. Dec. 435; Gibson *v.* Whip Pub. Co., 28 Mo. App. 450.

New Hampshire.—True *v.* Bryant, 32 N. H. 241; Lovering *v.* Lovering, 13 N. H. 513; Clement *v.* Clement, 8 N. H. 210.

New York.— Woolner *v.* Hill, 93 N. Y. 576; Hawley *v.* Keeler, 53 N. Y. 114; Taylor *v.* Risley, 28 Hun 141; Tone *v.* Doelger, 6 Rob. 251; Meyer *v.* Hallock, 2 Rob. 284; Delamater *v.* Miller, 1 Cow. 75, 13 Am. Dec. 512.

North Carolina.— Cape Fear, etc., Nav. Co. *v.* Wilcox, 52 N. C. 481, 78 Am. Dec. 260; Ashcraft *v.* Allen, 26 N. C. 96.

Vermont.— Camp *v.* Barker, 21 Vt. 469; Sutton *v.* Tyrell, 12 Vt. 79.

United States.— Hinckley *v.* Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967; Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423; Chicago *v.* Tilley, 103 U. S. 146, 26 L. ed. 371; Williams *v.* U. S. Bank, 2 Pet. 96, 7 L. ed. 360.

England.— Lovelock *v.* Franklyn, 8 Q. B. 371, 10 Jur. 246, 15 L. J. Q. B. 146, 55 E. C. L. 371; Panama, etc., Tel. Co. *v.* India Rubber, etc., Co., L. R. 10 Ch. 515, 45 L. J. Ch. 121, 32 L. T. Rep. N. S. 517, 23 Wkly. Rep. 583; *In re* English, etc., Mar. Ins. Co., L. R. 5 Ch. 737, 39 L. J. Ch. 685, 23 L. T. Rep. N. S. 685, 18 Wkly. Rep. 1122; Ford *v.* Tiley, 6 B. & C. 325, 5 L. J. K. B. O. S. 169, 30 Rev. Rep. 339, 13 E. C. L. 154; Bowdell *v.* Parsons, 10 East 359.

See 11 Cent. Dig. tit. "Contracts," § 1446.

40. Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Hawley *v.* Keeler, 53 N. Y. 114; Crist *v.* Armour, 34 Barb. (N. Y.) 378; Bowdell *v.* Parsons, 10 East 359. See SALES; VENDOR AND PURCHASER.

A covenant to convey property or to do any other act is broken by the covenantor, if before the time for performance he destroys the property to be conveyed or puts it out of his power to do the act which is the subject of the covenant. Hopkins *v.* Young, 11 Mass. 302.

Contract to convey land.— A special contract that one party shall remain with the other and carry on his farm until the decease of the latter, and shall then receive the farm in compensation of his services, is broken by a sale of the farm or a part of it by the owner, although for the purpose of paying an antecedent debt. Canada *v.* Canada, 6 Cush. (Mass.) 15.

Under a contract for the sale of a business, the defendants, who purchased, agreed to pay plaintiff a certain sum out of the first moneys collected from the accounts transferred; but before the same was paid defendants sold the accounts to a third person. It was held that defendants having disabled themselves from performing the agreement became at once liable under the contract, although the time for performance had not expired. Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862.

Where a lessor covenanted that the lessee should have as much firewood as she should desire from a certain tract of land, and then cut most of the wood thereon and converted it to his own use, it was held that such conduct was a breach of his covenant. Lovering *v.* Lovering, 13 N. H. 513.

41. King *v.* Kersey, 2 Ind. 402; Sheahan *v.* Barry, 27 Mich. 217; Short *v.* Stone, 8 Q. B. 358, 3 D. & L. 580, 10 Jur. 245, 15 L. J. Q. B. 143, 55 E. C. L. 358. A contract to marry on the death of the divorced wife of a party thereto is broken by the marriage of such party to another woman, although the divorced wife is still living, and he might be able to marry the plaintiff at her death. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914, 52 L. R. A. 660.

42. Clarke *v.* Westrope, 18 C. B. 765, 25 L. J. C. P. 287, 86 E. C. L. 765. But see

ness to be paid for by instalments dependent in amount upon the profits, and the buyer, instead of carrying on the business, discontinues it, and thereby renders it impossible to ascertain the price;[43] where a person agrees to do certain work within a certain time, and the employer orders a number of alterations which prevent completion within that time;[44] where a publisher engages an author to write a treatise for a publication, and before completion of the treatise abandons the publication, in which case the author is excused from further writing, as it has become impossible to publish the treatise in the manner stipulated, and is entitled to claim remuneration for the part already written;[45] where a person employs an attorney to defend him in a criminal prosecution, and gives his note for the fee, and then commits suicide before the trial;[46] and in other like cases.[47] In all of these cases the party by his own act renders performance of his promise impossible, and the other party may sue at once for breach of contract and claim a discharge from performance on his part.[48]

5. Discharge by Failure to Perform — a. In General. As we have just seen, where one of the parties to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties should not be required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised. Nor will the courts hold him any longer bound.[49] But one of the parties may claim that although he has broken his promise wholly or

Garberino *v.* Roberts, (Cal. 1895) 41 Pac. 857.

43. Telegraph Despatch, etc., Co. *v.* McLean, L. R. 8 Ch. 658.

44. Westwood *v.* India State Secretary, 7 L. T. Rep. N. S. 736, 1 New Rep. 262, 11 Wkly. Rep. 261.

45. Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 Moore & S. 51.

46. Mitcherson *v.* Dozier, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116. See also Bright *v.* Taylor, 4 Sneed (Tenn.) 159, where by a contract between an attorney and his client the former agreed to defend the latter on a charge of grand larceny for five hundred dollars, and when part of the service had been rendered, and the attorney was able and ready to go on, the client fled from justice, and forfeited his recognizance. It was held that the attorney might recover the entire fee in an action against the client.

47. For other illustrations see Murphy *v.* St. Louis, 8 Mo. App. 483 (holding that where a person agreed to sell to another at a stipulated price per ton all the ice on a pond, and in violation of the contract permitted another party to remove a portion of it, the purchaser was justified in refusing to take what remained); Kerr *v.* Little, 42 N. J. Eq. 528, 9 Atl. 110 (holding that where a lime-burner contracted with the receiver of a railroad to remove the ashes for a year from an ash-pit, for the cinders and coals to be found there, and before the expiration of the year the assistant general superintendent terminated the contract on the ground of the jealousy of other lime-burners, the receiver must respond in damages); Crist *v.* Armour, 4 Barb. (N. Y.) 378 (holding that where, upon a contract for the whole produce of a dairy for the year, the seller delivered a part, and then informed the purchaser that he had sold the product for the rest of the year to another, and had delivered part thereof, the seller had disabled himself to perform his contract, and that the buyer therefore might recover damages without any offer of performance on his part); Pittsburgh Bessemer Steel Rail Co. *v.* Hinckley, 17 Fed. 584 (where plaintiff agreed to make steel rails for defendant, who was to give directions as to the drilling, which he failed to do, finally declaring the contract off, and it appeared that the directions were necessary, and defendant might have been justified in refusing to accept the rails had they not been drilled as he wished, and it was held that defendant was liable for breach of contract).

48. Where a lessee had promised to assign to another, at any time within seven years from the date of the promise, all his interest in the lease, but before the expiration of the seven years assigned his whole interest to another person, it was held that he could be sued at once for breach of contract, without waiting until the end of the seven years. "The plaintiff," it was said, "has a right to say to the defendant: 'You have placed yourself in a situation in which you cannot perform what you have promised: you promised to be ready during the period of seven years; and, during that period, I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready.' That is a breach of the contract." Lovelock *v.* Franklyn, 8 Q. B. 371, 378, 10 Jur. 246, 15 L. J. Q. B. 146, 55 E. C. L. 371. See also *supra*, IX, F, 3.

49. See *supra*, IX, F, 3, 4.

in part, the contract is not thereby brought to an end, nor the other party discharged from his liabilities. We have then to ascertain whether the promise of the party injured was given conditionally on the performance by the other of that in which he has made default. If it was, he is discharged from his promise; if it was not, he must perform his promise, and bring an action for the damage occasioned by the default of the other. Herein lies the distinction between dependent or conditional and independent promises.[50]

b. When Promises Are Dependent and When Independent — (I) *In General.* In contracts containing executory considerations or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent of the performance of the other. But if the obligation of the one promise is expressly or impliedly conditional upon the due performance of the other, then the performance of the promise constituting the executory consideration is a condition precedent to the liability to perform the other promise.[51] No precise rule, it is said, can be laid down for the solution of the question whether a contract is entire or separable; it must be solved by considering both the language and the subject-matter of the contract.[52] But it may be said generally that where a person makes a promise to another in consideration of a promise by the latter to him, and has not in express terms or upon a reasonable construction of the contract made the performance of his promise to depend upon performance by the other party, he is not discharged by the latter's breach of his promise.[53]

(II) *Independent Promises.* Courts are disinclined to construe the stipulations in a contract to do certain things within a given time in consideration of the payment of money by the other party as conditions precedent, unless compelled to do so by the express language of the contract.[54] If there is no connection in the matter of the promises, and the performance on the one side is quite independent of the performance on the other, the promises are in general independent and not conditional.[55] Where by the terms of the contract the time to per-

50. Anson Contr. 295; and cases cited in the notes following.

51. Stansbury *v.* Fringer, 11 Gill & J. (Md.) 149; Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Leake Contr. 648.

52. More *v.* Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Hill *v.* Grigsby, 35 Cal. 656; McRaven *v.* Crisler, 53 Miss. 542; Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 57 Am. Dec. 538; Northup *v.* Northup, 6 Cow. (N. Y.) 296; Loud *v.* Pomona Land, etc., Co., 153 U. S. 564, 14 S. Ct. 928, 38 L. ed. 822; Hamilton *v.* Home Ins. Co., 137 U. S. 370, 11 S. Ct. 133, 34 L. ed. 708; Brusie *v.* Peck, 54 Fed. 820, 4 C. C. A. 597.

53. Hard *v.* Seeley, 47 Barb. (N. Y.) 428; Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Long *v.* Caffrey, 93 Pa. St. 526; Thorp *v.* Thorp, 12 Mod. 455; Ware *v.* Chappell, Style 186; Thomas *v.* Cadwallader, Willes 496.

54. Front St., etc., R. Co. *v.* Butler, 50 Cal. 574.

55. *Alabama.*— Maull *v.* Eiland, 83 Ala. 314, 3 So. 688; Logan *v.* Hodges, 6 Ala. 699; Mullins *v.* Cabiness, Minor 21.

Arkansas.—Taylor *v.* Patterson, 3 Ark. 238.

California.— Front St., etc., R. Co. *v.* Butler, 50 Cal. 574.

District of Columbia.— Hoss *v.* Wilson, 1 MacArthur 474.

Georgia.— Ensign *v.* Sharp, 72 Ga. 708.

Indiana.— Gillum *v.* Dennis, 4 Ind. 417.

Kentucky.— Hewitt *v.* Berryman, 5 Dana 162; Berryman *v.* Hewit, 6 J. J. Marsh. 462; Hutcheson *v.* Creel, 2 Litt. 348.

Maine.— Hunt *v.* Tibbetts, 70 Me. 221; New England Mut. F. Ins. Co. *v.* Butler, 34 Me. 451; Manning *v.* Brown, 10 Me. 49.

Maryland.— Finley *v.* Boehme, 3 Gill & J. 42; Benson *v.* Hobbs, 4 Harr. & J. 285.

Massachusetts.— Wiley *v.* Athol, 150 Mass. 426, 23 N. E. 311, 16 L. R. A. 342; Crawford *v.* Weston, 131 Mass. 283; Knight *v.* New England Worsted Co., 2 Cush. 271; Couch *v.* Ingersoll, 2 Pick. 292; Tileston *v.* Newell, 13 Mass. 406.

Minnesota.— State *v.* Winona, etc., R. Co., 21 Minn. 472.

Mississippi.—Robinson *v.* Harbour, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; McMath *v.* Johnson, 41 Miss. 439.

Missouri.— Turner *v.* Mellier, 59 Mo. 526; Butler *v.* Manny, 52 Mo. 497; Overton *v.* Curd, 8 Mo. 420; Burris *v.* Shrewsbury Park Land, etc., Co., 55 Mo. App. 381.

Montana.— Edgerton *v.* Power, 18 Mont. 350, 45 Pac. 204.

New Hampshire.— Clough *v.* Baker, 48 N. H. 254; Sumner *v.* Parker, 36 N. H. 449; Putnam *v.* Mellen, 34 N. H. 71; Robinson *v.* Crowninshield, 1 N. H. 76.

New York.—Meriden Britannia Co. *v.* Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Stokes

form the covenant on the one side is to arrive, or may arrive, before the time for the performance of the covenant on the other side, the former is not dependent on the latter.[56] So where one party contracts to do work, and another to pay a stipulated price for the same, and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and a full performance not as a condition precedent to any right of action, unless it is expressly so stipulated or is strongly implied.[57] Promises are independent, where on the one hand an article of merchandise is sold and agreed to be delivered on demand, and on the other payment is deferred until five months after the date of the contract.[58]

(III) *Dependent and Conditional Promises.* The courts at the present day incline strongly against the construction of promises as independent, and in the absence of clear language to the contrary promises which form the consideration for each other will be held to be concurrent or dependent and not independent,[59] so that a failure of one party to perform will discharge the other, and so

v. Stokes, 75 Hun 193, 26 N. Y. Suppl. 1025, 58 N. Y. St. 187 [*reversed* in 148 N. Y. 708, 43 N. E. 211]; Schenectady County *v.* McQueen, 15 Hun 551; Hard *v.* Seeley, 47 Barb. 428; Pearsoll *v.* Frazer, 14 Barb. 564; Pratt *v.* Gulick, 13 Barb. 297; Beekman F. Ins. Co. *v.* New York City First M. E. Church, 18 How. Pr. 431; Bruce *v.* Carter, 1 N. Y. City Ct. 380; Betts *v.* Perine, 14 Wend. 219; Dey *v.* Dox, 9 Wend. 129, 24 Am. Dec. 137; Slocum *v.* Despard, 8 Wend. 615; Gould *v.* Banks, 8 Wend. 562, 24 Am. Dec. 90; Tompkins *v.* Elliot, 5 Wend. 496; Goodwin *v.* Holbrook, 4 Wend. 377; Havens *v.* Bush, 2 Johns. 387; Seers *v.* Fowler, 2 Johns. 272; Barruso *v.* Madan, 2 Johns. 145.

North Carolina.— Henderson *v.* Bessent, 68 N. C. 223; Clancy *v.* Overman, 18 N. C. 402.

Ohio.— Gould *v.* Brown, 6 Ohio St. 538.

Pennsylvania.— Lippincott *v.* Low, 68 Pa. St. 314; Wright *v.* Smyth, 4 Watts & S. 527; Bredin *v.* Agnew, 3 Watts & S. 300; Quinlan *v.* Davis, 6 Whart. 169; Stevenson *v.* Kleppinger, 5 Watts 420; Obermyer *v.* Nichols, 6 Binn. 159, 6 Am. Dec. 439.

South Carolina.— Adrian *v.* Lane, 13 S. C. 183; Barksdale *v.* Toomer, 2 Bailey 180; Rice *v.* Sims, 2 Bailey 82.

Vermont.—Sherwin *v.* Rutland, etc., R. Co., 24 Vt. 347; Booth *v.* Tyson, 15 Vt. 515.

Virginia.— Tait *v.* Tait, 6 Leigh 154; Bream *v.* Marsh, 4 Leigh 21.

United States.— Pollak *v.* St. Louis Brush Electric Assoc., 128 U. S. 446, 9 S. Ct. 119, 32 L. ed. 474; Goldsborough *v.* Orr, 8 Wheat. 217, 5 L. ed. 600.

England.— Thorp *v.* Thorp, 12 Mod. 455; Ware *v.* Chappell, Style 186; Thomas *v.* Cadwallader, Willes 496.

See 11 Cent. Dig. tit. "Contracts," § 1209.

56. *California.*— Front St., etc., R. Co. *v.* Butler, 50 Cal. 574.

Massachusetts.— Couch *v.* Ingersol, 2 Pick. 292.

Minnesota.— Robson *v.* Bohn, 27 Minn. 333, 7 N. W. 357; State *v.* Winona, etc., R. Co., 21 Minn. 472.

Ohio.— McCoy *v.* Bixbee, 6 Ohio 310, 27 Am. Dec. 258.

United States.— American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563; Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341; Slater *v.* Emerson, 19 How. 224, 15 L. ed. 626.

England.— Mattock *v.* Kinglake, 10 A. & E. 50, 8 L. J. Q. B. 56, 1 P. & D. 46, 1 W. W. & H. 667, 37 E. C. L. 51.

The payment of money cannot be made dependent on the performance of a condition by the party to whom it is to be paid, where the condition, by its terms, may not be performed until after the date at which the money is to be paid. Front St., etc., R. Co. *v.* Butler, 50 Cal. 574.

57. Booth *v.* Tyson, 15 Vt. 515.

58. Dox *v.* Dey, 3 Wend. (N. Y.) 356. And see Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377; Lewis *v.* Weldon, 3 Rand. (Va.) 71.

Other illustration.— In an old English case plaintiff brought an action of debt for five hundred pounds against defendant upon an indenture of covenants between them that plaintiff should raise five hundred soldiers and bring them to a certain port, and that defendant should find shipping and victuals for them to transport them to Galicia; the action being brought for not providing the shipping and victuals at the time appointed. Defendant pleaded that plaintiff had not raised the soldiers at that time; and to this plea plaintiff demurred. Roll, C. J., held "that there was no condition precedent; but that they are distinct and mutual covenants, and that there may be several actions brought for them; and it is not necessary to give notice of the number of men raised, for the number is known to be 500, and the time for the shipping to be ready, is also known by the Covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping." Ware *v.* Chappell, Style 186, 187.

Where a bond was given toward the endowment of a professorship in a college, it was held that the establishment and endowment of the professorship was not a condition precedent to the right to recover on the bond, but that the promises were independent. Barnett *v.* Franklin College, 10 Ind. App. 103, 37 N. E. 427.

59. Mill Dam Foundery *v.* Hovey, 21 Pick. (Mass.) 417; Lowber *v.* Bangs, 2 Wall.

that one cannot maintain an action against the other without showing performance or a tender of performance on his part.[60] Where acts are to be performed

(U. S.) 728, 17 L. ed. 768; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157; Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169; Glazebrook *v.* Woodrow, 8 T. R. 366, 4 Rev. Rep. 700; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395.

60. *Alabama.*— Kirkland *v.* Oates, 25 Ala. 465; Drake *v.* Goree, 22 Ala. 409; Davis *v.* Adams, 18 Ala. 264; Davis *v.* Wade, 4 Ala. 208; Taylor *v.* Rhea, Minor 414.

Arkansas.— Haney *v.* Caldwell, 43 Ark. 184; Humphries *v.* Goulding, 3 Ark. 581; Manuel *v.* Campbell, 3 Ark. 324; Kuykendall *v.* Gilbreath, 3 Ark. 222.

California.— Peasley *v.* Hart, 65 Cal. 522, 4 Pac. 537; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

Connecticut.— Smith *v.* Lewis, 24 Conn. 624, 63 Am. Dec. 180; Hammond *v.* Gilmore, 14 Conn. 479; Bean *v.* Atwater, 4 Conn. 3, 10 Am. Dec. 91.

Delaware.— Houston *v.* Spruance, 4 Harr. 117.

Illinois.— Clark *v.* Weis, 87 Ill. 438, 29 Am. Rep. 60; Crabtree *v.* Levings, 53 Ill. 526; Mecum *v.* Peoria, etc., R. Co., 21 Ill. 533; Schoonover *v.* Christy, 20 Ill. 426; Bishop *v.* Newton, 20 Ill. 175; Baird *v.* Evans, 20 Ill. 29; Dunn *v.* Moore, 16 Ill. 151; Brown *v.* Cannon, 10 Ill. 174; Anderson *v.* Taylor, 29 Ill. App. 338; Waldron *v.* Brazil, etc., Coal Co., 7 Ill. App. 542.

Indiana.— Harshman *v.* Heavilon, 95 Ind. 147; McClellan *v.* Coffin, 93 Ind. 456; Summers *v.* Sleeth, 45 Ind. 598; Irwin *v.* Lee, 34 Ind. 319; Morton *v.* Kane, 18 Ind. 191; Ireland *v.* Chauncey, 4 Ind. 224; Ellis *v.* Hubbard, 4 Ind. 206; Heaston *v.* Colgrove, 3 Ind. 265.

Iowa.— White *v.* Day, 56 Iowa 248, 9 N. W. 210; Smith *v.* Cedar Rapids, etc., R. Co., 43 Iowa 239; Anamosa *v.* Wurzbacher, 37 Iowa 25.

Kansas.— Winfield Water Co. *v.* Winfield, 51 Kan. 104, 33 Pac. 714.

Kentucky.— Foster *v.* Watson, 16 B. Mon. 377; McLure *v.* Rush, 9 Dana 64; Hawley *v.* Mason, 9 Dana 32, 33 Am. Dec. 522; Brown *v.* Lowens, 3 Dana 473; Aldridge *v.* Birney, 7 T. B. Mon. 344, 18 Am. Dec. 183; Baker *v.* Legrand, Litt. Sel. Cas. 253; Barry *v.* Alsbury, Litt. Sel. Cas. 149; Conn *v.* Lewis, 5 Litt. 66; McCall *v.* Welsh, 3 Bibb 289; Carrell *v.* Collins, 2 Bibb 429.

Louisiana.— Golding *v.* Petit, 20 La. Ann. 505; Provosty *v.* Putnam, 19 La. Ann. 84; Kimball *v.* Dreher, 1 La. 208.

Maine.— Williams *v.* Hagar, 50 Me. 9.

Maryland.— Coates *v.* Sangston, 5 Md. 121.

Massachusetts.— Gates *v.* Ryan, 115 Mass. 596; Smith *v.* Boston, etc., R. Co., 6 Allen 262; Cadwell *v.* Blake, 6 Gray 402; Mill Dam Foundery *v.* Hovey, 21 Pick. 417; Hunt *v.* Livermore, 5 Pick. 395; Willington *v.* West Boylston, 4 Pick. 101; Couch *v.* Ingersoll, 2 Pick. 292; Johnson *v.* Reed, 9 Mass. 78, 6 Am. Dec. 36.

Mississippi.— Fultz *v.* House, 6 Sm. & M. 404.

Missouri.— Larimore *v.* Tyler, 88 Mo. 661; Turner *v.* Mellier, 59 Mo. 526; Caldwell *v.* Dickson, 26 Mo. 60; Denny *v.* Kile, 16 Mo. 450; Randolph *v.* Frick, 57 Mo. App. 400; Billups *v.* Daggs, 38 Mo. App. 367.

Nebraska.— Chicago, etc., R. Co. *v.* Cochran, 42 Nebr. 531, 60 N. W. 894; Reynolds *v.* Burlington, etc., R. Co., 11 Nebr. 186, 7 N. W. 737.

New Hampshire.— Elliott *v.* Heath, 14 N. H. 131.

New Jersey.— Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Chew *v.* Egbert, 14 N. J. L. 446.

New York.— Duffield *v.* Johnston, 96 N. Y. 369 [*affirming* 10 Daly 360]; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Johnson *v.* Tyng, 1 N. Y. App. Div. 610, 37 N. Y. Suppl. 516, 73 N. Y. St. 205; Johnson *v.* Tyng, 58 Hun 501, 12 N. Y. Suppl. 630, 35 N. Y. St. 570; Martin *v.* Leggett, 4 E. D. Smith 255; Tyng *v.* Good, 13 N. Y. Suppl. 503, 38 N. Y. St. 323; Smith *v.* Clark, 5 N. Y. St. 165; Dakin *v.* Williams, 11 Wend. 67; Dey *v.* Dox, 9 Wend. 129, 24 Am. Dec. 137; Albany Dutch Church *v.* Bradford, 8 Cow. 457; Cunningham *v.* Morrell, 10 Johns. 203, 6 Am. Dec. 332.

North Carolina.— Ducker *v.* Cochrane, 92 N. C. 597; Boyett *v.* Braswell, 72 N. C. 260; Dwiggins *v.* Shaw, 28 N. C. 46; Brittain *v.* Smith, 9 N. C. 572.

Ohio.— Mehurin *v.* Stone, 37 Ohio St. 49; Hounsford *v.* Fisher, Wright 580; Dunham *v.* Dayton, etc., R. Co., 3 Ohio Dec. (Reprint) 329.

Pennsylvania.— Becker's Estate, 166 Pa. St. 313, 31 Atl. 95; Morrow *v.* Waltz, 18 Pa. St. 118; Stokes *v.* Burrell, 3 Grant 241; McCrelish *v.* Churchman, 4 Rawle 26; Stout *v.* Rassel, 2 Yeates 334; Philadelphia Nat. Gas Co.'s Appeal, 1 Pennyp. 100; Harris' Appeal, 12 Atl. 743, 21 Wkly. Notes Cas. 189; Hester *v.* McNeille, 6 Phila. 234, 24 Leg. Int. 237.

South Carolina.— Law *v.* House, 3 Hill 268.

South Dakota.— Davis *v.* Jeffris, 5 S. D. 352, 58 N. W. 815.

Tennessee.— Bradford *v.* Gray, 3 Yerg. 463.

Texas.— Hood *v.* Raines, 19 Tex. 400; Davis *v.* Yates, 1 Tex. App. Civ. Cas. § 265.

Vermont.— Faulkner *v.* Hebard, 26 Vt. 452; Paige *v.* Hammond, 26 Vt. 375.

Virginia.—Brockenbrough *v.* Ward, 4 Rand. 352; Robertson *v.* Robertson, 3 Rand. 68.

Wisconsin.— Warren *v.* Bean, 6 Wis. 120.

United States.— Lowber *v.* Bangs, 2 Wall. 728, 17 L. ed. 768; Dermott *v.* Jones, 23 How. 220, 16 L. ed. 442; Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Hyde *v.* Booraem, 16 Pet. 169, 10 L. ed. 925; *Ex p.* Koehler, 24 Fed. 107; Blowers *v.* One Wire Rope Cable, etc., Co., 21 Fed. 352; The Alida,

by each party at the same time, neither party can maintain an action against the other without performance or tender of performance on his part.[61] So where a party sues on a special contract to recover compensation due on its performance, he must show performance on his part or a legal excuse.[62] In contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are in general concurrent acts and the promises dependent, whether a particular day be appointed for completion or not; and readiness and willingness to perform on either side is a condition precedent to liability to perform on the other.[63] Under such contracts an actual conveyance of the land is a condition precedent to the claim for the whole amount of the stipulated purchase-money; so that if the purchaser refuses to perform and take a conveyance, the vendor, although he may claim damages for not performing, cannot claim the purchase-money so long as he retains the property in the land.[64] In contracts for the sale of goods, the delivery of the goods and payment of the price are presumptively intended to be concurrent acts; and readiness and willingness on both sides, at the proper time for completion, to perform their respective parts of the contract are mutual conditions precedent.[65]

e. Part Performanee of Conditions Precedent. A part performance or a defective performance of a condition precedent is generally not sufficient.[66] But after one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability. In such case he must perform the contract on his part, and must rely upon his claim for damages in respect of the defective performance.[67] And where one who has agreed to perform certain work per-

12 Fed. 343; Bangs *v.* Lowber, 2 Fed. Cas. No. 840, 2 Cliff. 157; Goodwin *v.* Lynn, 10 Fed. Cas. No. 5,553, 4 Wash. 714.

England.— Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169; Glazebrook *v.* Woodrow, 8 T. R. 366, 4 Rev. Rep. 700; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395.

See 11 Cent. Dig. tit. "Contracts," § 1207 *et seq.*; and cases cited *infra*, note 61.

61. *Georgia.*— Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467.

Illinois.— Clark *v.* Weis, 87 Ill. 438, 29 Am. Rep. 60.

Indiana.— Nipp *v.* Diskey, 81 Ind. 214, 42 Am. Rep. 124; Meriwether *v.* Carr, 1 Blackf. 413.

Maine.— Brown *v.* Gammon, 14 Me. 276.

Massachusetts.— Dana *v.* King, 2 Pick. 155.

New York.— Fickett *v.* Brice, 22 How. Pr. 194; Northrup *v.* Northrup, 6 Cow. 296; Robb *v.* Montgomery, 20 Johns. 15; Hardin *v.* Kretsinger, 17 Johns. 293; Green *v.* Reynolds, 2 Johns. 207.

Oregon.— Powell *v.* Dayton, etc., R. Co., 14 Oreg. 356, 12 Pac. 665.

Texas.— Kelly *v.* Webb, 27 Tex. 368.

Vermont.— Paige *v.* Hammond, 26 Vt. 375.

Virginia.— Bailey *v.* Clay, 4 Rand. 346.

And see the cases cited *supra*, note 60.

62. Marsh *v.* Richards, 29 Mo. 99.

63. Runkle *v.* Johnson, 30 Ill. 328, 83 Am. Dec. 191; Frey *v.* Johnson, 22 How. Pr. (N. Y.) 316; Laird *v.* Pyne, 8 Dowl. P. C. 860, 10 L. J. Exch. 259, 7 M. & W. 474; Heard *v.* Wadham, 1 East 619; Manby *v.* Cremonini, 6 Exch. 808, 21 L. J. Exch. 288, 2 L. M. & P. 550; Marsden *v.* Moore, 4 H. & N. 500, 28 L. J. Exch. 288. See VENDOR AND PURCHASER.

64. Laird *v.* Pyne, 8 Dowl. P. C. 860, 10 L. J. Exch. 259, 7 M. & W. 474. See VENDOR AND PURCHASER.

65. Sargent *v.* Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718; Draper *v.* Jones, 11 Barb. (N. Y.) 263; Grandy *v.* McCleese, 47 N. C. 142, 64 Am. Dec. 574; Bloxam *v.* Sanders, 4 B. & C. 941, 7 D. & R. 407, 10 E. C. L. 868; Field *v.* Lelean, 6 H. & N. 617, 7 Jur. N. S. 918, 30 L. J. Exch. 168, 4 L. T. Rep. N. S. 121, 9 Wkly. Rep. 387; Callonel *v.* Briggs, 1 Salk. 112; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395. See SALES.

66. *Missouri.*— Bersch *v.* Sander, 37 Mo. 104.

New York.— Roberts *v.* Opdyke, 40 N. Y. 259; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Pattidge *v.* Gildermeister, 3 Abb. Dec. 461, 1 Keyes 93; Jenkins *v.* Wheeler, 2 Abb. Dec. 442, 3 Keyes 645, 4 Transcr. App. 450, 37 How. Pr. 458; Crane *v.* Knubel, 34 N. Y. Super. Ct. 443.

Wisconsin.— Malbon *v.* Birney, 11 Wis. 107.

United States.— U. S. *v.* Clarke, 25 Fed. Cas. No. 14,812, Hempst. 315.

England.— Neale *v.* Ratcliff, 15 Q. B. 916, 15 Jur. 166, 20 L. J. Q. B. 130, 69 E. C. L. 916.

67. Leake Contr. 664; 1 Wm. Saund. 320*e*; Oxford *v.* Provand, L. R. 2 P. C. 136, 5 Moore P. C. N. S. 150, 16 Eng. Reprint 472; White *v.* Beeton, L. R. 10 Q. B. 564, 7 H. & N. 42, 7 Jur. N. S. 735, 30 L. J. Exch. 373, 4 L. T. Rep. N. S. 474, 9 Wkly. Rep. 751; Behn *v.*

forms part of it, and is prevented from performing the residue without the fault of either party, he is entitled to pay in proportion, at the rate agreed upon for the whole.[68]

d. Performance of Conditions Precedent Waived or Discharged — (i) *In General.* The performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself prevents the complete performance by refusing to accept it when offered, or otherwise waives the performance.[69] Either party may waive any part of a contract, either expressly or by acts or declarations indicating a relinquishment of any provision or part of a provision, and without the performance of which, unless relinquished or waived, a recovery could not be had.[70] So although there may have been repeated violations of a contract by either party, yet, if either party elects to consider it unbroken and proceeds under it, the other cannot be considered as having been in default.[71] Thus the following have been declared to constitute a waiver in each instance, viz.: A request to go on with the work, together with partial payment, after the workman's failure to complete a building within the time stipulated in the contract;[72] payments made to the contractor and acceptance of the work by the owner, although the contract stipulated for payment in instalments as the work progressed, provided that in each case a certificate should be obtained, signed by a certain architect;[73] where a person contracted with another for two hundred pork-barrels of the ordinary size and quality, and afterward received of him that number of barrels, but not of the size and quality contracted for;[74] where a contract required a person to deliver ties to a railroad company, subject to the inspection and acceptance of its chief engineer, but the company directed another of its officers to make such inspection;[75] where a person made a subscription upon certain conditions toward the erection of a church, but during its erection frequently told those in charge of it to go on and finish it, and he would pay his subscription;[76] and where, in a written contract for putting up furnaces, the plaintiff agreed to put in a cold-air register face, which he omitted to do, but the furnace was used for three months, and no complaint was made of the omission.[77]

Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 717, 23 L. J. Exch. 228; Ellen *v.* Topp, 6 Exch. 424, 15 Jur. 451, 20 L. J. Exch. 241.

68. Hargrave *v.* Conroy, 19 N. J. Eq. 281.

69. *Alabama.*— Brigham *v.* Carlisle, 78 Ala. 243, 56 Am. Dec. 28.

Illinois.— Garrison *v.* Dingham, 56 Ill. 150.

Kentucky.— Cook *v.* Brandeis, 3 Metc. 555; Rankin *v.* Darnell, 11 B. Mon. 30, 52 Am. Dec. 557.

New York.— Fallon *v.* Lawler, 102 N. Y. 228, 6 N. E. 392; Allen *v.* Robinson, 2 Barb. 341.

South Carolina.—Davis *v.* Crawford, 2 Mill 401, 12 Am. Dec. 682.

70. Shaw *v.* Lewiston, etc., Turnpike Co., 2 Penr. & W. (Pa.) 454.

In a leading English case it appeared that defendant had chartered plaintiff's vessel for a certain voyage and promised to pay a certain sum in full for her use on condition of her taking a cargo of not less than one thousand tons. Defendant had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for non-payment of the freight, defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition, and it was said that defendant, while the contract was still executory, might have rescinded, and refused to put any goods on board; but as the contract had been executed, and defendant had received a substantial part of the consideration, he could not rescind the contract, but must be left to his cross-action for damages. Pust *v.* Dowie, 32 L. J. Q. B. 179.

71. McCord *v.* West Feliciana R. Co., 3 La. Ann. 285.

72. Eyster *v.* Parrott, 83 Ill. 517.

73. Smith *v.* Alker, 102 N. Y. 87, 5 N. E. 791; Haden *v.* Coleman, 73 N. Y. 567.

74. Murray *v.* Farthing, 6 Mo. 251.

75. Hobart *v.* Beers, 26 Kan. 329.

76. Westfield Protestant Reformed Dutch Church *v.* Brown, 29 Barb. (N. Y.) 335 [*affirmed* in 4 Abb. Dec. (N. Y.) 31].

77. Bristol *v.* Tracy, 21 Barb. (N. Y.) 236.

Other illustrations of waiver of performance of conditions precedent are where a party purchased and had shipped to him certain barrels of apples, and upon receiving them and finding a portion worthless, he did

(II) *Acts Not Constituting a Waiver.* To constitute a waiver of the performance of a condition precedent, the acts relied upon must as a rule be inconsistent with an intention to insist upon performance.[78] Payment or part payment for work done is not of itself, and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work.[79] To constitute a waiver, the acts or circumstances relied on to constitute it must have been performed or have transpired after the party against whom the waiver is urged knew, or should have known, the facts constituting the breach.[80] The receiving of articles contracted for and putting them to use will not estop a party from claiming damages if they prove defective.[81] A person not knowing anything about machinery was held not to have accepted water-wheels contracted to be well built by looking at and giving his note for them immediately after they were finished.[82]

(III) *Party Disabling Himself From Performing.* Where the promisor disables himself from performing the contract on his part, he excuses the performance of all conditions precedent to his liability.[83]

e. Alternative Promises and Election. A promise may be alternative, that is, to perform one or the other of two or more acts, either at the election of the promisor or of the promisee. If the promisor have the election, he can be charged with a breach only when he refuses to perform both. As a rule the person who is to perform the contract has a right to elect which one of the alternative promises he will perform;[84] but the election may be expressly given to the promisee.[85] If the promisee have the election, he must generally give notice of his election to the promisor before he can charge him.[86] If the promisor has the right to do one of two things by a given day, his right of election is lost if

not return or offer to return them, or notify the vendor that he would not receive them, and that they were subject to the vendor's order, but paid the vendor for those he considered good (Weaver *v.* Wisner, 51 Barb. (N. Y.) 638); where a party to a contract for the construction of a steam-engine to be delivered on or before a specified time consented to receive it after that time (Moore *v.* Detroit Locomotive Works, 14 Mich. 266); where a party entered into possession of a completed house, not built according to contract (Taylor *v.* Williams, 6 Wis. 363); and where the owner of a steamboat was present when a boiler containing forty-eight instead of forty-four flues, as contracted for, was being made and put into the boat (Waters *v.* Harvey, 3 Houst. (Del.) 441).

78. In the following cases it was held that there was no waiver, viz.: Where a contract bound a person to pay another for each wagon-load as delivered, but several wagon-loads were delivered without requiring payment for each (Gardner *v.* Clark, 21 N. Y. 399); where defendant agreed with plaintiff to deliver on or before a fixed time, and at a certain place, twelve thousand feet of clapboards, and sent to the place a smaller quantity, part according to contract and part not, but plaintiff neglected, within a reasonable time after he was informed that the clapboards were at the place, to notify defendant that he would not accept them (Hale *v.* Taylor, 45 N. H. 405. And see Ketchum *v.* Wells, 19 Wis. 25); where a person contracted to deliver to another one hundred fish-stands of a certain description, and upon his tendering them, the latter received fifty, but refused to receive the other fifty, because they were not made according to the contract (Freeman *v.* Skinner, 31 N. C. 32); and where a contract that an actor should appear at least seven times a week and be paid one hundred dollars for each appearance was violated by the manager's failure to provide employment for three weeks, but the actor subsequently appeared under the contract and received pay pursuant thereto (Coghlan *v.* Stetson, 19 Fed. 727).

79. Moulton *v.* McOwen, 103 Mass. 587; Morrison *v.* Cummings, 26 Vt. 486.

80. Dodge *v.* Minnesota Plastic State Roofing Co., 14 Minn. 49.

81. Monroe Female University *v.* Broadfield, 30 Ga. 1; Strawn *v.* Cogswell, 28 Ill. 457; Van Buskirk *v.* Murden, 22 Ill. 446, 74 Am. Dec. 163; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209; Veazie *v.* Bangor, 51 Me. 509.

82. Robinson *v.* Brinson, 20 Tex. 438.

83. Simmons *v.* Pomeroy, 3 Mackey (D. C.) 213. See *supra*, IX, F, 4.

84. *California.*— Norris *v.* Harris, 15 Cal. 226.

Illinois.— Metz *v.* Albrecht, 52 Ill. 491.

New York.— Provided he makes it before he is in default. Stephens *v.* Howe, 34 N. Y. Super. Ct. 133; Smith *v.* Sanborn, 11 Johns. 59; Disborough *v.* Neilson, 3 Johns. Cas. 81.

South Carolina.— Choice *v.* Moseley, 1 Bailey, 136, 19 Am. Dec. 661.

Vermont.— Mayer *v.* Dwinell, 29 Vt. 298.

85. See Norris *v.* Harris, 15 Cal. 226.

86. Center *v.* Center, 38 N. H. 318.

that day passes without his electing.[87] A promise to pay a certain amount of money on a given day, with a stipulation following that it may be discharged in some other commodity, becomes an absolute promise to pay money, if that commodity is not paid on the day.[88] If a person receives special articles of another and promises to return them within a certain time or pay a fixed price it is the duty of the promisor to ascertain from the promisee the place where he will receive the articles.[89] An election once made is final and irrevocable.[90]

f. Divisible Promises — (i) *In General.* Where promises are divisible, that is, where the contract contains a number of promises to do a number of similar acts, a breach of one of them does not discharge the other party.[91] Illustrations of divisible promises are to be found in contracts to receive and pay for goods by instalments. Where the instalments are numerous, extending over a considerable period of time, a default either of delivery or payment would not appear to discharge the contract, although it must necessarily give rise to an action for damages.[92] Where one contract relates to separate matters, a breach as to one matter does not excuse the other party from performance as to the other matter.[93] If the promise is entire or indivisible, and is not independent as heretofore explained, its entire performance is as a rule a condition concurrent or precedent

87. Roberts *v.* Beatty, 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 410; Choice *v.* Moseley, 1 Bailey (S. C.) 136, 19 Am. Dec. 661.

88. Kalkmann *v.* Baylis, 17 Cal. 291; Plummer *v.* Keaton, 9 Yerg. (Tenn.) 27; Baker *v.* Todd, 6 Tex. 273, 55 Am. Dec. 775.

89. White *v.* Perley, 15 Me. 470.

90. Brown *v.* Royal Ins. Co., 1 E. & E. 853, 5 Jur. N. S. 1255, 28 L. J. Q. B. 275, 7 Wkly. Rep. 479, 102 E. C. L. 853; Gath *v.* Lees, 3 H. & C. 558.

91. *California.*— Norris *v.* Harris, 15 Cal. 226.

Colorado.— Gomer *v.* McPhee, 2 Colo. App. 287, 31 Pac. 119.

Maryland.— Broumel *v.* Rayner, 68 Md. 47, 11 Atl. 833; Bollman *v.* Burt, 61 Md. 415.

Minnesota.— McGrath *v.* Cannon, 55 Minn. 457, 57 N. W. 150.

New Jersey.— Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

New York.— Cohen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

North Carolina.— Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.

Pennsylvania.— Fullmer *v.* Poust, 155 Pa. St. 275, 26 Atl. 543, 35 Am. St. Rep. 881; Gill *v.* Johnston Lumber Co., 151 Pa. St. 534, 25 Atl. 120; Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753; Morgan *v.* McKee, 77 Pa. St. 228.

England.—Mersey Steel, etc., Co. *v.* Naylor, 9 Q. B. D. 648, 51 L. J. Q. B. 576, 47 L. T. Rep. N. S. 369, 31 Wkly. Rep. 80 [*reversed* in 9 App. Cas. 434, 53 L. J. Q. B. 497, 51 L. T. Rep. N. S. 637, 32 Wkly. Rep. 989]; Honck *v.* Muller, 7 Q. B. D. 92, 50 L. J. Q. B. 529, 45 L. T. Rep. N. S. 202, 29 Wkly. Rep. 830; Freeth *v.* Burr, L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. Rep. N. S. 773, 22 Wkly. Rep. 370; Simpson *v.* Crippin, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. Rep. N. S. 546, 21 Wkly. Rep. 141; Ritchie *v.* Atkinson, 10 East 295, 10 Rev. Rep. 307; Hoare *v.* Rennie, 5 H. & N. 19.

In a leading case the plaintiff had promised to take his ship to a certain port, and there load a complete cargo of hemp and iron, and to deliver the same on being paid freight at specified rates. He came away with an incomplete cargo, and the defendant refused to pay any freight, on the ground that the completeness of the cargo was a condition precedent to any payment being due. Lord Ellenborough said that whether it was so or not depended, "not on any formal arrangement of words, but on the reason and sense of the thing, as it is to be collected from the whole contract," and with regard to the promise in question he held that "where the freight is made payable upon an indivisible condition, such as the arrival of the ship with her cargo at her destined port of discharge, such arrival must be a condition precedent, because it is incapable of being apportioned; but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery." Ritchie *v.* Atkinson, 10 East 295, 10 Rev. Rep. 307.

"The rule is, that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain." Blackburn *v.* Reilly, 47 N. J. L. 290, 308, 1 Atl. 27, 54 Am. Rep. 159.

92. See SALES.

93. Tucker *v.* Billing, 3 Utah 82, 5 Pac. 554. And see further cases cited in note 91 *supra.*

to the liability of the other party to perform.[94] In construing contracts to determine whether they were divisible or not, the courts have not agreed.[95] The question is one of construction.[96]

(II) *Repudiation of Contract.* The courts are agreed that if a default in one item of a continuous contract of a divisible nature is accompanied with an announcement of intention not to perform the contract upon the agreed terms, or, what amounts to the same thing, if the failure to fully perform is deliberate and intentional, and not the result of inadvertence or inability to perform, the rule we have been discussing does not apply. The other party under these circumstances may treat the contract as being at an end.[97]

94. *Illinois.*— Bradley *v.* King, 44 Ill. 339.
Indiana.— Smith *v.* Lewis, 40 Ind. 98.
Maine.— Dwinel *v.* Howard, 30 Me. 258.
Maryland.— Broumel *v.* Rayner, 68 Md. 47, 11 Atl. 833.
Massachusetts.— Barrie *v.* Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.
New York.— Pope *v.* Porter, 102 N. Y. 366, 7 N. E. 304; Hill *v.* Blake, 97 N. Y. 216; Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183.
North Carolina.— Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.
Pennsylvania.— Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.
Rhode Island.—King Philip Mills *v.* Slater, 12 R. I. 82, 3 Am. Rep. 603.
United States.— Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; Hartupee *v.* Crawford, 56 Fed. 61; Clark *v.* Wheeling Steel Works 53 Fed. 494, 3 C. C. A. 600.
England.— Honck *v.* Muller, 7 Q. B. D. 92, 50 L. J. Q. B. 529, 45 L. T. Rep. N. S. 202, 29 Wkly. Rep. 830; Ritchie *v.* Atkinson, 10 East 295, 10 Rev. Rep. 307; Hoare *v.* Rennie, 5 H. & N. 19.

95. *Compare* Simpson *v.* Crippin, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. Rep. N. S. 546, 21 Wkly. Rep. 141, with Hoare *v.* Rennie, 5 H. & N. 19, and Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366.

96. Wooten *v.* Walters, 110 N. C. 251, 256, 14 S. E. 734, 736, where it was said: "The contract may be entire or severable, according to the circumstances of each particular case, and the criterion is to be found in the question whether the whole quantity — all of the things as a whole — is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decision on the subject, 'but on the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices, at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties.' This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts, and the circumstances of each particular case." This was said in reference to contracts of sale, but the reason applies to other contracts as well. See Broumel *v.* Rayner, 68 Md. 47, 11 Atl. 833. In a leading English case the defendant had agreed with plaintiffs to supply them with a certain quantity of coal, to be delivered in equal monthly instalments for twelve months. Plaintiffs had agreed to send wagons to receive the coal, but during the first month did not send wagons enough to receive the one twelfth of the whole amount. Defendant sought to rescind the contract, but it was held that he was not entitled to do so, since plaintiffs were willing to continue the contract as to the remaining instalments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of them to fulfil one of the series of terms. Simpson *v.* Crippin, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. Rep. N. S. 546, 21 Wkly. Rep. 141. The earlier case of Hoare *v.* Rennie, 5 H. & N. 19, is directly opposed to the case just referred to. The defendants had bought of plaintiffs a large quantity of iron, to be shipped in the months of June, July, August, and September in about equal portions each month, and plaintiffs shipped only a small portion in June, not being nearly the portion stipulated for in that month. It was held that defendant was not bound to accept the smaller quantity, nor any subsequent tender, as plaintiffs had substantially failed to perform their part of the contract, which formed a condition precedent to the liability of the defendant.

In the United States some of the courts have followed Simpson *v.* Crippin, *supra*, while others have followed Hoare *v.* Rennie, *supra*. See the American cases *supra*, notes 91, 94.

97. *Massachusetts.*— Stephenson *v.* Cady, 117 Mass. 6.
New Jersey.— Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159.
New York.— Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183.
Pennsylvania.— Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.
England.— Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370.

If non-payment of one instalment of goods be accompanied by such circumstances as to give the seller reasonable grounds for thinking that the buyer will not be able to pay for the rest, he may take advantage of this one omission to repudiate the contract. Stephenson *v.* Cady, 117 Mass. 6; Bloomer *v.* Bernstein, L. R. 9 C. P. 588, 43 L. J. C. P.

(III) *Express Provision For Discharge.* The general rule applicable to contracts of this sort may be contravened by express stipulation. It is always permissible for the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfilment by the other party of his promise. In such a case nothing can be obtained, either upon the contract or upon a *quantum meruit*, for what has been performed. All must have been performed.[98]

g. Subsidiary Promises. Where there are several terms in a contract, a breach committed by one of the parties may be a breach of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. Such a term is said to be subsidiary, and a breach thereof does not discharge the other party. He is bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default.[99] A frequent illustration of a subsidiary promise is found in the warranty of quality on the sale of goods.[1] The prevailing rule is that where a promise is to be performed in the course of the performance of the contract, and after some of the consideration of which it forms a part has been given, it will

375, 31 L. T. Rep. N. S. 306, 23 Wkly. Rep. 238. See Sales.

98. Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Hartley *v.* Decker, 89 Pa. St. 470; Martin *v.* Shoenberger, 8 Watts & S. (Pa.) 367; Cutter *v.* Powell, 6 T. R. 320, 3 Rev. Rep. 185.

Illustration.— This point is illustrated by a case in which the master of a ship gave a sailor a note promising to pay him thirty guineas, which was more than the ordinary wages, "provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." The sailor died after having performed the agreement for about seven weeks, but about three weeks before the ship reached Liverpool. The court held that the sailor's representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a *quantum meruit* for such services as he had rendered because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a *quantum meruit*. "It may fairly be considered," it was said, "that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage." Cutter *v.* Powell, 6 T. R. 320, 326, 3 Rev. Rep. 185.

99. *Connecticut.*— Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Illinois.— Weintz *v.* Hafner, 78 Ill. 27; Richards *v.* Shaw, 67 Ill. 222; White *v.* Gillman, 43 Ill. 502; Nelson *v.* Oren, 41 Ill. 18; Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233.

Iowa.— Wolf *v.* Gerr, 43 Iowa 339; Byerlee *v.* Mendel, 39 Iowa 382.

Michigan.—Wilson *v.* Wagar, 26 Mich. 452.

Missouri.— Lee *v.* Ashbrook, 14 Mo. 378, 55 Am. Dec. 110.

New Hampshire.— Haines *v.* Tucker, 50 N. H. 307; Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

New York.— Nolan *v.* Whitney, 88 N. Y. 648.

Ohio.— Kane *v.* Stone Co., 39 Ohio St. 1.

Vermont.— Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363.

Wisconsin.— Bast *v.* Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841.

England.— Bettini *v.* Gye, 1 Q. B. D. 183, 45 L. J. Q. B. 209, 34 L. T. Rep. N. S. 246, 24 Wkly. Rep. 551; MacAndrew *v.* Chapple, L. R. 1 C. P. 643, 12 Jur. N. S. 567, 35 L. J. C. P. 281, 14 L. T. Rep. N. S. 556, 14 Wkly. Rep. 891; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228; Boone *v.* Eyre, H. Bl. 273 note; Tarrabochia *v.* Hickie, 1 H. & N. 183.

In a leading case on this point, the plaintiff, a professional singer, had entered into a contract with defendant, director of an opera, for his services as a singer for a considerable time, and upon a number of terms, one of which was that plaintiff should be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals. Plaintiff broke this term by arriving only two days before the commencement of the engagement, and defendant treated this breach as a discharge of the contract. The court held that, in the absence of any express declaration that the term was vital to the contract, it must "look to the whole contract, and, . . . see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages," and the court held that the term did not go to the root of the matter, so as to constitute a condition precedent. Bettini *v.* Gye, 1 Q. B. D. 183, 45 L. J. Q. B. 209, 34 L. T. Rep. N. S. 246, 24 Wkly. Rep. 551. And see MacAndrew *v.* Chapple, L. R. 1 C. P. 643, 12 Jur. N. S. 567, 35 L. J. C. P. 281, 14 L. T. Rep. N. S. 556, 14 Wkly. Rep. 891.

1. See Sales.

be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract.[2] In some jurisdictions there are decisions to the contrary.[3]

X. JOINT AND SEVERAL CONTRACTS.

A. The Different Kinds of Promises — 1. In General. There are three kinds of promises or covenants,[4] viz., those that are several, those that are joint, and those that are joint and several. The first and simplest form is the covenant of one with another; making a several covenant on each side; or two or more may covenant together with one, making a joint covenant on the one side and a several on the other; or two or more may together covenant with two or more, making a joint covenant on each side; or two or more may wish to bind themselves together as a company or a partnership, and also separately as individuals for the performance of the same thing, which is a joint and several covenant.[5]

2. Promises on One Side Only. All contracts do not contain mutual promises. The covenant may be upon one side only; as where A and B for a consideration promise with C to pay an annuity to D. There the covenant is on one side and only one side, that is, the covenantee can bring suit; for it is presumed that one will bring suit upon a covenant made by another, and not upon a covenant made by himself. In the above case the promise is made upon one side only, and therefore only he to whom the covenant was made can bring suit, for he himself, as the other party, has made no covenant.[6]

3. Promises on Both Sides. Mutual promises may be made on both sides at the same time relative to the same subject-matter;[7] but the promises may be dif-

2. *Connecticut.*—Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Illinois.— Richards *v.* Shaw, 67 Ill. 222; White *v.* Gillman, 43 Ill. 502; Nelson *v.* Oren, 41 Ill. 18; Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233.

Iowa.— Wolf *v.* Gerr, 43 Iowa 339; Byerlee *v.* Menidel, 39 Iowa 382.

Michigan.— Wilson *v.* Wagar, 26 Mich. 452.

Missouri.— Lee *v.* Ashbrook, 14 Mo. 378, 55 Am. Dec. 110.

New Hampshire.— Haines *v.* Tucker, 50 N. H. 307; Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

New York.— Nolan *v.* Whitney, 88 N. Y. 648.

Ohio.— Kane *v.* Stone Co., 39 Ohio St. 1.

Vermont.— Blood *v.* Enos, 12 Vt. 625, 36 Am. Dec. 363.

Wisconsin.— Bast *v.* Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841.

England.— Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 716, 23 L. J. Exch. 228, where it was said: "Where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration."

3. In New York for instance it is held that a contract for the sale of goods, to be delivered at specified times, is entire; that the vendee has a right to insist upon its performance as an entirety, unless he waives it; and, where the vendor refuses or fails to perform, the vendee is not bound either to pay for or to return what he has received as a part performance; and the same rule has been applied in the case of building contracts. Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Champlin *v.* Rowley, 18 Wend. (N. Y.) 187. And see Clark *v.* Baker, 5 Metc. (Mass.) 452; Haslack *v.* Mayers, 26 N. J. L. 284; Larkin *v.* Buck, 11 Ohio St. 561. See, generally, Sales.

4. The term "covenant" is a general one, bracing all contracts, as well those that are not under seal as those that are. 2 Bacon Abr. 550.

5. A joint and several obligation "is one which binds a plurality of persons. All are bound to fulfil the same obligation, and each is bound to fulfil the whole of it; and it is the option of the creditor to enforce the whole obligation against any one of those taken bound." Leake Contr. 377 [*quoting* the Lord President in Dundee Police Com. *v.* Stratton, as quoted in House of Lords in 1887]. See also Moore *v.* Rogers, 19 Ill. 347; Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; *In re* Davison, 13 Q. B. D. 50, 50 L. T. Rep. N. S. 635.

6. See *supra*, I, F.

7. See *supra*, I, F; IV, D, 10.

ferent in kind and are always different in substance. For instance, A, B, and C may jointly covenant to lease Blackacre to X, Y, and Z for a term of years, and X, Y, and Z may at the same time in the same instrument jointly and severally covenant to pay rent, repair, etc. There the covenants are different in kind, one being joint, the other joint and several; and different in substance, the one being to lease, the other to pay rent, etc. Each side is a covenantor and each a covenantee, but upon distinct covenants. The covenants on either side may be several, joint, or joint and several.[8] The same form of covenant may be upon one side as upon the other; or there may be a different form of covenant on each side, as above shown. But to each of the three forms of covenants the liability attached is different.[9] Since a covenantor may be upon the one side or the other of the contract, it becomes important to notice upon which covenant suit is brought. A covenantor is liable as to that which he himself covenants, according to that form in which he has chosen to bind himself. Different rules of law govern covenantors from those governing covenantees.[10]

B. Distinction Between Rights and Obligations. A right may belong to two or more individuals severally, but not to two or more jointly and severally; but it may belong to two or more jointly. An obligation may be imposed upon two or more persons severally or jointly, or jointly and severally at the same time.[11]

C. Several Contracts — 1. PROMISORS. Two or more persons may bind themselves severally for the same matter, so that the creditor is simply entitled to claim the performance against each of them separately.[12] When a several obligation is entered into by two or more in one instrument, it is the same as though each had executed separate instruments,[13] although they may all be for the same subject-matter; and consequently each obligation furnishes a several cause of action.[14] The effect of several obligations is that, although they concern the same subject-matter, each obligor is liable only for his several promise, and cannot be held for the others.[15] For example, in the case of a subscription paper, where each subscriber promises to pay the sum set opposite his name, it is unreasonable to suppose that any of them intended to become jointly liable for any or all of the other subscriptions.[16] A suit brought against one of the obligors on his promise is no bar to a subsequent suit against another, and suit may be brought against each obligor at the option of the obligee.[17]

2. PROMISEES. One person may bind himself to each of several persons for the same debt or matter, so that each of the persons is separately entitled as creditor to claim the whole debt or performance.[18]

3. SURVIVORSHIP. The doctrine of survivorship does not apply to several

8. 7 Bacon Abr. tit. Obligations 252; Rolle Abr. 149.

9. King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 505.

10. See Eccleston *v.* Clipsham, 1 Saund. 153.

11. Slingsby's Case, 5 Coke 18*b*; Harriman Contr. 137.

12. Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Fuselier *v.* Lacour, 3 La. Ann. 162; Moffett *v.* Bowman, 6 Gratt. (Va.) 219; Payne *v.* Jelleff, 67 Wis. 246, 30 N. W. 526; Leake Contr. 454.

13. Evans *v.* Sanders, 10 B. Mon. (Ky.) 291; Colt *v.* Learned, 118 Mass. 380; Costigan *v.* Lunt, 104 Mass. 217; Northumberland *v.* Errington, 5 T. R. 522, 2 Rev. Rep. 666; Bliss Code Pl. 103 and note; Leake Contr. 371.

14. See the authorities in the preceding note.

15. Fisher *v.* Spang, 43 Ill. App. 378.

16. Moss *v.* Wilson, 40 Cal. 159. And see Harlan *v.* Berry, 4 Greene (Iowa) 212; Ward *v.* Johnson, 13 Mass. 148. See SUBSCRIPTIONS.

17. Harlan *v.* Berry, 4 Greene (Iowa) 212; Ward *v.* Johnson, 13 Mass. 148. See *infra*, XII, F, 3.

18. *Alabama.*— Burton *v.* Henry, 90 Ala. 281, 7 So. 925.

Michigan.— Rorabacher *v.* Lee, 16 Mich. 169.

New York.— Yates *v.* Foot, 12 Johns. 1.

Pennsylvania.— Catawissa R. Co. *v.* Titus, 49 Pa. St. 277.

Vermont.— Geer *v.* Tenth School Dist., 6 Vt. 76.

United States.— Hall *v.* Leigh, 8 Cranch 50, 3 L. ed. 484.

England.— Chanter *v.* Lease, 1 H. & H. 224, 8 L. J. Exch. 58, 4 M. & W. 295.

See Leake Contr. 454.

contracts.[19] If an obligor is deceased, his heirs or executors are liable on his several contract.[20]

4. Joint Action Will Not Lie. Where parties are bound severally only, their liability is separate and distinct, and in the absence of a statute, they cannot be sued jointly; and where the promises are several in respect of the promisees, they must sue separately and cannot sue jointly.[21] This rule, however, is in some jurisdictions changed by statute.[22]

D. Joint Contracts — 1. Promisors — a. In General. Where two or more make a joint promise, each is liable to the promisee for the whole debt or liability; neither is bound by himself, but both of them are bound jointly to the full extent of the promise.[23]

b. Survivorship. Upon the death of one of several joint contractors, the legal liability under the contract devolves at common law on the surviving joint contractors or contractor; and the representative of the deceased cannot be sued at law, either alone or jointly with the survivors. Consequently, the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives.[24] By statute, however, in a number of states, in case of the death of one or more joint obligors or promisors, the joint debt or contract survives against the heirs or administrators as well as against the survivors.[25]

19. Carthrae *v.* Brown, 3 Leigh (Va.) 98, 23 Am. Dec. 255; Enys *v.* Donnithorne, 2 Burr. 1190.

20. Howe *v.* Handley, 25 Me. 116; Ludlow *v.* McCrea, 1 Wend. (N. Y.) 228; McCready *v.* Freedly, 3 Rawle (Pa.) 251; Collins *v.* Prosser, 1 B. & C. 682, 3 D. & R. 112, 1 L. J. K. B. O. S. 212, 25 Rev. Rep. 540, 8 E. C. L. 287; Leake Contr. 371; Parsons Contr. 15.

21. *Alabama.*— Burton *v.* Henry, 90 Ala. 281, 7 So. 925.

Georgia.— Sims *v.* Clark, 91 Ga. 302, 13 S. E. 158.

Indiana.— Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137.

Maine.— Frost *v.* Paine, 12 Me. 111.

Michigan.— Davis *v.* Belford, 70 Mich. 120, 37 N. W. 919.

Missouri.— Peery *v.* Kerr, 30 Mo. 349.

New Hampshire.—Wills *v.* Cutler, 61 N. H. 405.

New Jersey.— Armstrong *v.* Ebener, 46 N. J. Eq. 457, 19 Atl. 265.

New York.— St. Paul's Church *v.* Ford, 34 Barb. 16.

Texas.— Gazley *v.* Wayne, 36 Tex. 689.

See Parties.

22. Costigan *v.* Lunt, 104 Mass. 217; Wallis *v.* Carpenter, 13 Allen (Mass.) 19; Steffes *v.* Lemke, 40 Minn. 27, 41 N. W. 302; Wibaux *v.* Grinnell Live-Stock Co., 9 Mont. 154, 22 Pac. 492; Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8. See Parties.

23. *Kentucky.*— Allin *v.* Shadburne, 1 Dana 68, 25 Am. Dec. 121.

Maine.— Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491.

Massachusetts.— Meyer *v.* Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; Bartlett *v.* Robbins, 5 Metc. 184; Munroe *v.* Perkins, 9 Pick. 298, 20 Am. Dec. 475.

Michigan.— Dumanoise *v.* Townsend, 80 Mich. 302, 45 N. W. 179.

New Jersey.— Alpaugh *v.* Wood, 53 N. J. L. 638, 23 Atl. 261; Field *v.* Runk, 22 N. J. L. 525.

New York.— Clark *v.* Rawson, 2 Den. 135; Slocum *v.* Fairchild, 7 Hill 292.

24. *Connecticut.*— Bundy *v.* Williams, 1 Root 543.

Illinois.— Moore *v.* Rogers, 19 Ill. 347; Ballance *v.* Samuel, 4 Ill. 380; Stevens *v.* Catlin, 44 Ill. App. 114.

Indiana.— Brown *v.* Benight, 3 Blackf. 39, 23 Am. Dec. 373. See Indiana, etc., R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5.

Kentucky.— Clark *v.* Parish, 1 Bibb 547. And see McCalla *v.* Rigg, 3 A. K. Marsh. 259.

Massachusetts.— New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Martin *v.* Hunt, 1 Allen 418; Foster *v.* Hooper, 2 Mass. 572.

New York.—Comins *v.* Pottle, 22 Hun 287; De Agreda *v.* Mantel, 1 Abb. Pr. 130; Bradley *v.* Burwell, 3 Den. 61; Gere *v.* Clarke, 6 Hill 350.

Ohio.— Burgoyne *v.* Ohio L. Ins., etc., Co., 5 Ohio St. 586.

Pennsylvania.— Hoskinson *v.* Eliot, 62 Pa. St. 393; Ensminger *v.* Finkey, 5 Pa. Dist. 358, 17 Pa. Co. Ct. 544.

South Carolina.— Ayer *v.* Wilson, 2 Mill 319, 12 Am. Dec. 677; Boykin *v.* Watson, 1 Treadw. 157.

Virginia.— Atwell *v.* Milton, 4 Hen. & M. 253.

Wisconsin.— Murphey *v.* Weil, 92 Wis. 467, 66 N. W. 532.

United States.— U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

England.— Richards *v.* Heather, 1 B. & Ald. 29.

See 11 Cent. Dig. tit. "Contracts," § 787.

25. *Massachusetts.*—Bachelder *v.* Fiske, 17 Mass. 464.

New York.— Harbeck *v.* Pupin, 55 Hun 335, 8 N. Y. Suppl. 695, 29 N. Y. St. 258 [*affirmed* in 123 N. Y. 115, 25 N. E. 311, 33 N. Y. St. 220].

Ohio.— Burgoyne *v.* Ohio L. Ins., etc., Co.,

The rule in this respect is the same in equity as at law, unless there are special circumstances which show that the liability should be treated as a several liability.[26] It is sometimes said that joint contracts will be treated in equity as joint and several ones.[27] But such is not the fact. A joint contract will be treated in equity as a joint and several one only where there is some special and equitable reason for so treating it.[28] Thus where money is loaned to two, who give a joint obligation for its repayment, equity will enforce the obligation against the representatives of the deceased obligor on the ground that "the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill failed to accomplish their object."[29] But where no such equity exists, as in the case of the joint obligation of principal and surety, equity follows the law and the estate of the deceased surety is not held liable.[30]

c. Effect of Release. In the absence of a statute, a release of one of several joint promisors will discharge all, although a mere covenant not to sue one joint promisor will not have such effect.[31] But a release of one joint debtor by operation of law, as by a discharge in bankruptcy or insolvency, or a discharge by the exercise of a right to avoid the contract, as because of infancy, or a discharge by operation of the statute of limitations, does not affect the liability of the others.[32]

d. Effect of Judgment. So also in the absence of a statute a judgment against one of several joint promisors is a bar to an action against them jointly.[33]

e. Suit Must Be Against All. All the joint promisors must be joined in the suit, if living and within the jurisdiction of the court,[34] unless the rule is changed, as it is in some jurisdictions, by statute.[35] Where one of the joint debtors is dead,

5 Ohio St. 586; Williams *v.* Bradley, 5 Ohio Cir. Ct. 114.

Tennessee.— Taylor *v.* Taylor, 5 Humphr. 110.

Wyoming.— Fisher *v.* Hopkins, 4 Wyo. 379, 34 Pac. 899, 62 Am. St. Rep. 38.

26. Sumner *v.* Powell, 2 Meriv. 30, Turin & R. 423, 16 Rev. Rep. 136.

27. Richardson *v.* Draper, 87 N. Y. 337; Davis *v.* Van Buren, 72 N. Y. 587.

28. Harriman Contr. 139.

29. Pickersgill *v.* Lahens, 15 Wall. (U. S.) 140, 21 L. ed. 119.

Partners.— For similar reasons a partnership contract is several as well as joint, and the estate of a deceased partner is liable. See PARTNERSHIP.

30. U. S. *v.* Price, 9 How. (U. S.) 83, 13 L. ed. 56. See PRINCIPAL AND SURETY.

31. *Kentucky.*— Allin *v.* Shadburne, 1 Dana 68, 25 Am. Dec. 121.

Maine.— Lunt *v.* Stevens, 24 Me. 534.

Massachusetts.— Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; Wiggin *v.* Tudor, 23 Pick. 434; Shaw *v.* Pratt, 22 Pick. 305.

New York.—Newcomb *v.* Raynor, 21 Wend. 108, 34 Am. Dec. 219; Rowley *v.* Stoddard, 7 Johns. 207.

Pennsylvania.— Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565.

West Virginia.—Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

England.— Brooks *v.* Stuart, 9 A. & E. 854, 8 L. J. Q. B. 184, 1 P. & D. 615, 36 E. C. L. 445.

See RELEASE.

32. See BANKRUPTCY; INFANTS; LIMITATIONS OF ACTIONS. If one obligor be discharged by operation of law without the consent of the obligee, and by no act of his, it shall not take away his remedy against the solvent obligors. Ward *v.* Johnson, 13 Mass. 148; Bacon Abr. tit. Release; Coke Litt. 232*a*; Parsons Contr. 26.

33. Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783. See *infra*, XII, F, 2, b, (IV); and JUDGMENTS.

34. *Idaho.*— People *v.* Sloper, 1 Ida. 158.

Illinois.— Page *v.* Brant, 18 Ill. 37.

Indiana.— Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Bledsoe *v.* Irvin, 35 Ind. 293.

Louisiana.— Beale *v.* Trudeau, 18 La. Ann. 129; Dougart *v.* Desangle, 10 Rob. 430; Bird *v.* Doiron, 7 Rob. 181; Bourgerol *v.* Allard, 6 Rob. 351; Duggan *v.* De Lizardi, 5 Rob. 224; Van Wyck *v.* Hills, 4 Rob. 140; Drew *v.* Atchison, 3 Rob. 140; Thompson *v.* Chrétien, 3 Rob. 26; New Orleans *v.* Ripley, 5 La. 120, 35 Am. Dec. 175.

Maine.— Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491.

Michigan.— Van Leyen *v.* Wreford, 81 Mich. 606, 45 N. W. 1116; Searles *v.* Reed, 63 Mich. 485, 29 N. W. 884.

New Jersey.— Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39; Field *v.* Runk, 22 N. J. L. 525.

South Carolina.— O'Brien *v.* Bound, 2 Speers 495, 42 Am. Dec. 384; McCall *v.* Price, 1 McCord 82; Boykin *v.* Watson, Treadw. 157.

United States.— Walker *v.* Windsor Nat. Bank, 56 Fed. 76.

England.— Lodge *v.* Dicas, 3 B. & Ald. 611, 22 Rev. Rep. 497, 5 E. C. L. 352.

See *infra*, XII, F, 2, b.

35. By statute in some states the action may be brought against all or any of the

or without the jurisdiction of the court, or has been discharged from the debt by bankruptcy or insolvency proceedings, or where he has exercised a right, because of infancy or otherwise, to avoid the contract, or the debt is barred as against him by the statute of limitations, the other debtor or debtors may be sued without joining him.[36] If all are not joined, the defendants are not bound to answer, but if the defect in parties appears on the face of the pleadings, they may demur; or if it does not so appear they may plead in abatement.[37] A plea to the merits, or that he or they have not promised, is not allowed for non-joinder. Thus if the declaration sets out a promise by the defendant to plaintiff, and the contract sued on shows a joint promise by defendant and another to plaintiff, defendant cannot say that he has not promised.[38] Therefore by pleading to the merits the defendants will waive the right to have their coöbligors joined in the action, and the judgment will be binding on those against whom it is given.[39]

2. Promisees — a. In General. Where a promise is made to several jointly, they are entitled jointly and not separately, and must as a rule all join in a suit on the promise.[40] If one of them is not joined as a plaintiff, the defendant may

joint obligors. Bradford *v.* Toney, 30 Ark. 763; Davis *v.* Sanderlin, 23 N. C. 389; Johnson *v.* Byrd, 13 Fed. Cas. No. 7,376, Hempst. 434. See *infra*, XII, F, 2, b, (III). Such a statute has been held not to apply to an oral contract. Denver Exch. Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449.

36. Leake Contr. 214. See *infra*, XII, F, 2, b. Where suit is brought against all but one of several coöbligors, that one being deceased, the action will nevertheless fail on plea by defendants, unless it appear affirmatively that the other coöbligor is deceased. Jell *v.* Douglas, 4 B. & Ald. 374, 23 Rev. Rep. 310, 6 E. C. L. 523; Cabell *v.* Vaughan, 1 Saund. 291.

37. *Alabama.*—Henderson *v.* Hammond, 19 Ala. 340.

Indiana.— Bledsoe *v.* Irvin, 35 Ind. 293.

Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

New Jersey.— Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

New York.—Seymour *v.* Minturn, 17 Johns. 169, 8 Am. Dec. 380.

Pennsylvania.— Potter *v.* McCoy, 26 Pa. St. 458.

Vermont.— Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

England.—Richards *v.* Heather, 1 B. & Ald. 29; Rice *v.* Shute, 5 Burr. 2611, 2 W. Bl. 695; Whelpdale's Case, 5 Coke 119*a*.

38. Richards *v.* Heather, 1 B. & Ald. 29; Whelpdale's Case, 5 Coke 119*a*.

39. Bonnon *v.* Urton, 3 Greene (Iowa) 228; Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; Cabell *v.* Vaughan, 1 Saund. 291. Each party to a joint contract is therefore severally liable in the sense that if he is sued severally and does not plead in abatement he is liable to pay the entire debt.

Massachusetts.— Elder *v.* Thompson, 13 Gray 91.

Michigan.— Coon *v.* Anderson, 101 Mich. 295, 59 N. W. 607.

Minnesota.— Sandwich Mfg. Co. *v.* Herriott, 37 Minn. 214, 33 N. W. 782; Davis *v.* Chouteau, 32 Minn. 548, 21 N. W. 748.

Nebraska.— Beeler *v.* Larned First Nat. Bank, 34 Nebr. 348, 51 N. W. 857; Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395.

New Jersey.— Lieberman *v.* Brothers, 55 N. J. L. 379, 26 Atl. 828.

Vermont.— Hicks *v.* Cram, 17 Vt. 449; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

Virginia.— Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976.

United States.—Clarion First Nat. Bank *v.* Hamor, 49 Fed. 45, 1 C. C. A. 153.

England.— Mountstephen *v.* Brooke, 1 B. & Ald. 224; Richards *v.* Heather, 1 B. & Ald. 29; Rice *v.* Shute, 5 Burr. 2611, 2 W. Bl. 695; King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 505; Abbot *v.* Smith, 2 W. Bl. 947.

40. *Connecticut.*— Beach *v.* Hotchkiss, 2 Conn. 697.

Delaware.— Cannon *v.* Maull, 4 Harr. 223.

Illinois.— Archer *v.* Bogue, 4 Ill. 526.

Iowa.— Linder *v.* Lake, 6 Iowa 164, holding that in a written contract, "I, E. W. Lake . . . bind myself" to have a certain encumbrance released, "I having this day sold forty acres of said land to Anton Linder and Jacob Rees," to whom the bond was delivered, the names of the obligees were implied, if not expressed, and the action on the contract was brought properly by the parties jointly.

Louisiana.— Alling *v.* Woodruff, 16 La. Ann. 6.

Maine.— Moody *v.* Sewall, 14 Me. 295.

Massachusetts.— Hayden *v.* Snell, 9 Gray 365; Capen *v.* Barrows, 1 Gray 376; Hewes *v.* Bayley, 20 Pick. 96; Halliday *v.* Doggett, 6 Pick. 359.

Missouri.— Slaughter *v.* Davenport, 151 Mo. 26, 51 S. W. 471 (holding that a contract to pay B, S, or G a sum of money, in trust for the purpose of macadamizing a public road was joint); Henry *v.* Mt. Pleasant Tp., 70 Mo. 500; Rainey *v.* Smizer, 28 Mo. 310; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Thieman *v.* Goodnight, 17 Mo. App. 429.

New Hampshire.— Moore *v.* Chesley, 17 N. H. 157; Willoughby *v.* Willoughby, 5 N. H. 244.

New York.— Marie *v.* Garrison, 83 N. Y.

plead in abatement, but failure to do so, unlike the case of non-joinder of joint debtors, will not constitute a waiver of the defect.[41] If the defect appears upon the face of the record, it may be objected to by demurrer or by motion in arrest of judgment or on writ of error.[42] If it does not so appear, there is still a variance between the contract as pleaded and proved which will be fatal.[43] If the declaration sets out a promise by defendant to plaintiff and the evidence shows a promise by defendant to plaintiff and another jointly, there is a fatal variance, for plaintiff has no separate right on the contract and therefore cannot sue alone.[44]

b. Survivorship. Where one of several joint creditors or promisees dies, the legal right under the contract devolves upon the survivors, and they only can sue on the contract. The representative of the deceased creditor cannot be joined, nor can he sue alone.[45]

c. Payment or Release. A payment of the debt to one of several joint promisees or a release given by one without the others joining will bind the others.[46] If the interest of obligees be taken as joint as to some, it must be joint as to all, for it cannot be joint as to some and several as to the remainder.[47]

E. Joint and Several Contracts — 1. Promisors — a. In General. Several persons may enter into concurrent contracts respecting the same matter, binding

14; Gould *v.* Gould, 6 Wend. 263; Dob *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293.

Pennsylvania.— Marys *v.* Anderson, 2 Grant 446; Wilson *v.* Wallace, 8 Serg. & R. 53.

South Carolina.— Ellis *v.* McLemoor, 1 Bailey 13.

Vermont.— Angus *v.* Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758.

United States.— Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67. See Clark *v.* Great Northern R. Co., 81 Fed. 282, holding that where a number of persons jointly contributed to procure a right of way for a railroad through a city in consideration of the company's agreement to give certain rates, all must join in a suit to rescind the contract for failure of the company to comply.

England.— Pease *v.* Hirst, 10 B. & C. 122, 8 L. J. K. B. O. S. 94, 5 M. & R. 88, 21 E. C. L. 61; Hatsall *v.* Griffith, 2 C. & M. 679, 3 L. J. Exch. 191, 4 Tyrw. 487; Wetherell *v.* Langston, 1 Exch. 634, 17 L. J. Exch. 338; Eccleston *v.* Clipsham, 1 Saund. 153.

See *infra*, XII, F, 2, a.

Where one has parted with his interest.— An action on a written contract made with two persons jointly may be brought in the names of both, although one had parted with his interest therein to the other before it was signed. Brewer *v.* Stone, 11 Gray (Mass.) 228.

Assignment of joint obligation.— All of several joint obligees must subscribe an assignment at law of a joint obligation to them, even though one of such obligees be vested with authority to assign the legal interests of his coöbligees. Sanders *v.* Blain, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86.

41. Jell *v.* Douglas, 4 B. & Ald. 374, 23 Rev. Rep. 310, 6 E. C. L. 523.

42. *Connecticut.*— Beach *v.* Hotchkiss, 2 Conn. 697.

Indiana.— Bragg *v.* Wetzell, 5 Blackf. 95.

Massachusetts.— Wiggin *v.* Cumings, 8 Allen 353; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

Minnesota.— Davis *v.* Chouteau, 32 Minn. 548, 21 N. W. 748.

New York.— Ehle *v.* Purdy, 6 Wend. 629.

Pennsylvania.— Sweigart *v.* Berk, 8 Serg. & R. 308.

United States.— Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67; Gilman *v.* Rives, 10 Pet. 298, 9 L. ed. 432.

England.— Petrie *v.* Bury, 3 B. & C. 353, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165; Pugh *v.* Stringfield, 3 C. B. N. S. 2, 27 L. J. C. P. 34, 91 E. C. L. 2; Wetherell *v.* Langston, 1 Exch. 634, 17 L. J. Exch. 338.

43. Chanter *v.* Lease, 1 H. & H. 224, 8 L. J. Exch. 58, 4 M. & W. 295.

44. Jell *v.* Douglas, 4 B. & Ald. 374, 23 Rev. Rep. 310, 6 E. C. L. 523.

45. *Alabama.*— Bebee *v.* Miller, Minor 364.

Arkansas.— Trammell *v.* Harrell, 4 Ark. 602.

Connecticut.— Vandenheuvel *v.* Storrs, 3 Conn. 203.

Kentucky.— McCalla *v.* Rigg, 3 A. K. Marsh. 259; Clark *v.* Parish, 1 Bibb 547; Brown *v.* King, 1 Bibb 462; Morrison *v.* Winn, Hard. 480.

Massachusetts.—Smith *v.* Franklin, 1 Mass. 480; Walker *v.* Maxwell, 1 Mass. 104.

Minnesota.— Hedderly *v.* Downs, 31 Minn. 183, 17 N. W. 274.

Virginia.— Chicester *v.* Vass, 1 Munf. 98.

England.— Jell *v.* Douglas, 4 B. & Ald. 374, 23 Rev. Rep. 310, 6 E. C. L. 523.

46. Myrick *v.* Dame, 9 Cush. (Mass.) 248; Tuckerman *v.* Newhall, 17 Mass. 581; Napier *v.* McLeod, 9 Wend. (N. Y.) 120; Bruen *v.* Marquard, 17 Johns. (N. Y.) 58; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Rawstone *v.* Gandell, 3 D. & L. 682, 10 Jur. 294, 15 L. J. Exch. 291, 15 M. & W. 304, 4 R. & Can. Cas. 295; Wilkinson *v.* Lindo, 7 M. & W. 81. See Payment; Release.

47. Parsons Contr. 13.

themselves jointly as one party, and also severally as separate parties, at the same time; in which case, besides the one joint contract, there are also as many several contracts as there are separate persons, the debt or matter of the contract being one and the same in all the contracts thus made. A joint and several contract is a contract with each promisor and a joint contract with all; therefore in a joint and several contract there is one more contract than there are promisors.[48] A joint and several covenant may be executed in two ways: (1) The obligors may covenant together in one instrument, binding themselves by such words as "We (our heirs, etc.) jointly covenant and agree," etc., and each may also bind himself at the same time severally in a separate instrument for the performance of the same thing; or (2) they may all be bound at the same time jointly and severally for the performance of the same thing, by uniting in one instrument the joint obligation of all and the several obligation of each.[49]

b. Union of Joint and Several Liabilities. As a joint and several contract is not one obligation, but a combination in one instrument of one joint obligation and as many distinct several obligations as there are parties, it follows that the liabilities must be a combination of those attaching to joint contracts and of those attaching to several contracts; so that if action be brought against them all jointly they are all liable as upon a joint contract;[50] and if against them all separately, they are liable as upon a several contract.[51] The same rules govern as in joint or as in several contracts, with the following additional provisions.

c. Liable Altogether or Singly. The obligors are liable either jointly or severally and covenantees are not privileged or do not have the option to sue some covenantors jointly and others severally; they must be sued either jointly or severally.[52] That is to say, joint and several covenantors are liable altogether on

48. *Illinois.*— People *v.* Harrison, 82 Ill. 84; Cummings *v.* People, 50 Ill. 132.

Maine.— Turner *v.* Whitmore, 63 Me. 526.

Massachusetts.— Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27.

Pennsylvania.— Klapp *v.* Kleckner, 3 Watts & S. 519.

United States.— U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

England.— *Ex p.* Honey, L. R. 7 Ch. 178, 41 L. J. Bankr. 9, 25 L. T. Rep. N. S. 728, 20 Wkly. Rep. 223; Beecham *v.* Smith, E. B. & E. 442, 4 Jur. N. S. 1018, 27 L. J. Q. B. 257, 6 Wkly. Rep. 627, 96 E. C. L. 442; Bolton *v.* Lee, 2 Lev. 56.

49. A joint and several bond, although on one piece of parchment or paper, comprises in effect the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee. King *v.* Hoare, 13 M. & W. 494, 505. There being one more than the number of obligors. Leake Contr. 377; Evans *v.* Sanders, 10 B. Mon. (Ky.) 291; Rose *v.* Poulton, 2 B. & Ad. 822, 1 L. J. K. B. 5, 22 E. C. L. 346; Parke, B., in King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494; *Ex p.* Honey, 7 Ch. App. 178, 41 L. J. Bankr. 9, 25 L. T. Rep. N. S. 728, 20 Wkly. Rep. 223.

Form.— The correct words to express this kind of a promise are said by Mr. Leake to be "We bind ourselves, our heirs, executors and administrators, and each of us bindeth himself, his heirs, executors and administrators." Leake Contr. 379.

50. A release of one joint-and-several obligor releases other obligors as in joint obligations. Coke Litt. 232*a*; American Bank *v.* Doolittle, 14 Pick. (Mass.) 123; Tuckerman *v.* Newhall, 17 Mass. 581. But a covenant not to sue is not a release. Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207. See RELEASE.

51. A creditor may bring several actions against each of the obligors on a joint and several contract at the same time and have judgment for damages and costs against each of them. Simonds *v.* Center, 6 Mass. 18.

Where two lessees covenant jointly and severally, the executors of a deceased lessee are liable. Enys *v.* Donnithorne, 2 Burr. 1190.

One only may be liable upon joint and several covenants. Lilly *v.* Hedges, 1 Str. 553.

52. *Connecticut.*— Carter *v.* Carter, 2 Day 442, 2 Am. Dec. 113.

Kansas.— Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143.

Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

Michigan.— Winslow *v.* Herrick, 9 Mich. 380.

Vermont.— Claremont Bank *v.* Wood, 12 Vt. 252.

England.— King *v.* Hobbs, Yelv. 26. See Streatfield *v.* Halliday, 3 T. R. 779, 782, where Buller, J., said: "If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all, or each of them separately." If he sues two only of the three he still proceeds upon it as a joint bond, for he can sue only one or each of them on a several bond. There is no difference between suing two only of three joint obligors and one only of two joint obligors.

the joint obligation, or each severally upon the separate obligations. For example, if five be bound jointly and severally the covenantees cannot sue three only upon the joint obligation and the other two upon their several obligations. If any be sued jointly all must be sued jointly, or if one be sued severally all are liable severally until satisfaction is secured.[53]

d. Both Remedies Available Until Satisfaction. It is settled in England that the promisee may bring a joint action against all and a several action against each promisor until satisfaction is obtained.[54] This doctrine is followed in some of the United States,[55] and was followed by Mr. Justice Story in a case decided by him in 1836.[56] The supreme court of the United States, however, has held to the contrary.[57]

53. See the cases above cited.

54. Prosser *v.* Evans, [1895] 1 Q. B. 108; *In re* Davison, 13 Q. B. D. 50, 50 L. T. Rep. N. S. 635; Drake *v.* Mitchell, 3 East 251, 7 Rev. Rep. 449.

55. People *v.* Harrison, 82 Ill. 84; Moore *v.* Rogers, 19 Ill. 347; Costigan *v.* Lunt, 104 Mass. 217; Simonds *v.* Center, 6 Mass. 18; Clearmont Bank *v.* Wood, 12 Vt. 252.

56. U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426. The first action (U. S. *v.* Cushman, 25 Fed. Cas. No. 14,907, 2 Sumn. 310) was brought at law in May, 1846, on a joint judgment against a deceased obligor, and it was held that plaintiff could not recover. The second action (U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426) was brought in equity, in October, 1846, for the amount of the joint judgment against the deceased obligor, but the action was based on the original contract which was joint and several; and it was held that plaintiff could recover. And see Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 3 Story 646. In U. S. *v.* Cushman, *supra* (the second action), Mr. Justice Story said: "When a party enters into a joint and several obligation, he in effect agrees, that he will be liable to a joint action, and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit. if that judgment remains unsatisfied. The defect of the opposing argument is, that it supposes, that the obligee has an election only of the one remedy, or of the other; and that by electing a joint suit, he waives his right to maintain a several suit. That I take not to be a sound legal interpretation of the contract. The remedies are concurrent. And I know of no principle of law, which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein *pari passu*. It is true, they could have but one satisfaction. But we all know, that upon the same contract the plaintiff may often maintain different suits at the same time, though he can have but one satisfaction. A joint judgment is not *per se* a satisfaction of a joint and several contract."

57. In U. S. *v.* Price, 9 How. (U. S.) 83, 93, 13 L. ed. 56, Mr. Justice Grier delivered the decision of the court which is based on the following grounds: "The law on this subject is too well settled to admit of a doubt, or require the citation of authorities, that, if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment, *quia transit in rem judicatam*. It is essential to the idea of election that a party cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature. The creditor has no longer a remedy, either at law or in equity, on his bond, but only on his judgment. The obligor is no longer bound by the bond; but by the judgment, it has become the evidence of his indebtedness, and the measure of his liability." The two grounds upon which Justice Grier's decision is based are: (1) That the obligee "may elect to sue them jointly or severally," but having elected one he is barred from the use of the other remedy; (2) that one judgment in a joint and several contract merges all the liabilities in the judgment — *transit in rem judicatem*. As to the first ground. It is not denied that the obligee has only the right to sue jointly or severally and not both on the basis of interest, but this question does not concern the rights of obligees but the liability of obligors. And it is established beyond question that obligors are bound according to the intention clearly expressed. The court has either attempted to apply to obligors the rule governing obligees, which is against the overwhelming weight of authority, or else has mistaken its application; either of which is fatal to the decision as based on this ground. The second ground, that is, the merger of the contract in the judgment, is answered by two or three leading decisions which have established the law in England. In Drake *v.* Mitchell, 3 East 251, 258, 7 Rev. Rep. 449, decided by Lord Ellenborough in 1803, one of three joint obligors gave a bill of exchange for a debt secured by a covenant. A judgment was recovered on the bill, but that judgment was held no bar to a subsequent suit on the covenant as the bill was not taken in satisfaction of the debt. Lord Ellenborough said: "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered, operating as a change of

2. Promisees. Promisees cannot be both joint and several; that is, persons must be entitled under a contract jointly only or severally only.[58] It is not possible by any words of joinder or severance to give the covenantees the election to sue separately and together, that is, both jointly and severally.[59]

F. Construction of Such Contracts — 1. Intention of Parties. Whether

remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." In the case of *In re* Davison, 13 Q. B. D. 50, 53, 50 L. T. Rep. N. S. 635, defendants had executed a joint bond, but by reason of fraud in misappropriation of funds it became in fact joint and several. A judgment had been rendered against all covenantors jointly and the same question was presented as is presented here and the same objections made; but the court, by Mr. Justice Cave, said: "Does the fact that they have obtained a joint judgment only necessarily preclude them from proving against the separate estate of one of the bankrupts? If so precluded, it can only be either because the separate cause of action is merged in the joint judgment, or because by suing on the joint cause of action they have elected to rely on that only, and have thus waived the separate cause of action. First, Is the separate cause of action merged in the joint judgment? Take the illustration of a joint and several note against A., B., and C., which is usually comprised in one document. The result is the same as if three separate notes were given as well as the joint note. If A. is sued to judgment on his separate note, is the joint note of A., B., and C., merged in the judgment? On principle why should it be? The object of taking a joint and several note is to have the separate liability of each promisor as well as the joint liability of all, and why should the fact that the separate liability of one promisor has merged in a separate judgment against him prove a bar to an action on the joint note? Is there any authority? King *v.* Hoare, (2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494) is the leading case, and there it was held that a judgment without satisfaction recovered against one of two joint debtors was a bar to an action against the other, but it was pointed out both at the bar and in the judgment that the law is otherwise when the obligation is joint and several. This very point was decided as long ago as Drake *v.* Mitchell (*supra*)." Mr. Justice Cave then quotes from that case and continues: "No authorities to the contrary can be found, and it seems clear both on principle and authority that a joint judgment is not a bar to a separate cause of action. Neither is the separate cause of action gone by reason of the doctrine of election or waiver. This doctrine applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed: Curtis *v.* Williamson (L. R. 10 Q. B. 57, 44 L. J. Q. B. 27, 31 L. T. Rep. N. S. 678, 23 Wkly. Rep. 236) or the old or new partners in a firm where the old partners are liable only by estoppel, as in Scarf *v.* Jardine (7 App. Cas. 345, 51 L. J. Q. B. 612, 47 L. T. Rep. N. S. 258, 30 Wkly. Rep. 893) or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other. In this case on the contrary it is admitted that if the respondents could have proved a fraudulent misappropriation (which they did) by the partners they might have had both a joint and separate judgment, and consequently there was no election and no waiver." And see Prosser *v.* Evans, [1895] 1 Q. B. 108. And the English doctrine is supported by Mr. Justice Field in the United States supreme court in Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783, where he in effect controverts the opinion of Mr. Justice Grier in U. S. *v.* Price, *supra*, and distinguishes between joint and joint and several contracts in the following words: "When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment."

Liable to one suit only at one time.— It would seem that covenantees may not at the same time bring a joint action against all and a several action against each obligor. No case has decided directly upon this point, although Mr. Justice Story in U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426, advanced the opinion that such actions could be brought *pari passu*. The better opinion is no doubt against this view, not because Mr. Justice Story's opinion conflicts with the theory of a joint and several obligation or contract, for, since each obligation is a joint and several contract and furnishes its own liability and a separate cause of action, such actions could legally be brought, but it would be rather against the spirit of equity to allow such a union of suits in their nature vexatious and harassing.

58. Slingsby's Case, 5 Coke 18*b*; Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339; Bradburne *v.* Botfield, 14 L. J. Exch. 330, 14 M. & W. 559.

59. Parsons Contr. 15; Starret *v.* Gault, 165 Ill. 99, 46 N. E. 220; Capen *v.* Barrows, 1 Gray (Mass.) 376; Robbins *v.* Ayers, 10 Mo. 538, 47 Am. Dec. 125; White *v.* Tyndall, 13 App. Cas. 263; Slingsby's Case, 5 Coke 18*b*; Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339; Bradburne *v.* Botfield, 14 L. J. Exch. 330, 14 M. & W. 559; Eccleston *v.* Clipsham, 1 Saund. 153.

the promises are several or joint, or joint and several, depends upon a construction of the language used, and the intention of the parties as manifested by the language used must by followed by the court.[60] If the contract made by several persons purports simply to bind themselves, or to covenant, without more, the obligation or covenant is taken to be joint only, and not several; if the contract purports that they bind themselves or covenant severally, the liability is separate; if they purport to bind themselves jointly and severally, or to bind themselves and each of them, or to covenant for themselves and each of them, using both joint and several words, the liability is both joint and several.[61]

2. PRESUMPTION THAT PROMISES ARE JOINT. Promises of several persons are presumed to be joint and not several, unless a contrary intention is shown in the instrument,[62] or there is some statutory provision to the contrary.[63] In case the parties use but one instrument for a joint and for several obligations, it is obvious that the wording should be very clear to show the intention of the parties to be bound other than merely jointly, or merely severally, that is to say, both jointly and severally. Hence the rule given by the authorities that to create a several liability, or joint and several liability, there must be express words of severance.[64]

3. PROMISOR'S LIABILITY GOVERNED BY INTENT. As the promisors or covenantors may bind themselves severally, jointly, or jointly and severally, or in any manner or in any words, the only question is to determine the intention. If by any means the courts can construe that from the words of the instrument it will be done; if that cannot be done, then all the circumstances of the case and the interests of the parties will be looked at, to discover their intention.[65] In the case of sub-

60. *California.*—Brady *v.* Reynolds, 13 Cal. 31.

Connecticut.— Olmstead *v.* Bailey, 35 Conn. 584.

Indiana.— Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137.

Maine.— Lombard *v.* Cobb, 14 Me. 222.

Maryland.— Slater *v.* Magraw, 12 Gill & J. 265.

Massachusetts.— New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Capen *v.* Barrows, 1 Gray 376; Hall *v.* Thayer, 12 Metc. 130; Bartlett *v.* Robbins, 5 Metc. 184; Appleton *v.* Bascom, 3 Metc. 169; Eastman *v.* Wright, 6 Pick. 316; Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27.

Michigan.— Davis *v.* Belford, 70 Mich. 120, 37 N. W. 919.

Minnesota.— Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80.

New Hampshire.— Pickering *v.* De Rochemont, 45 N. H. 67; Willoughby *v.* Willoughby, 5 N. H. 244.

New York.— Van Alstyne *v.* Van Slyck, 10 Barb. 383; Ehle *v.* Purdy, 6 Wend. 629; Gould *v.* Gould, 6 Wend. 263.

Pennsylvania.— Boggs *v.* Curtin, 10 Serg. & R. 211.

Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404. And see to the same effect Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135, 8 N. W. 15.

United States.— Hall *v.* Leigh, 8 Cranch 50, 3 L. ed. 384; Davis, etc., Bldg., etc., Co. *v.* Barber, 51 Fed. 148; Davis *v.* Shafer, 50 Fed. 764.

England.— King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494; Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146; March *v.* Ward, Peake 130, 3 Rev. Rep. 667; Eccleston *v.* Clipsham, 1 Saund. 153.

See 11 Cent. Dig. tit. "Contracts," § 780 *et seq.*

61. Leake Contr. 456; and cases cited in the note preceding.

62. *Alabama.*—Boswell *v.* Morton, 20 Ala. 235.

California.— Brady *v.* Reynolds, 13 Cal. 31.

Indiana.— Eller *v.* Lucy, 137 Ind. 436, 36 N. E. 1088.

New Jersey.— Alpaugh *v.* Wood, 53 N. J. L. 638, 23 Atl. 261.

Pennsylvania.— Philadelphia *v.* Reeves, 48 Pa. St. 472.

West Virginia.— Elliott *v.* Bell, 37 W. Va. 834, 17 S. E. 399.

England.— White *v.* Tyndall, 13 App. Cas. 263.

See 11 Cent. Dig. tit. "Contracts," § 780 *et seq.*

Civil law.— In Louisiana the rule is different and a joint obligation (called solidarity) is never presumed; it must be expressly stipulated. Stowers *v.* Blackburn, 21 La. Ann. 127; Pecquet *v.* Pecquet, 17 La. Ann. 204; Shreeveport *v.* Gooch, 15 La. Ann. 474; Kohn *v.* Hall, 8 Rob. (La.) 149; Erwin *v.* Greene, 5 Rob. (La.) 70; Walton *v.* Lizardi, 15 La. 588; Oxnard *v.* Locke, 13 La. 447; Dean *v.* Smith, 12 Mart. (La.) 316. Joint purchasers of property, unless there is an express stipulation to that effect, cannot be held liable *in solido* for the purchase-price. Burney *v.* Ludeling, 47 La. Ann. 73, 16 So. 507.

63. By statute in a number of states joint contracts or contracts which would have been joint by the common law are declared to be joint and several. See Clough *v.* Holden, (Mo. 1892) 20 S. W. 695.

64. See the cases above cited.

65. *Indiana.*— Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088.

scriptions by a number of persons to promote some common enterprise, the promises, although joint in form, are held to be several. Each subscriber is held to promise severally to pay the amount of his subscription, and an action against all the subscribers jointly will not lie. It clearly appears from the character of such a contract that each subscriber only intends to bind himself for his own subscription, and this intention must prevail, notwithstanding the joint form of the promise.[66]

4. Promisee's Rights Governed by Interest — a. In General. On the other hand the courts have held from very early times, and the weight of authority and reason continues to be, that the rights of covenantees or promisees is to be determined by their interests in the contract.[67] What the nature of that interest is to be and how it shall be determined has been the subject of some controversy. The early courts decided what interests should govern from the facts of each case, without laying down any general rule.

b. Baron Parke's Rule of Interest. The following rule established by Baron Parke in 1843 is now generally recognized as the correct one: "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reasons of several interests, if it be expressly joint."[68] In other words that interest shown upon the face of the deed shall govern where possible. From this general rule the following deductions may be made.

c. Legal Interest. First, the names of parties appearing in the instrument as covenantees create in them a legal interest according to which, if no higher interest appear in some of them, all must be made parties plaintiff.[69] For

New York.— Ernst *v.* Bartle, 1 Johns. Cas. 319, holding that where it is the evident intent of a covenant that each of the covenantors shall be separately liable for what he stipulated to pay, such intent will be carried out.

Ohio.— Duncan *v.* Willis, 51 Ohio St. 433, 38 N. E. 13.

Pennsylvania.— McCready *v.* Freedly, 3 Rawle 251.

Rhode Island.— Commercial Nat. Bank *v.* Gorham, 11 R. I. 162.

United States.— Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67.

England.— Foley *v.* Addenbrooke, 4 Q. B. 197, 3 G. & D. 64, 7 Jur. 234, 12 L. J. Q. B. 163, 45 E. C. L. 197; White *v.* Tyndall, 13 App. Cas. 263; Collins *v.* Prosser, 1 B. & C. 682, 3 D. & R. 112, 1 L. J. K. B. O. S. 212, 25 Rev. Rep. 540, 8 E. C. L. 287; Scott *v.* Godwin, 1 B. & P. 67; Enys *v.* Donnithorne, 2 Burr. 1190; *Ex p.* Symonds, 1 Cox Ch. 200, 29 Eng. Reprint 1128; Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339; Robinson *v.* Walker, 1 Salk. 393; Southcote *v.* Hoare, 3 Taunt. 87, 12 Rev. Rep. 600; Thomas *v.* Frazer, 3 Ves. Jr. 399.

66. *Indiana.*— Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137.

Massachusetts.— Hall *v.* Thayer, 12 Metc. 130.

Michigan.— Davis *v.* Belford, 70 Mich. 120, 37 N. W. 919.

Minnesota.— Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80.

United States.— Davis, etc., Bldg., etc., Co. *v.* Barber, 51 Fed. 148. *Contra,* Davis *v.* Shafer, 50 Fed. 764.

See Subscriptions.

67. *Illinois.*— St. Johns, etc., R. Co. *v.* Coultas, 33 Ill. 188.

Maine.— Haskins *v.* Leonard, 16 Me. 140, 33 Am. Dec. 648; Lombard *v.* Cobb, 14 Me. 222.

Maryland.— Jacobs *v.* Davis, 34 Md. 204.

Massachusetts.— Capen *v.* Barrows, 1 Gray 376; Appleton *v.* Bascom, 3 Metc. 169.

New Hampshire.— Pickering *v.* De Rochemont, 45 N. H. 67.

New York.— Gould *v.* Gould, 6 Wend. 263.

Ohio.— Cahoon *v.* Kinen, 42 Ohio St. 190.

Vermont.— Sharp *v.* Conkling, 16 Vt. 355; Catlin *v.* Bernard, 1 Aik. 9.

Virginia.— Carthrae *v.* Brown, 3 Leigh 98, 23 Am. Dec. 255.

United States.— Goldsmith *v.* Sachs, 17 Fed. 726, 8 Sawy. 110.

England.— Foley *v.* Addenbrooke, 4 Q. B. 197, 3 G. & D. 64, 7 Jur. 234, 12 L. J. Q. B. 163, 45 E. C. L. 197; Withers *v.* Bircham, 3 B. & C. 254, 5 D. & R. 106, 3 L. J. K. B. O. S. 30, 27 Rev. Rep. 350, 10 E. C. L. 123; Slingsby's Case, 5 Coke 18*b*; Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339; Eccleston *v.* Clipsham, 1 Saund. 153; James *v.* Emery, 2 Moore C. P. 195, 5 Price 529, 8 Taunt. 245, 19 Rev. Rep. 503, 4 E. C. L. 129; Rolls *v.* Yate, Yelv. 177.

See 11 Cent. Dig. tit. "Contracts," § 783 *et seq.*

68. Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146.

69. Anderson *v.* Martindale, 1 East 497, 6 Rev. Rep. 334.

Unless a several interest appears on the face of the deed, several parties must sue

instance, if a covenant be made with two jointly for the benefit of a third, both covenantees should sue jointly, for the words of the covenant correspond with the legal interest, since no higher interest appears. So also if a covenant be made with two for the payment of a sum to one of them.[70] But if a covenant be made with two jointly to pay a separate distinct sum to each separately, a higher interest appears and each must sue severally, notwithstanding words that otherwise would give them a joint right of action.[71]

d. Higher Interest. This leads to the second deduction from the general rule; namely, that where from the face of the covenant a higher interest appears than that granted by the technical words of joinder or severalty, that interest must govern to protect the substantial rights of parties thereto. And that interest may be legally related to the subject-matter of the contract or beneficially related to the fruits thereof.[72] According to this rule the circumstances of each case are to govern, and it is not inconceivable that a covenant may be so framed as to give a joint right in two or more to sue and also a distinct several right in one, based upon interest. For instance, where one of two tenants in common is dead, a covenant for rent may be made by two lessees for payment to one lessor severally and to the three heirs of the other lessors jointly. These are in reality, however, distinct, although like covenants united in one instrument;[73] that is to say, a joint covenant to one and a joint covenant to three.

5. Singular and Plural Number. A promise by two or more in the singular number is *prima facie* several, while a promise in the plural is *prima facie* joint.[74] But as in all other cases, if the whole instrument shows a contrary intention, that intention will govern.[75] Thus the words "we promise to pay" import a joint obligation.[76]

6. Several Promises. The following have been held to be several obligations: An agreement entered into by a number of persons to "pay the sum annexed to their names" in order to make up an aggregate sum, to be paid to another person in consideration of services to be rendered;[77] an agreement with a storekeeper

jointly. Crosby *v.* Jeroloman, 37 Ind. 264; Sorsbie *v.* Park, 13 L. J. Exch. 9, 12 M. & W. 146.

70. Anderson *v.* Martindale, 1 East 497, 6 Rev. Rep. 334.

71. Withers *v.* Bircham, 3 B. & C. 254, 5 D. & R. 106, 3 L. J. K. B. O. S. 30, 27 Rev. Rep. 350, 10 E. C. L. 123.

72. Leake Contr. 383; Servante *v.* James, 10 B. & C. 410, 8 L. J. K. B. O. S. 64, 5 M. & R. 299, 21 E. C. L. 177; Hatsall *v.* Griffith, 2 C. & M. 679, 3 L. J. Exch. 191, 4 Tyrw. 487.

73. Keightley *v.* Watson, 3 Exch. 716, 18 L. J. Exch. 339.

74. *Indiana.*— Maiden *v.* Webster, 30 Ind. 317.

Maryland.— Slater *v.* Magraw, 12 Gill & J. 265.

Massachusetts.— New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Monk *v.* Beal, 2 Allen 585; Bartlett *v.* Robbins, 5 Metc. 184; Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27.

New York.— Van Alstyne *v.* Van Slyck, 10 Barb. 383; Ehle *v.* Purdy, 6 Wend. 629.

Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404; Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135, 8 N. W. 15.

England.— King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494; March *v.* Ward, Peake 130, 3 Rev. Rep. 667.

See 11 Cent. Dig. tit. "Contracts," § 781.

75. See the cases above cited.

An agreement in form in the singular number, signed in the name of a firm, is joint, and not joint and several, or several. Brown *v.* Fitch, 33 N. J. L. 418.

76. *Georgia.*— Jernigan, etc., Co. *v.* Wimberly, 1 Ga. 220.

Indiana.— Barnett *v.* Juday, 38 Ind. 86.

Louisiana.— New Orleans *v.* Ripley, 5 La. 120, 25 Am. Dec. 175.

Pennsylvania.— City *v.* Reeves, 5 Phila. 357, 21 Leg. Int. 37.

Vermont.— McCullis *v.* Thurston, 27 Vt. 596.

77. *California.*— O'Conner *v.* Hooper, 102 Cal. 528, 36 Pac. 930; Moss *v.* Wilson, 40 Cal. 159.

Illinois.— Combs *v.* Steele, 80 Ill. 101; Robertson *v.* Marsh, 4 Ill. 198.

Indiana.— Davis, etc., Bldg., etc., Co. *v.* McKinney, 11 Ind. App. 696, 38 N. E. 1093; Davis, etc., Bldg., etc., Co. *v.* Booth, 10 Ind. App. 364, 37 N. E. 818; Davis, etc., Bldg., etc., Co. *v.* Hillsboro Creamery Co., 10 Ind. App. 42, 37 N. E. 549.

Massachusetts.— Duff *v.* Maguire, 99 Mass. 300.

Michigan.— Davis, etc., Bldg., etc., Co. *v.* Murray, 102 Mich. 217.

Minnesota.— Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80.

Missouri.— Peery *v.* Kerr, 30 Mo. 349; Davis *v.* Hendrix, 59 Mo. App. 444.

that if a certain person is elected to an office A will pay for certain cloth, and if he is not elected B will pay for it;[78] where several persons signed a contract reciting that whereas they owed the town of Manchester, etc., by certain notes made payable to the plaintiff, as treasurer of the town, and whereas the plaintiff had been called upon to pay to the town the amount of their notes, etc., they agreed as follows: "We agree to indemnify and save harmless the said Stevens from all costs and trouble which he may be put to, touching the same, in proportion to the several sums which we owe as aforesaid;"[79] where four persons who did not buy as partners agreed to pay fifteen hundred dollars for a printing-press and materials in instalments, each of the said first parties to be held personally responsible for one fourth of such amount;[80] an agreement signed by the members of a stock company to pay a certain amount proportionate to the stock of each;[81] where two persons contracted with a boat-builder to pay for a boat to be built for them a certain sum "each his one-half";[82] an instrument reading "We, the subscribers, promise to pay A B, teacher, the following rates of tuition;"[83] an agreement entered into by several adjacent landowners to accept a boundary line as located by a surveyor;[84] where lots held in severalty were conveyed to a corporation by the owners, who were also incorporators, pursuant to a contract with the other incorporators, made before incorporation, by which the grantors agreed to devote their energies to the sale of such lots for the corporation, and to refrain from selling other lots in competition;[85] and where A covenanted with B and others to cut a certain canal for the purpose of floating certain logs to market, and B and others covenanted to sell to A all the pine logs which he should cause to be hauled into such canal for a term of years.[86]

7. Joint Promises. Where several persons execute an instrument, in parol or under seal, upon the same consideration, at the same time, and for the same purpose, and which takes effect from a single delivery, it is a joint promise.[87] So

Nebraska. — Davis *v.* Raveman Creamery Co., 48 Nebr. 471, 67 N. W. 436.

New York. — Ludlow *v.* McCrea, 1 Wend. 228.

North Carolina. — Williamson *v.* Chiles, 27 N. C. 244.

South Dakota. — Frost *v.* Williams, 2 S. D. 457, 50 N. W. 964.

Wisconsin. — Davis, etc., Bldg., etc., Co. *v.* Cupp, 89 Wis. 673, 62 N. W. 520; Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829.

United States. — Davis, etc., Bldg., etc., Co. *v.* Jones, 66 Fed. 124, 14 C. C. A. 30, 51 Fed. 148, 50 Fed. 764; Davis, etc., Bldg., etc., Co. *v.* Barber, 51 Fed. 148.

See 11 Cent. Dig. tit. "Contracts," § 780 *et seq.*

Subscriptions see *supra*, X, F, 3 note 66.

78. Lurton *v.* Gilliam, 7 Ill. 577, 33 Am. Dec. 430.

79. Stevens *v.* Hall, 19 N. H. 560.

80. Larkin *v.* Butterfield, 29 Mich. 254.

81. Green *v.* Relf, 14 La. Ann. 828; Gibbons *v.* Grinsel, 79 Wis. 365, 48 N. W. 255. See Corporations.

82. Costigan *v.* Lunt, 104 Mass. 217.

83. Beck *v.* Pounds, 20 Ga. 36.

84. Corrington *v.* Pierce, 28 Ill. App. 211.

85. Des Moines, etc., Land, etc., Co. *v.* Polk County Homestead, etc., Co., 82 Iowa 666, 45 N. W. 773.

86. Walker *v.* Webber, 12 Me. 60.

Other illustrations.—Where a proposal was made to the workmen in a foundry collectively, by a partner therein, that if they would go to work his firm would pay them the amount due from a former proprietor, it was held a promise to each of them individually. Wills *v.* Cutler, 61 N. H. 405. Where an agreement was in the following form: "I hereby agree to pay James B. Lee one hundred and twenty-five dollars and to Ira Case one hundred and ten dollars, by the first day of April, A. D. 1862; provided Wm. M. Power execute," etc., it was held that the rights of action of Lee and Case were several and distinct. Rorabacher *v.* Lee, 16 Mich. 169. Where a contract between four persons provided that one was to represent the interests of the others in the coal trade at a certain place, selling their coal only, taking from them in equal quantities, agreeing to labor to improve the market, and to give the others the advantage of any improvement, except his fair proportion, and to keep his books open to them, they agreeing to aid his trade, it was held that the contract was several, not joint. Shipman *v.* Straitsville Cent. Min. Co., 158 U. S. 356, 15 S. Ct. 886, 39 L. ed. 1015. If the terms of a covenant by creditors to indemnify the debtor against demands by them or persons claiming under them are general, it will be construed a several covenant by each creditor, and not a joint one by all. Halsey *v.* Fairbanks, 11 Fed. Cas. No. 5,964, 4 Mason 206.

87. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Stage *v.* Olds, 12 Ohio 158.

where parties enter into a contract under seal in their individual characters, they are jointly personally responsible, although they in fact contract as a committee in anticipation of an incorporation.[88] The fact that one of two builders contracting to build a house is to receive a certain fixed sum, and the other another, does not render the contract several, so as to prevent their maintaining a joint action thereon.[89]

8. Joint and Several Promises. An agreement to pay money, signed by two, but in the body of it providing for the payment by one of them only, is a joint and several obligation.[90] So where the obligatory part of a bond was in these words: "We are holden and bound unto M. C. in the sum of $500, for the payment of which, we bind ourselves, and each of us," this was held a joint and several bond, on which an action could be brought against one of the obligors separately.[91]

XI. CONFLICT OF LAWS.

A. In General — 1. Introduction. The subject of conflict of laws rests entirely upon the comity of nations. The law of one state has, *proprio vigore*, no force or authority beyond the jurisdiction of its own courts.[92] Whatever effect

88. Rowland *v.* Phalen, 1 Bosw. (N. Y.) 43; Lincoln *v.* Crandall, 21 Wend. (N. Y.) 101; Eichbaum *v.* Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; Richmond Presb. Church *v.* Manson, 4 Rand. (Va.) 197.

89. Fauble *v.* Davis, 48 Iowa 462.

A mortgage executed by one of a partnership in his own name, but for the firm, and upon property held by him in trust for the firm, by which he agrees to assume the payment of certain notes of another person, they being for the purchase of the real estate, and the partnership having an interest in the real estate, is the joint contract only of all the partners, and not the several contract of each. Crosby *v.* Jeroloman, 37 Ind. 264.

Other illustrations of joint contracts are: An agreement to indemnify one from loss by becoming bail, commencing, "We agree," etc., and signed by a number of names, with a certain sum of money marked opposite to each, the entire amount being inadequate to meet the damages claimed (McCullis *v.* Thurston, 27 Vt. 596); an instrument signed by several persons, proposing that if a railroad company will extend its road to a certain point, "we will undertake" to buy a certain amount of stock (New Haven, etc., Co. *v.* Hayden, 119 Mass. 361); an order by a committee of a political party of a public dinner of a caterer, the committee being jointly liable for the price (Eichbaum *v.* Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540); an agreement by three persons hiring of a livery a horse, carriage, and driver (O'Brien *v.* Bound, 2 Speers (S. C.) 495, 42 Am. Dec. 384). Where a number of persons associated for the purpose of instituting a bank, and at a meeting of the associates, at which all were not present, an agent was appointed to attend the legislature and procure a charter, and he accordingly undertook the service and endeavored to procure the charter, but did not succeed, it was held that they were jointly liable to the agent for his services and expenses, as well those who were not present at the meeting as those who were. Sproat *v.* Porter, 9 Mass. 300. Where a written contract is made in form between two, and signed by the parties named, and at the same time a third person adds, "I agree to be security for the promisor in the above contract," with his signature, the latter is holden as a joint promisor. Norris *v.* Spencer, 18 Me. 324. Where two persons are responsible on a sealed instrument to pay for the erection of a building, and both superintend the work, one acting in the other's absence, and always with a joint view to the same object, a parol promise by each, at different times to waive the written contract, and pay the reasonable value, makes the promise joint. Monroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475. An agreement to sell property to three persons, one of them to make a cash payment, and the others to make a conveyance of real estate, is a joint obligation on their part, and the seller is not liable to perform until all three have performed. Brewster *v.* Wooster, 58 N. Y. Super. Ct. 10, 9 N. Y. Suppl. 312, 30 N. Y. St. 251.

90. Klapp *v.* Kleckner, 3 Watts & S. (Pa.) 519.

91. Carter *v.* Carter, 2 Day (Conn.) 442, 2 Am. Dec. 113; Morange *v.* Mudge, 6 Abb. Pr. (N. Y.) 243. See Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

A joint "or" several liability is a joint "and" several liability. Strauss *v.* Trotter, 6 Misc. (N. Y.) 77, 26 N. Y. Suppl. 20, 55 N. Y. St. 489; Outlaw *v.* Farmer, 71 N. C. 31.

For other illustrations of a joint and several liability see Gwinn *v.* McDaniel, 5 Tex. Civ. App. 112, 23 S. W. 850; Davis *v.* Shafer, 50 Fed. 764.

92. *Georgia.*— Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300.

Indiana.— Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376.

New Hampshire.— Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617.

is given to it by the courts of foreign countries or other states is the result of that international comity which is the product of modern civilization. It is left to each state or nation to say how far it will recognize this comity, and to what extent it will be permitted to control its own laws.[93] And because the effect of a foreign law depends so largely upon state comity, there is, as would naturally be expected, considerable conflict in the authorities where the laws conflict.[94] The law of the domicile of the party does not necessarily govern his contract or determine his rights or obligations. The question is where was it made or where was it to be performed as the case may be.[95]

2. Action on Contracts Transitory. The rights and liabilities upon an executory contract are generally transitory and enforceable in the courts of any country obtaining jurisdiction of the promisor's person.[96] The effect to be given to such contract may be different, however, in one country from the effect which would be given it in another. The important question then arises, Which law is to govern in a particular case?

3. Intention of Parties the Test. The first general principle is that a contract is to be governed by the law with a view to which it was made, in other words the law which is to decide upon the nature, interpretation, and validity of an engagement is that which the parties have either expressly or presumptively incorporated with their contract as constituting their obligation.[97]

4. Contract Expressly Prescribing Law to Govern. Where the parties have expressly provided that the contract shall be governed by the law of a particular country this intention will as a rule be carried out by the courts.[98] Thus where

New Jersey.— New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450.

New York.— People *v.* McLeod, 1 Hill 377, 25 Wend. 483, 37 Am. Dec. 328.

"That the laws of any state cannot, by any inherent authority, be entitled to respect extraterritorially, or beyond the jurisdiction of the State which enacts them, is the necessary result of the independence of distinct sovereignties. But the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the State in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other State. And nothing can be more just than this principle. For, when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conusant of the laws of the place where he is and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has, in some other way, excepted his particular contract from the laws of the country where he is." Blanchard *v.* Russell, 13 Mass. 1, 4, 7 Am. Dec. 106.

93. Delop *v.* Windsor, 26 La. Ann. 185; Cole *v.* Lucas, 2 La. Ann. 946; Oliver *v.* Townes, 2 Mart. N. S. (La.) 93; New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25.

94. Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250.

95. Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55. But see Felch *v.* Bughee, 48 Me. 9, 77 Am. Dec. 203.

96. Minor Confl. L. § 151. See Venue.

97. Union City Commercial Bank *v.* Jackson, 7 S. D. 135, 63 N. W. 548; Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

The term "proper law of a contract" means the law or laws by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed, or in other words the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves, or more accurately, although in more cumbersome language, the law of the country or the laws of the countries by the law or the laws whereof the parties to a contract intended or may fairly be presumed to have intended the contract to be governed. Dicey Confl. L. Rule 143; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100; Hamlyn *v.* Talisker Distillery, [1894] A. C. 202, 58 J. P. 540, 71 L. T. Rep. N. S. 1, 6 Reports 188; *In re* Missouri Steamship Co., 42 Ch. D. 321, 6 Aspin. 423, 58 L. J. Ch. 721, 61 L. T. Rep. N. S. 316, 37 Wkly. Rep. 696.

98. U. S. Sav., etc., Co. *v.* Scott, 98 Ky. 695, 34 S. W. 235, 17 K. L. Rep. 1244; Grecr *v.* Poole, 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. Rep. N. S. 687, 28 Wkly. Rep. 582; Dicey Confl. L. Rule 143.

two persons make a contract in England, but by its very terms it is provided that it shall be governed by the laws of Scotland, the law of Scotland then becomes the proper law of the contract, and the law by which it is to be interpreted and its legality decided.[99] "Parties may substitute the laws of another place or country than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms."[1] This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of that contract.[2]

5. Contract Impliedly Prescribing Law to Govern. The contract may impliedly prescribe the law. Where the intention is not expressed, it is to be inferred from the terms and nature of the contract and the general circumstances of the case, and such inferred intention determines the proper law of the contract.[3] Thus where a Scotchman marries a Scotchwoman in England, and the marriage settlement is executed in England, yet if it is in the Scotch form, the law of Scotland will be presumed to have been meant as the proper law of the contract.[4]

6. Law Declared by Statute. Comity is overruled by positive law.[5] Where a statute intended to have an extraterritorial operation makes a contract either valid or invalid, its validity or invalidity must be determined by such statute, independently of the law of any foreign country whatever.[6] In this country it is held that a penal statute will not be given an extraterritorial operation where it does not expressly so provide.[7]

B. Place of Making and Place of Performance — 1. Place of Making.

99. Dicey Confl. L. Rule 143 [*citing* Chamberlain *v.* Napier, 15 Ch. D. 614, 49 L. J. Ch. 628, 29 Wkly. Rep. 194].

1. McAlister *v.* Smith, 17 Ill. 328, 334, 65 Am. Dec. 651.

2. McAlister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651.

Illustrations.— Thus where a citizen of Chicago made a contract with the agents of a line of British steamers to carry cattle from Baltimore to Liverpool, and it was stipulated that any questions arising should be determined by the law of England, it was held that a federal court sitting in Maryland would recognize this stipulation, and would apply the English rule of law to the solution of the questions in controversy under the contract. The Oranmore, 24 Fed. 922. So where an English underwriter executed in England a policy of insurance which provided that it should be construed and enforced in accordance with French law, it was held that it would be so construed in an English court. Greer *v.* Poole, 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. Rep. N. S. 687, 28 Wkly. Rep. 582. And where natives of a foreign country residing in New York, in anticipation of marriage and of a return to their native country, entered into an agreement for the regulation of their interests under the marriage, expressly referring to the law of their native country, it was held that that law governed the contract, although the parties had continued to reside in New York. Le Breton *v.* Miles, 8 Paige (N. Y.) 261.

3. Dicey Confl. L. Rule 149, subrule 2. And see Grumwald *v.* Freeze, (Cal. 1893) 34 Pac. 73; Brown *v.* Ramsey, 74 Ga. 210; Codman *v.* Krell, 152 Mass. 214, 25 N. E. 90; Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104.

4. Dicey Confl. L. Rule 143. See *Re* Barnard, 56 L. T. Rep. N. S. 9. And see Jacobs *v.* Credit Lyonnais, 12 Q. B. D. 589, 53 L. J. Q. B. 156, 50 L. T. Rep. N. S. 194, 32 Wkly. Rep. 761; India, etc., Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., 10 Q. B. D. 521; Chamberlain *v.* Napier, 15 Ch. D. 614, 49 L. J. Ch. 628, 29 Wkly. Rep. 194.

5. Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641.

6. Dicey Confl. L. Rule 144. See also to the same effect Wharton Confl. L. §§ 178, 179.

Statement of rule.—"Sometimes," says Dicey, "though not often, an Act of Parliament lays down a positive rule as to the validity or invalidity of a contract wherever made. Whenever an Act of Parliament thus validates or invalidates a contract, a British Court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case." The illustrations given by Dicey are of a marriage made in France but void there because not following the formalities required by French law; but made valid by the English Foreign Marriage Act; a marriage of a member of the British royal family to a foreigner in a foreign country which would be good there but contrary to an English statute, no matter where celebrated; and a loan by a British subject in a foreign country of money to carry on the slave trade void wherever made by the English slave trade act. Dicey Confl. L. Rule 144.

7. See Statutes.

The parties by making their contract in a given country are held, in the absence of proof to the contrary, to have intended that it should be judged by the laws of that country, that is, by the *lex loci contractus*.[8] "*Prima facie*, the proper law of the contract is presumed to be the law of the country where the contract

8. *Alabama.*— Swinks *v.* Dechard, 41 Ala. 258; Evans *v.* Kittrell, 33 Ala. 449; Walker *v.* Forbes, 31 Ala. 9; McDougald *v.* Rutherford, 30 Ala. 253; Jones *v.* Jones, 18 Ala. 248; Peake *v.* Yeldell, 17 Ala. 636; Thomas *v.* Degraffenreid, 17 Ala. 602; Goodman *v.* Munks, 8 Port. 84.

Arkansas.— Howcott *v.* Kilbourn, 44 Ark. 213; Laird *v.* Hodges, 26 Ark. 356; Lane *v.* Levillian, 4 Ark. 76, 37 Am. Dec. 769.

California.— Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

Connecticut.— Koster *v.* Minett, 32 Conn. 246; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Georgia.— Flournoy *v.* Jeffersonville First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Champion *v.* Wilson, 64 Ga. 184.

Illinois.— Burchard *v.* Dunbar, 82 Ill. 450, 25 Am. Rep. 334; Evans *v.* Anderson, 78 Ill. 558; Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597; Munsford *v.* Canty, 50 Ill. 370; Lewis *v.* Headley, 36 Ill. 433, 87 Am. Dec. 227; Austedt *v.* Sutter, 30 Ill. 164; McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651; Phinney *v.* Baldwin, 16 Ill. 108, 1 Am. Dec. 62; Stacy *v.* Baker, 2 Ill. 417; Humphries *v.* Collier, 1 Ill. 297; Bradshaw *v.* Newman, 1 Ill. 133, 12 Am. Dec. 149; Waters *v.* Cox, 2 Ill. App. 129.

Indiana.— Farhni *v.* Ramsee, 19 Ind. 400.

Iowa.— Doyle *v.* McGuire, 38 Iowa 410; Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73; McDaniels *v.* Chicago, etc., R. Co., 24 Iowa 412; Bean *v.* Briggs, 4 Iowa 464.

Kansas.— Hefferlin *v.* Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593.

Kentucky.— Ford *v.* Buckeye State Ins. Co., 6 Bush 133, 99 Am. Dec. 663; Archer *v.* National Ins. Co., 2 Bush 226; Jameson *v.* Gregory, 4 Metc. 363; Young *v.* Harris, 14 B. Mon. 447, 61 Am. Dec. 170; Cross *v.* Petree, 10 B. Mon. 413; Johnson *v.* U. S. Bank, 2 B. Mon. 310; Steele *v.* Curle, 4 Dana 381; Cocke *v.* Conigmaker, 1 A. K. Marsh. 254; Grubbs *v.* Harris, 1 Bibb 567; Gibson *v.* Sublett, 4 Ky. L. Rep. 730.

Louisiana.— Pecquet *v.* Pecquet, 17 La. Ann. 204; Hollomon *v.* Hollomon, 12 La. Ann. 607; Spears *v.* Shropshire, 11 La. Ann. 559, 66 Am. Dec. 206; U. S. *v.* U. S. Bank, 8 Rob. 262; Shaw *v.* Oakey, 3 Rob. 361; Briggs *v.* Campbell, 19 La. 524; Buckner *v.* Watt, 19 La. 216, 36 Am. Dec. 671; Jackson *v.* Tiernan, 15 La. 485; Graves *v.* Roy, 13 La. 454, 33 Am. Dec. 568; Andrews *v.* His Creditors, 11 La. 464; King *v.* Harman, 6 La. 607, 26 Am. Dec. 485; Clague *v.* Their Creditors, 2 La. 114, 20 Am. Dec. 300; Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286; Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279; Miles *v.* Oden, 8 Mart. N. S. 214, 19 Am. Dec. 177; Astor *v.* Price, 7 Mart. N. S. 408; Shiff *v.* Louisiana State Ins. Co., 6 Mart. N. S. 629; Bell *v.* James, 6 Mart. N. S. 74; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Thorn *v.* Morgan, 4 Mart. N. S. 292, 16 Am. Dec. 173; Baldwin *v.* Gray, 4 Mart. N. S. 192, 16 Am. Dec. 169; Chartres *v.* Cairnes, 4 Mart. N. S. 1; Oliver *v.* Townes, 2 Mart. N. S. 93; Brown *v.* Richardson, 1 Mart. N. S. 202; Evans *v.* Gray, 12 Mart. 475; Morris *v.* Eves, 11 Mart. 730; Whiston *v.* Stodder, 8 Mart. 95, 13 Am. Dec. 281; Lynch *v.* Postlethwaite, 7 Mart. 69, 12 Am. Dec. 495.

Maine.— Bond *v.* Cummings, 70 Me. 125; Kennedy *v.* Cochrane, 65 Me. 594; Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661.

Maryland.— Dakin *v.* Pomeroy, 9 Gill 1; Trasher *v.* Everhart, 3 Gill & J. 234; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Massachusetts.— Stebbins *v.* Leowolf, 3 Cush. 137; Carnegie *v.* Morrison, 2 Metc. 381; Pitkin *v.* Thompson, 13 Pick. 64; Bulger *v.* Roche, 11 Pick. 36, 22 Am. Dec. 359; Blanchard *v.* Russell, 13 Mass. 1, 7 Am. Dec. 106.

Michigan.— Tolman Co. *v.* Reed, 115 Mich. 71, 72 N. W. 1104; Collins Iron Co. *v.* Binkham, 10 Mich. 283.

Mississippi.— Woodsen *v.* Owens, (1892) 12 So. 207; Partee *v.* Silliman, 44 Miss. 272; Brown *v.* Freeland, 34 Miss. 181; Brown *v.* Nevitt, 27 Miss. 801; Bank of England *v.* Tarleton, 23 Miss. 173; Martin *v.* Martin, 1 Sm. & M. 176.

Missouri.—Johnston *v.* Gawtry, 83 Mo. 339; Sallee *v.* Chandler, 26 Mo. 124; Houghtaling *v.* Ball, 19 Mo. 84, 59 Am. Dec. 331; Phœnix Mut. L. Ins. Co. *v.* Simons, 52 Mo. App. 357; Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88; Kerwin *v.* Doran, 29 Mo. App. 397; Roach *v.* St. Louis Type Foundry, 21 Mo. App. 118; Banchor *v.* Gregory, 9 Mo. App. 102; State *v.* Carroll, 6 Mo. App. 263.

New Hampshire.— Gilman *v.* Stevens, 63 N. H. 342, 1 Atl. 202; Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207; Bliss *v.* Brainerd, 41 N. H. 256; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Thayer *v.* Elliott, 16 N. H. 102; Bliss *v.* Houghton, 16 N. H. 90.

New Jersey.— Marvin Safe Co. *v.* Norton, 48 N. J. L. 410, 7 Atl. 418, 57Am. Rep. 566; Dacoster *v.* Davis, 24 N. J. L. 319; New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450; Atwater *v.* Walker, 16 N. J. Eq. 42.

New York.— King *v.* Sarria, 69 N. Y. 24, 25 Am. Dec. 128; Ross *v.* Wigg, 34 Hun 192; Gans *v.* Frank, 36 Barb. 320; Hodges *v.* Shuler, 24 Barb. 68; Pomeroy *v.* Ainsworth, 22 Barb. 118; Ball *v.* Davis, 1 N. Y. St. 517; Waldron *v.* Ritchings, 9 Abb. Pr. N. S. 359; Aymar *v.* Sheldon, 12 Wend. 439, 27 Am. Dec. 137; Whittemore *v.* Adams, 2 Cow. 626; Sherrill *v.* Hopkins, 1 Cow. 103; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467; Thompson *v.* Ketcham, 8 Johns. 190, 5 Am.

is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country."[9] In other words the proper law of a contract is the law of the place where it is made.[10] This law (of the place where the contract is made or to be performed, as shown in the next section) governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge.[11]

Dec. 332; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482; Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410; Crosby *v.* Berger, 3 Edw. 538.

North Carolina.— Williams *v.* Carr, 80 N. C. 294; Anderson *v.* Doak, 32 N. C. 295; Watson *v.* Orr, 14 N. C. 161.

Ohio.— Lockwood *v.* Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78; Scheferling *v.* Hoffman, 4 Ohio St. 241, 62 Am. Dec. 281; Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134.

Pennsylvania.— Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508; Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532; Greenwald *v.* Kaster, 86 Pa. St. 45, 5 Wkly. Notes Cas. 140; Benners *v.* Clemens, 58 Pa. St. 24; Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540; Watson *v.* Brewster, 1 Pa. St. 381; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520; Brewster *v.* Lynde, 2 Miles 185; Whitehurst's Estate, 18 Wkly. Notes Cas. 403, 2 Pa. Co. Ct. 212; Hoag *v.* Dessan, 1 Pittsb. 390; Gilbert *v.* Black, 1 Leg. Chron. 132.

South Carolina.— Pegram *v.* Williams, 4 Rich. 219; Gilliland *v.* Phillips, 1 Rich. 152; Weatherby *v.* Covington, 3 Strobh. 27, 49 Am. Dec. 623; Ayres *v.* Audubon, 2 Hill 601; Touro *v.* Cassin, 1 Nott & M. 173, 9 Am. Dec. 680; Le Prince *v.* Guillemot, 1 Rich. Eq. 187.

South Dakota.— Union City Commercial Bank *v.* Jackson, 7 S. D. 135, 63 N. W. 548.

Tennessee.— Ingram *v.* Smith, 1 Head 411; Pearl *v.* Hansborough, 9 Humphr. 426; McKissick *v.* McKissick, 6 Humphr. 75; Yerger *v.* Raus, 4 Humphr. 259.

Texas.— Cantu *v.* Bennett, 39 Tex. 303; Shelton *v.* Marshall, 16 Tex. 344; Crosby *v.* Huston, 1 Tex. 203.

Vermont.— Cartwright *v.* New York, etc., R. Co., 59 Vt. 675, 9 Atl. 370; Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364; Suffolk Bank *v.* Kidder, 12 Vt. 464, 36 Am. Dec. 354; Bryant *v.* Edson, 8 Vt. 325, 30 Am. Dec. 472.

Virginia.— Warder *v.* Arell, 2 Wash. 282, 1 Am. Dec. 488.

West Virginia.— Crumlist *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; Stevens *v.* Brown, 20 W. Va. 450.

Wisconsin.— Fisher *v.* Otis, 3 Chandl. 78.

United States.— Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104; Scudder *v.* Union Bank, 91 U. S. 406, 23 L. ed. 245; Wilcox *v.* Hunt, 13 Pet. 378, 10 L. ed. 209; Cox *v.* U. S., 6 Pet. 172, 8 L. ed. 359; Harrison *v.* Sterry, 5 Cranch 289, 3 L. ed. 104; Potter *v.* The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746; Brown *v.* American Finance Co., 31 Fed. 516, 24 Blatchf. 384; Burrows *v.* Hannegan, 4 Fed. Cas. No. 2,206, 1 McLean 315; Green *v.* Collins, 10 Fed. Cas. No. 5,755, 3 Cliff. 494; Nicolls *v.* Rodgers, 18 Fed. Cas. No. 10,260, 2 Paine 437; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,871, 1 Gall. 371.

England.— Robinson *v.* Bland, 2 Burr. 1077, 1 W. Bl. 234; Peninsular, etc., Steam Nav. Co. *v.* Shand, 11 Jur. N. S. 771, 12 L. T. Rep. N. S. 808, 3 Moore P. C. N. S. 272, 13 Wkly. Rep. 1049, 16 Eng. Reprint 103.

See 11 Cent. Dig. tit. "Contracts," §§ 2, 41, 145, 455 *et seq.*, 724 *et seq.*, 1216.

9. Dicey Confl. L. Rule 149, subrule 3.

10. Chatenay *v.* Brazilian Submarine Tel. Co., [1891] 1 Q. B. 79, 60 L. J. Q. B. 295, 63 L. T. Rep. N. S. 739, 39 Wkly. Rep. 65; Gibbs *v.* La Societe Industrielle, etc., 25 Q. B. D. 399, 59 L. J. Q. B. 510, 63 L. T. Rep. N. S. 503; Jacobs *v.* Credit Lyonnais, 12 Q. B. D. 589, 53 L. J. Q. B. 156, 50 L. T. Rep. N. S. 194, 32 Wkly. Rep. 761; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100; Kearney *v.* King, 2 B. & Ald. 301; Sprowle *v.* Legge, 1 B. & C. 16, 8 E. C. L. 8; Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 88, 11 Moore C. P. 209; Scott *v.* Pilkington, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 6 L. T. Rep. N. S. 21, 110 E. C. L. 11; Peninsular, etc., Steam Nav. Co. *v.* Shand. 11 Jur. N. S. 771, 12 L. T. Rep. N. S. 808, 3 Moore P. C. N. S. 272, 13 Wkly. Rep. 1049, 16 Eng. Reprint 103.

11. Davis *v.* Morton, 5 Bush (Ky.) 160, 96 Am. Dec. 345.

Illustrations.— Thus where two citizens of France, at Paris, entered into a marriage contract for community of goods according to the law of Paris, and the husband afterward deserted his wife, came to New York, and after remaining there many years, died there, it was held that the rights of the wife in the distribution of the estate must be governed by the law of France. Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 473. So where plaintiffs, who lived in New York, made a contract in New York with defendants, whereby plaintiffs paid certain bills for

2. Place of Performance. When the contract is made in one country and is to be performed either wholly or partly in another, the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where performance is to take place, the *lex loci solutionus*.[12] When the contract is silent on the subject, the place of the making of the contract is presumed to be the place of performance.[13] In the absence of evidence to the

defendants' accommodation; the money being paid in New York, it was held in an action in New York to recover the amount paid on such bills, that the law of New York, and not of Missouri, governed the contract, notwithstanding the defendants resided in Missouri, and the bills were drawn there. Suydam *v.* Barber, 18 N. Y. 468, 75 Am. Dec. 254 [*reversing* 6 Duer (N. Y.) 34]. And where money was borrowed in Massachusetts of A by an agent of B, a resident in New Hampshire, the agent being employed by B for the purpose, and the latter, after receiving the money from the agent to whom it had been delivered by A, signed and returned to A a receipt sent with the money, it was held that the contract was made in Massachusetts and governed by the laws thereof, and that the fact that the receipt was signed in New Hampshire was immaterial. Hill *v.* Chase, 143 Mass. 129, 9 N. E. 30.

12. *Connecticut.*— Citizens' Nat. Bank *v.* Hine, 49 Conn. 236; Lewis *v.* McCabe, 49 Conn. 141, 44 Am. Rep. 217; Medbury *v.* Hopkins, 3 Conn. 472; Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.

Georgia.— Clampion *v.* Wilson, 64 Ga. 184; Dunn *v.* Welsh, 62 Ga. 241; Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 289; Herschfeld *v.* Dexel, 12 Ga. 582.

Illinois.— Mason *v.* Dousay, 35 Ill. 424, 35 Am. Dec. 368; Strawbridge *v.* Robinson, 10 Ill. 470, 50 Am. Dec. 420; Sherman *v.* Gassett, 9 Ill. 521.

Iowa.— McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412; Boyd *v.* Ellis, 11 Iowa 97.

Kentucky.— Young *v.* Harris, 14 B. Mon. 556, 61 Am. Dec. 170; Goddin *v.* Shipley, 7 B. Mon. 575.

Louisiana.— Beirna *v.* Patton, 17 La. 589.

Maine.— Maguire *v.* Pingree, 30 Me. 508; White *v.* Perley, 15 Me. 470.

Maryland.— Larrabee *v.* Talbot, 5 Gill 426, 46 Am. Dec. 637; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Massachusetts.— Culver *v.* Benedict, 13 Gray 7; Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray 244, 71 Am. Dec. 753.

Mississippi.— Wyse *v.* Dandridge, 35 Miss. 672, 72 Am. Dec. 149; Brown *v.* Freeland, 34 Miss. 181; Dalton *v.* Murphy, 30 Miss. 59; Wooten *v.* Miller, 7 Sm. & M. 380.

New Hampshire.— Bliss *v.* Houghton, 16 N. H. 90.

New York.— Lee *v.* Selleck, 32 Barb. 522, 20 How. Pr. 275; Pomeroy *v.* Ainsworth, 22 Barb. 118; Merchants' Bank *v.* Spalding, 12 Barb. 302; Bowen *v.* Bradley, 9 Abb. Pr. 395; Dickinson *v.* Edwards, 58 How. Pr. 24; Connecticut Mut. L. Assur. Co. *v.* Cleveland, etc., R. Co., 23 How. Pr. 180; Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. 1; Thompson *v.* Ketcham, 4 Johns. 285; Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410.

Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134.

Pennsylvania.—Waverly Nat. Bank *v.* Hall, 150 Pa. St. 466, 24 Atl. 665, 30 Am. St. Rep. 823.

South Carolina.—Correll *v.* Georgia Constr., etc., R. Co., 37 S. C. 444, 16 S. E. 156; McCandlish *v.* Cruger, 2 Bay 377.

Vermont.— Baxter *v.* Willey, 9 Vt. 276, 31 Am. Dec. 623.

Virginia.— Warder *v.* Arell, 2 Wash. 282, 1 Am. Dec. 488.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

Wisconsin.— Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543; Fisher *v.* Otis, 3 Chandl. 78.

United States.— Hall *v.* Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. ed. 956; Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104; Brabston *v.* Gibson, 9 How. 263, 13 L. ed. 131; Bell *v.* Bruen, 1 How. 169, 11 L. ed. 89; Andrews *v.* Pond, 13 Pet. 65, 10 L. ed. 61; Cox *v.* U. S., 6 Pet. 172, 8 L. ed. 359; Martin *v.* Roberts, 36 Fed. 217; Howenstein *v.* Barnes, 12 Fed. Cas. No. 6,786, 5 Dill. 482; Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; York *v.* Wistar, 30 Fed. Cas. No. 18,141.

England.— Chatenay *v.* Brazilian Submarine Tel. Co., [1891] 1 Q. B. 79, 82, 60 L. J. Q. B. 295, 63 L. T. Rep. N. S. 739, 39 Wkly. Rep. 65, where Lord Esher said: "The business sense of all business men has come to a conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country." Rouquette *v.* Overmann, L. R. 10 Q. B. 525, 44 L. J. Q. B. 221, 33 L. T. Rep. N. S. 333; Hamlyn *v.* Talisker Distillery, [1894] A. C. 202, 58 J. P. 540, 71 L. T. Rep. N. S. 1, 6 Reports 188; Robertson *v.* Jackson, 2 C. B. 412, 10 Jur. 98, 15 L. J. C. P. 28, 52 E. C. L. 412; Norden Steamship Co. *v.* Dempsey, 1 C. P. D. 654, 45 L. J. C. P. 764, 24 Wkly. Rep. 984; Cash *v.* Kennion, 11 Ves. Jr. 314.

See 11 Cent. Dig. tit. "Contracts," §§ 2, 458, 725, 1216; Dicey Confl. L. Rule 149, subrule 3.

13. *Alabama.*— Schuessler *v.* Watson, 37 Ala. 98, 76 Am. Dec. 348.

contrary, the place of performance, the laws of which govern the validity of a contract, is presumed to be the place of the common domicile of the parties.[14]

3. Where Contract Is Made. A contract is as a rule considered as entered into at the place where the acceptance is made.[15] Where an offer is made in one state, and accepted by letter or telegraph in another, the contract is completed in the latter state by sending the letter or telegram.[16] So where negotiations for a contract are carried on between parties living in different states, partly by the interchange of letters, and partly by oral communications through an agent, the contract is regarded as made in the state or place where it first takes effect, so as to become a binding obligation upon both parties.[17] A contract by a traveling agent which requires ratification by his principal is considered as made at the place where the ratification is given.[18] So under a statute giving a lien on vessels for certain debts contracted in the state, the place where the services are in fact rendered, although rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted.[19] In the case of a deed, the contract is made where the deed is delivered, and not where it is prepared and signed.[20]

4. Fact of Agreement. The question whether in fact an agreement has been entered into is to be determined by the law of the place where the parties were at the time the alleged agreement was entered into, and not by the law of the

Kentucky.— Hyatt *v.* Commonwealth Bank, 8 Bush 193; Short *v.* Trabue, 4 Metc. 299.

Maryland.— De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Mississippi.— Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136.

New York.— Potter *v.* Tallman, 35 Barb. 182, holding that where a citizen of New York lent money to a firm in Iowa, and took a certificate of debt for the same dated at the office of the firm in Iowa, and which did not specify the place of payment, the contract was an Iowa contract.

Pennsylvania.— Allshouse *v.* Ramsay, 6 Whart. 331, 37 Am. Dec. 417.

14. Bliss *v.* Haighton, 16 N. H. 90.

15. Leake Contr. 49. See Dord *v.* Bonnaffee, 6 La. Ann. 563, 54 Am. Dec. 573; Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Dec. 241.

Illustrations.— Thus where an Ohio corporation, having its principal place of business in that state, made a contract with a resident of Michigan, which was signed by the latter in Michigan, and subsequently signed by the corporation's agent in that state, but approved by the corporation in Ohio, pursuant to a provision of the contract that it should not be valid unless countersigned by the agent in Michigan and approved in Ohio, it was held that the contract was made in Ohio. Aultman, etc., Co. *v.* Holder, 68 Fed. 467. Where lottery tickets were purchased by a party living in one state, by means of an order sent to the vendor living in another state, it was held that the contract was made in the latter state. Jameson *v.* Gregory, 4 Metc. (Ky.) 363. And where an insolvent debtor, residing and doing business and having his property in Minnesota, made in that state an agreement with a creditor residing in another state, to prefer him, by sending to him at his residence goods to be applied on his claim, and the debtor sent the goods, it was held a Minnesota transaction. *In re* Kahn, 55 Minn. 509, 57 N. W. 154.

16. Perry *v.* Mount Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902. But where a resident of Nebraska applied for a loan by letter to a resident of New York, and the latter accepted the proposition by letter, and directed the money to be paid over to the borrower by a bank in Nebraska, upon delivery to it of notes of the borrower secured by collateral, which was done, it was held that the contract was made in Nebraska. Bascom *v.* Zediker, 48 Nebr. 380, 67 N. W. 148.

17. Hitchcock *v.* U. S. Bank, 7 Ala. 386; Mills *v.* Wilson, 88 Pa. St. 118. Thus where plaintiff, being in New York, agreed with defendant, the manager of an opera in Philadelphia, to go there and make her début, she to be assured, if she did not fail in the estimation of the public and the press, of an engagement upon terms specified in the negotiation between the parties, it was held that the contract was not made in New York, but in Philadelphia, upon her fulfilling the test of success. Waldron *v.* Ritchings, 9 Abb. Pr. N. S. (N. Y.) 359. But see Golson *v.* Ebert, 52 Mo. 260. And where a contract made by a Missouri company was signed by its president and secretary in Missouri, but contained a condition that it should not be valid unless countersigned by the duly authorized agent of the company at New York city, where the contract was subsequently fully executed and delivered, it was held that the contract was governed by the laws of New York. Todd *v.* Missouri State Ins. Co., 3 Wkly. Notes Cas. (Pa.) 330, 33 Leg. Int. (Pa.) 239.

18. Mack *v.* Lee, 13 R. I. 293; Shuenfeldt *v.* Junkermann, 20 Fed. 357.

19. Mullin *v.* Hicks, 49 Barb. (N. Y.) 250.

20. Baum *v.* Birchall, 150 Pa. St. 164, 24 Atl. 620, 30 Am. St. Rep. 797.

place where it is attempted to enforce the agreement.[21] Such a question does not relate to the remedy; nor is it a question of procedure or evidence relating to the remedy. The rule, as well said in one case, "that matters pertaining to the remedy are governed by the forum always assumes that there is a contract upon which a remedy is sought. It cannot be properly appealed to, to determine the question of contract or no contract." [22]

5. Capacity of Parties. The capacity of the parties to make a contract is as a general rule to be determined by the law of the place where the contract is entered into;[23] as for example the enforceability of a bond made by a married woman,[24] of the contract of a person under guardianship,[25] the age at which a person may contract.[26]

6. Form. The *lex loci contractus* also governs as to the form of the contract,[27]

21. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88; Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

Illustrations.— Thus where property was delivered to a carrier in Illinois to transport to St. Louis, Missouri, and where, by the law of Illinois when the receipt was given, the mere acceptance of a receipt did not import assent to its conditions, while by the law of Missouri the mere acceptance of the receipt without objection imported an agreement on all the terms of the receipt, it was held, in an action brought in Missouri, that the question as to whether a contract had been made was to be tested by the law of Illinois, and that therefore on the evidence no agreement in the case at bar could be presumed. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88. But see Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106. So where an officer of a Pennsylvania corporation rendered it certain services there and then sued on a *quantum meruit* in a West Virginia court, and it appeared that by the law of Pennsylvania no contract for payment was implied in the case of services rendered by an officer of a corporation, while in West Virginia such an agreement was implied, it was held by the West Virginia court that the Pennsylvania law must govern. Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

22. Thompson, J., in Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88.

23. Augusta Ins., etc., Co. *v.* Morton, 3 La. Ann. 417; Union Nat. Bank *v.* Chapman, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L. R. A. 513; Huey's Appeal, 1 Grant (Pa.) 51; Matthews *v.* Murchison, 17 Fed. 760; Campbell *v.* Crampton, 2 Fed. 417, 18 Blatchf. 150.

"The capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situated therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there they will be invalid everywhere. As to acts done and rights acquired and contracts made in other countries touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons. Hence we may deduce as a corollary that, in regard to questions of minority or majority, . . . and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done." Story Confl. L. 101.

24. U. S. *v.* Garlinghouse, 25 Fed. Cas. No. 15,189, 4 Ben. 194.

25. Gates *v.* Bingham, 49 Conn. 275.

26. *Indiana.*— Hiestand *v.* Kuns, 8 Blackf. 345, 46 Am. Dec. 481.

Louisiana.— Andrews *v.* His Creditors, 11 La. 464; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Baldwin *v.* Gray, 4 Mart. N. S. 192, 16 Am. Dec. 169.

New York.— Thompson *v.* Ketchum, 8 Johns. 189, 5 Am. Dec. 332.

Pennsylvania.— Huey's Appeal, 1 Grant 51.

Tennessee.— Pearl *v.* Hansborough, 9 Humphr. 426.

Vermont.— Pickering *v.* Fisk, 6 Vt. 102.

United States.—Polydore *v.* Prince, 19 Fed. Cas. No. 11,257, 1 Ware 411.

See Infants; Insane Persons.

27. Smith *v.* Blatchford, 2 Ind. 184; 52 Am. Dec. 504; Wilder's Succession, 22 La. Ann. 219, 2 Am. Rep. 721; Tickner *v.* Roberts, 11 La. 14, 30 Am. Dec. 706; Matthews *v.* Murchison, 17 Fed. 760. But where defendant, under a written contract made in Belgium, agreed to pay plaintiff's fare to the United States, if he would enlist in the United States army, and plaintiff agreed to assign his bounty to defendant, it was held that, after defendant paying the fare and after plaintiff's enlistment, the latter was not entitled to the bounty on the ground that the written contract was invalid for failing to contain the formality required by the laws of Belgium. Vrancx *v.* Ross, 98 Mass. 591.

As to the requirement of a stamp see Skinner *v.* Tinker, 34 Barb. (N. Y.) 333; Satterthwaite *v.* Doughty, 44 N. C. 314, 59 Am. Dec. 554; Armendiaz *v.* Serna, 40 Tex. 291; Fant *v.* Miller, 17 Gratt. (Va.) 47; and *supra*, III, G, 9.

and the execution and acknowledgment.[28] If the place of the contract requires a written notice, a verbal notice will not avail, although such a notice would be good in the state where suit is brought.[29]

7. Defenses. A defense or discharge which is good by the law of the place where the contract is made or to be performed is of equal validity wherever the question may be litigated.[30] It is a well-settled principle that if a party be justified as to a transaction in the country where it took place he is justified everywhere.[31] Thus if the defense of infancy is valid by the *lex loci contractus*, it is good wherever the contract may be sued on.[32] And so it is of the defense of tender or payment.[33]

8. Set-Off and Counter-Claim. At common law a set-off to an action allowed by the local law is a part of the remedy, and may therefore be admissible by the *lex fori*, although not admissible by the law of the country where the contract was entered into.[34] But where the defense inheres in the transaction itself, and does not arise out of something wholly distinct and independent it may be set up wherever the contract is put in suit, and its effect must be determined by the *lex loci contractus* and not by the *lex fori*.[35]

9. Validity of Contract — a. General Rule. The validity of the contract, that is, the question whether the contract is a legal or an illegal one, is judged by the law on the subject in the state or country in which the contract is entered into, the general rule being that a contract good where made is good everywhere, and a contract invalid where made is invalid everywhere.[36] This has been deter-

28. Harmon *v.* Taft, 1 Tyler (Vt.) 6.

29. Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532.

30. *Connecticut.*— Hempstead *v.* Reed, 6 Conn. 480; Vermont State Bank *v.* Porter, 5 Day 316, 5 Am. Dec. 157.

Maine.— Very *v.* McHenry, 29 Me. 206.

Massachusetts.— Blanchard *v.* Russell, 13 Mass. 1, 7 Am. Dec. 106.

New Hampshire.— Hall *v.* Boardman, 14 N. H. 38; Dyer *v.* Hunt, 5 N. H. 401; Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30.

New York.— Hicks *v.* Brown, 12 Johns. 142; Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410; McMenomy *v.* Murray, 3 Johns. Ch. 435.

31. Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

32. Thompson *v.* Ketchum, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332. See *supra*, XI, B, 5.

33. Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536; Gilman *v.* Stevens, 63 N. H. 342, 1 Atl. 202; Warder *v.* Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488. See Payment; Tender.

34. *Connecticut.*— Vermont State Bank *v.* Porter, 5 Day 316, 5 Am. Dec. 157.

Kentucky.— Galliopolis Bank *v.* Trimble, 6 B. Mon. 599.

New Hampshire.— Gibbs *v.* Howard, 2 N. H. 296.

New York.— Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482.

Vermont.— Carver *v.* Adams, 38 Vt. 500; Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364.

See Recoupment, Set-Off, and Counter-Claim.

35. Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364; Britton *v.* Bishop, 11 Vt. 70.

36. *Alabama.*—Scheible *v.* Bacho, 41 Ala. 423; Swink *v.* Dechard, 41 Ala. 258; Evans *v.* Kittrell, 33 Ala. 449; Thomas *v.* Degraffenreid, 17 Ala. 602; Goodman *v.* Munks, 8 Port. 84.

Arkansas.— Howcott *v.* Kilbourn, 44 Ark. 213.

Connecticut.— Koster *v.* Merritt, 32 Conn. 246; Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Illinois.— Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597; Mumford *v.* Canty, 50 Ill. 370, 99 Am. Dec. 525; Anstedt *v.* Sutter, 30 Ill. 164; McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651; Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62.

Iowa.— McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412.

Kansas.—Alexander *v.* Barker, 64 Kan. 396, 67 Pac. 829.

Kentucky.— Ford *v.* Magnolia Ins. Co., 6 Bush 133, 99 Am. Dec. 663; Archer *v.* National Ins. Co., 2 Bush 226; Jameson *v.* Gregory, 4 Metc. 363; Fally *v.* Steinfield, 10 Ky. L. Rep. 982; Labatt *v.* Smith, 4 Ky. L. Rep. 422.

Louisiana.— Fell *v.* Darden, 17 La. Ann. 236; Hughes *v.* Klingender, 14 La. Ann. 845; Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446.

Maine.— Bond *v.* Cummings, 70 Me. 125; Kennedy *v.* Cochrane, 65 Me. 594.

Maryland.— Dakin *v.* Pomeroy, 9 Gill 1.

Massachusetts.— Parsons *v.* Trask, 7 Gray 473, 66 Am. Dec. 502.

Michigan.— Collins Iron Co. *v.* Burkam, 10 Mich. 283.

Minnesota.—Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

Mississippi.— Partee *v.* Silliman, 44 Miss. 272; Ivey *v.* Lalland, 42 Miss. 444, 97 Am.

mined in the case even of contracts regarding slaves good where made but illegal where sought to be enforced;[37] of contracts made in the Confederate states;[38] of contracts whose object was the dismissal of criminal prosecutions;[39] of agreements in violation of the revenue laws of foreign states;[40] of contracts made on Sunday;[41] of contracts relating to lotteries;[42] and of contracts claimed to be in violation of the usury laws.[43] Some courts have held that where a contract is made in one state, but is to be performed in another, the law of the latter place will govern as to its validity;[44] but other decisions are to the contrary, that is, to the effect that no matter where the contract is to be performed, its legality must

Dec. 475, 2 Am. Rep. 606; Brown *v.* Nevitt, 27 Miss. 801.

Missouri.— Johnston *v.* Gawtry, 83 Mo. 339; Kerwin *v.* Doran, 29 Mo. App. 397.

New Hampshire.— Hall *v.* Costello, 48 N. H. 176. 2 Am. Rep. 207; Bliss *v.* Brainard, 41 N. H. 256; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Thayer *v.* Elliott, 16 N. H. 102; Bliss *v.* Houghton, 16 N. H. 90.

New Jersey.— Dacosta *v.* Davis, 24 N. J. L. 319; New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450; Atwater *v.* Walker, 16 N. J. Eq. 42.

New York.— Ross *v.* Wigg, 34 Hun 192; Ball *v.* Davis, 1 N. Y. St. 517.

North Carolina.— Williams *v.* Carr, 80 N. C. 294; Satterthwaite *v.* Doughty, 44 N. C. 314, 59 Am. Dec. 554; Watson *v.* Orr, 14 N. C. 161.

Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Scheferling *v.* Huffman, 4 Ohio St. 241, 62 Am. Dec. 281; Harrison *v.* Baldwin, 5 Ohio Cir. Ct. 310.

Pennsylvania.— Pittsburgh, etc., R. Co.'s Appeal, (1886) 4 Atl. 385; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Brewster *v.* Lyndes, 2 Miles 185.

Rhode Island.— Chambers *v.* Church, 14 R. I. 398, 51 Am. Rep. 410.

South Dakota.— Commercial Bank *v.* Jackson, 7 S. D. 135, 63 N. W. 548.

Tennessee.— Pearl *v.* Hansborough, 9 Humphr. 426; Yerger *v.* Rains, 4 Humphr. 259.

Texas.— Shelton *v.* Marshall, 16 Tex. 344.

United States.— Scudder *v.* Chicago Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; White *v.* Hart, 13 Wall. 646, 20 L. ed. 685; Wilcox *v.* Hunt, 13 Pet. 378, 10 L. ed. 209; Brown *v.* American Finance Co., 31 Fed. 516, 24 Blatchf. 384; Blackwell *v.* Webster, 29 Fed. 614, 23 Blatchf. 537; The Oranmore, 24 Fed. 922; Shuenfeldt *v.* Junkermann, 20 Fed. 357; Green *v.* Collins, 10 Fed. Cas. No. 5,755, 3 Cliff. 494.

See 11 Cent. Dig. tit. "Contracts," § 455 *et seq.*

37. White *v.* Hart, 3 Wall. (U. S.) 646, 20 L. ed. 685.

38. Scheible *v.* Bacho, 41 Ala. 423.

39. Harrison *v.* Baldwin, 5 Ohio Cir. Ct. 310.

40. Kohn *v.* The Renaisance, 5 La. Ann. 25, 52 Am. Dec. 577.

41. Where a statute of Connecticut prohibited secular business on Sunday between sunrise and sunset, and a statute of Rhode Island prohibited business in one's ordinary calling during the whole day of Sunday, it was held that a contract made in Connecticut in the plaintiff's ordinary calling after sunset on Sunday could be enforced in Rhode Island. Brown *v.* Browning, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908. See SUNDAY.

42. Thus where A, B, and C agreed to purchase lottery tickets and share in the proceeds of the winnings, the agreement being made in Missouri where lotteries were illegal, but the tickets being issued and the drawing to take place in Louisiana, where they were legal, it was held that the agreement was governed by the law of Missouri and was void. Roselle *v.* Farmers' Bank, 141 Mo. 36, 39 S. W. 274, 64 Am. St. Rep. 501.

43. Any rate of interest which is authorized by the law of the place where a contract is made, or of the place where it is to be performed or paid, will be recognized and enforced in the courts of other governments, whose laws would otherwise make such rates of interest usurious. McAllister *v.* Smith, 17 Ill. 328, 65 Am. Dec. 651. Where a bond was dated in North Carolina and delivered in Virginia, and no place of payment was specified, it was held that the usury laws of North Carolina applied. Morris *v.* Hockaday, 94 N. C. 286, 55 Am. Rep. 607. See USURY.

44. Thus where a building association loaned money in Virginia to a citizen of that state on land located there, but the bond was made payable in New York, it was held to be governed by the law of New York. National Mut. Bldg., etc., Assoc. *v.* Ashworth, 91 Va. 706, 22 S. E. 521. Where a life-insurance policy was issued by a New York company to a citizen of Missouri, on an application made in Missouri and accepted in New York, where the policy was drawn and signed, but the policy was delivered in Missouri, the premiums being payable in New York as well as the loss, it was held that the policy was governed by the Missouri statute relating to policies delivered in that state. Wall *v.* Equitable L. Assur. Soc., 32 Fed. 273. Where the agents of a New York company, at the request of its Canadian agent, insured a Canadian vessel, and the premium note was given and made payable in Canada, and the policy was delivered there, it was held that the contract was a Canadian, not a New York, contract. *In re* Pennsylvania Ins. Co., 22 Fed. 109. See INSURANCE. And see as to the law of place of performance *supra*, XI, B, 2.

be determined by the law of the place of making.[45] So it has been held that where a contract is declared void by the law of the state or country where it is made, it cannot be enforced as a valid contract in any other, although by its terms it was to have been performed there.[46] A contract good according to the law either of the place of contract or of performance will be presumed to have been made in view of the law of that place where it would be good.[47] And where the court can see, either from the contract itself or from evidence *aliunde*, that the parties intended that the law of the place where it was executed should govern it, instead of that of the place of performance, as if the contract would be legal in the former place and illegal in the latter, the intention of the parties will prevail.[48]

b. Exceptions to Rule — (i) *In General.* The general doctrine that a contract valid where made is valid also in the courts of any other country or state where it is sought to be enforced, even though had it been made in the latter country or state it would be illegal and hence unenforceable, is subject to several exceptions: (1) Where the contract in question is contrary to good morals; (2) where the state of the forum or its citizens would be injured through the enforcement by its courts of contracts of the kind in question; (3) where the contract violates the positive legislation of the state of the forum, that is, is contrary to its constitution or statutes; and (4) where the contract violates the public policy of the state of the forum.[49]

(ii) *Agreements Contrary to Good Morals.* The courts of a country or state are not bound to, and will not, enforce contracts which offend public morals, no matter where they are made.[50] In many countries, it was said in an old case, a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here upon such a contract which arose in such a country; but that would never be allowed in this country.[51] So marriages entered into in a foreign country, although legal there, would not be

45. Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Anheuser-Busch Brewing Assoc. *v.* Bond, 66 Fed. 653, 13 C. C. A. 665; Brown *v.* American Finance Co., 31 Fed. 516, 24 Blatchf. 384.

46. Hyde *v.* Goodnow, 3 N. Y. 266. *Contra*, Smith *v.* Muncie Nat. Bank, 29 Ind. 158.

47. Brown *v.* Freeland, 34 Miss. 181.

48. Berrien *v.* Wright, 26 Barb. (N. Y.) 208. But see American Freehold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587. Thus where the law of the place of performance differs from that of the place of execution of a contract for the sale of lands, it is material that the subject-matter of the contract is in the former place, since that fact is evidence that the place of performance was not chosen to evade the laws of the place of execution. Berrien *v.* Wright, 26 Barb. (N. Y.) 208.

49. These exceptions are grounded on the principle that the rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return. It belongs exclusively to each nation to form its own judgment of what it prescribes to it — what is proper or improper for it to do; and it will examine and determine what it can do for another without neglecting the duty which it owes to itself. No state can demand the recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights and interests of its citizens or against its public policy. Vattel Law of Nations 61; Dicey Confl. L. 558; Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

50. "Where a contract conflicts with what are deemed in England to be essential, public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law." West Priv. Int. L. § 204. "A contract (whether lawful by its proper law or not), is invalid if it, or the enforcement thereof, is opposed to English interests of state, or to the policy of English law, or to the moral rules upheld by English law." Dicey Confl. L. 558. And see Levy *v.* Kentucky Distilling Co., 9 Ky. L. Rep. 103; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Armstrong *v.* Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468; Brown *v.* American Finance Co., 31 Fed. 516, 24 Blatchf. 384; Le Roy *v.* Crowninshield, 15 Fed. Cas. No. 8,269, 2 Mason 151; Binnington *v.* Wallis, 4 B. & Ald. 650, 6 E. C. L. 639; Lloyd *v.* Johnson, 1 B. & P. 340, 4 Rev. Rep. 822; Walker *v.* Perkins, 3 Burr. 1568, 1 W. Bl. 517; Boucher *v.* Lawson, Cas. t. Hard. 84.

51. Robinson *v.* Bland, 3 Burr. 1077, 1 W. Bl. 234.

recognized here if they were contrary to the ideas of a christian people, as for example incestuous or polygamous marriages.[52]

(III) *AGREEMENTS INJURIOUS TO THE STATE OR ITS CITIZENS.* Where the state or its citizens would be injured if the agreement were enforced in its courts, they will refuse to do so.[53] Illustrating this principle are cases in which the courts of a state have refused to enforce contracts by foreign corporations, authorized by their charters, but prohibited by the laws of the state to similar domestic corporations.[54]

(IV) *AGREEMENTS CONTRARY TO CONSTITUTION OR LEGISLATION OF STATE.* Where the contract violates the positive legislation of the state, that is, where it is contrary to its constitution or statutes, it will not be enforced.[55] The cases

52. In a very recent case in the federal court it was ruled that a marriage between uncle and niece, celebrated in Russia, although lawful in that country, would not be recognized in Pennsylvania, the court saying: "Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle, and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public." U. S. *v.* Rodgers, 109 Fed. 886, 888. See MARRIAGE.

53. *Arkansas.*— Woodward *v.* Roane, 23 Ark. 523.

Florida.— Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607.

Illinois.— Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302.

Kentucky.— Gibson *v.* Sublett, 4 Ky. L. Rep. 730.

Louisiana.— Galliano *v.* Pierre, 18 La. Ann. 10, 89 Am. Dec. 643; Hughes *v.* Klingender, 14 La. Ann. 52; Groves *v.* Nutt, 13 La. Ann. 117; Tatum *v.* Wright, 7 La. Ann. 358; Mary *v.* Brown, 5 La. Ann. 269; Cole *v.* Lucas, 2 La. Ann. 946; Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Whiston *v.* Stodder, 8 Mart. 95, 13 Am. Dec. 281.

Maryland.— Gardner *v.* Lewis, 7 Gill 377.

Massachusetts.— Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; West Cambridge *v.* Lexington, 1 Pick. 506, 11 Am. Dec. 231; Tappan *v.* Poor, 15 Mass. 419; Ingraham *v.* Geyer, 13 Mass. 146, 7 Am. Dec. 132; Prentiss *v.* Savage, 13 Mass. 20; Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

Mississippi.— Ivey *v.* Lalland, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606.

Missouri.— Thurston *v.* Rosenfield, 42 Mo. 474, 97 Am. Dec. 351.

Nebraska.— Randall *v.* National Bldg., etc., Union, 43 Nebr. 876, 62 N. W. 252.

New Hampshire.— Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

New Jersey.— Bentley *v.* Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671.

New York.— Martin *v.* Hill, 12 Barb. 631; Merchants' Bank *v.* Spalding, 12 Barb. 302.

North Carolina.— Rowland *v.* Old Dominion Assoc., 115 N. C. 825, 18 S. E. 965; McLean *v.* Hardin, 56 N. C. 294, 69 Am. Dec. 740.

Texas.— Crosby *v.* Houston, 1 Tex. 203.

Vermont.— Territt *v.* Bartlett, 21 Vt. 184.

United States.— Andrews *v.* Pond, 13 Pet. 65, 10 L. ed. 61; Le Roy *v.* Crowninshield, 15 Fed. Cas. No. 8,269, 2 Mason 15.

England.— Forbes *v.* Cochrane, 2 B. & C. 448, 2 D. & R. 679, 2 L. J. K. B. O. S. 67, 26 Rev. Rep. 402, 9 E. C. L. 199.

See 11 Cent. Dig. tit. "Contracts," § 456 *et seq.*; and Dicey Confl. L. 558, Rule 148, Ex. 1; Story Confl. L. § 327.

54. See CORPORATIONS. In an Illinois case it was admitted that a Missouri building association had loaned money in Illinois at a usurious rate, unless it fell within the statute of Illinois providing that no interest, premiums, or fines accruing to a building association should be deemed usurious, and that the shares of stock in such associations should be one hundred dollars each, payable in periodical instalments not to exceed two dollars per share. The Missouri association was organized under an act authorizing the issuance of full paid-up interest-bearing stock, of the par value of one thousand dollars per share, to be matured when the dividends and sum invested equaled the face value. It was held by the supreme court of Illinois that, as this was not authorized by the local statute, the rule of comity did not apply, and the contract would be held usurious, since the building association provided for by the latter statute was not within the spirit and meaning, but was opposed to the idea of such an association as was protected by the local statute. Said the court: "Under these statutes, and under the general rule of comity existing between States, we will allow to foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all valid liens against property situated in this State. But that rule of comity does not require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement whereof would work against our own citizens and give to the citizens of another State an advantage which the resident has not." Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621, 628, 50 N. E. 998, 42 L. R. A. 92. See Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 30 So. 51, 84 Am. St. Rep. 657, 57 L. R. A. 800.

55. *Alabama.*— Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

under this head are usually connected with those under the next exception, for the reason that the public policy of the state is so frequently expressed in its legislation.[56]

(v) *Agreements Contrary to Public Policy.* Where the agreement is one which violates the fixed public policy of the state where the action is brought it will not be enforced.[57] The reason of this exception is summed up by an

Georgia.— Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280.

Illinois.— Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302; Mumford *v.* Canty, 50 Ill. 370, 99 Am. Dec. 525.

Kansas.— Mackey *v.* Pettijohn, (1897) 49 Pac. 636.

Louisiana.— Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212.

Massachusetts.— Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; Parsons *v.* Trask, 7 Gray 473, 66 Am. Dec. 502.

Mississippi.— Ivey *v.* Lalland, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606; Mahorner *v.* Hooe, 9 Sm. & M. 247, 48 Am. Dec. 706; Hinds *v.* Breazelle, 2 How. 837, 22 Am. Dec. 307.

Nebraska.— Randall *v.* Minneapolis Nat. Bldg., etc., Union, 43 Nebr. 876, 62 N. W. 252.

New Hampshire.— Fisher *v.* Ford, 63 N. H. 514, 3 Atl. 927; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

North Carolina.— Rowland *v.* Old Dominion Bldg., etc., Assoc., 115 N. C. 825, 18 S. E. 965.

Pennsylvania.— Pittsburg, etc., R. Co.'s Appeal, (1886) 4 Atl. 385.

United States.— Swann *v* Swann, 21 Fed. 299.

Lotteries.— In a New Jersey case certain persons had obtained lottery franchises from the states of Missouri, Virginia, Kentucky, and Louisiana, and had entered into a partnership agreement for the conduct of the lotteries and the divisions of the profits. One of them filed a bill in a New Jersey court for the dissolution of the partnership and the sale and distribution of the assets. The bill was dismissed, the court saying that "assuming that all the contracts and transactions involved in it occurred in states where they were tolerated by law, my opinion is that this court will not undertake to enforce and administer them." The public policy of the state toward lotteries was shown by the statute of New Jersey, which made the selling of lottery tickets a misdemeanor, declared lotteries public nuisances, and otherwise penalized the carrying on of such enterprises within its borders. Watson *v.* Murray, 23 N. J. Eq. 257. See Lotteries.

Agreement to make will.— By a statute of Massachusetts an agreement to make a will "is not binding" unless in writing. A woman of Massachusetts, being in Maine, orally promised the plaintiff that if she would leave Maine and take care of her during her life she would leave her all her property at her death. The plaintiff accepted the proposal, went with her to Massachusetts, performed her part of the agreement, and at her death sued her executor on the promise. It was shown that the oral contract was good in Maine, but the court of Massachusetts refused to enforce it. "The statute," says Holmes, J., "evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. . . . If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts' testators should be sued here upon such contracts without written evidence, wherever they are made." Emery *v.* Burbank, 163 Mass. 326, 328, 39 N. E. 1026, 47 Am. St. Rep. 456, 28 L. R. A. 57.

Corporate bonds and mortgages.— A contract was made in New York for the issue of bonds and the creation of a mortgage by a corporation. It was good in New York, but was in contravention of the provision in the Pennsylvania constitution against the fictitious issue of corporate stock. The supreme court of Pennsylvania refused to enforce it because it was repugnant to the public policy of the state. Pittsburg, etc., R. Co.'s Appeal, (Pa. 1886) 4 Atl. 385. See, generally, Corporations.

56. See the cases above cited.

57. *Illinois.*— Mumford *v.* Canty, 50 Ill. 370, 99 Am. Dec. 530; Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62.

Iowa.— Davis *v.* Bronson, 6 Iowa 410.

Maryland.—Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Trasher *v.* Everhart, 3 Gill & J. 234.

Michigan.— Seamans *v.* Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430.

New Hampshire.— Bliss *v.* Brainard, 41 N. H. 256; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162.

North Carolina.— Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

Ohio.— Kanagar *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62.

Pennsylvania.— Swing *v.* Munson, 191 Pa. St. 582, 43 Atl. 342; Pittsburg, etc., R. Co.'s Appeal, (1886) 4 Atl. 385.

Rhode Island.—Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

South Carolina.— Welling *v.* Eastern Bldg., etc., Assoc., 56 S. C. 280, 34 S. E. 409.

Wisconsin.— Rose *v.* Kimberly, etc., Co., 89 Wis. 545, 62 N. W. 526, 46 Am. St. Rep. 855, 27 L. R. A. 556.

United States.— Ogden *v.* Saunders, 12 Wheat. 213, 6 L. ed. 606.

English chancellor in these words: "It appears to me, however, plain, on general principles, that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else." [58] This rule has been applied to contracts of marriage between persons within the prohibited degrees,[59] or between whites and blacks;[60] to

And see Dicey Confl. L. 558; Pollock Contr. 342; Westlake Priv. Int. L. § 204.

Contracts of married women.— Mr. Justice Gray, in Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241, admits that in a state where the common law prevailed in full force, as to married women — the common law which deemed the *feme sole* incapable of binding herself by any contract whatever — such an incapacity would be so fixed by the public policy of the state that it would not yield to the law of another state in which she might undertake to make a contract. But if the state had enlarged her capacity to contract, although not to the extent of other states, this relaxation in itself would show such a change in the public policy on that subject as to make it likely that a contract of any kind made by her in another state and valid according to those laws would be recognized by it. The same principle was recognized in a recent case in New Jersey (Thompson *v.* Taylor, 66 N. J. L. 253, 49 Atl. 544, 88 Am. St. Rep. 485, 54 L. R. A. 585), where it was laid down that the statute of New Jersey that regulates the right of married women to make contracts of suretyship is not a declaration of a public policy that closes the courts of that state to rights of action arising in other jurisdictions, where the law is different. See also Bowles *v.* Field, 83 Fed. 886; *infra*, note 69; HUSBAND AND WIFE.

Intoxicating liquors.— Although in some states a contract for the sale of intoxicating liquor, if prohibited by their laws, will not be enjoined, although made in a state where such sales are legal (see Davis *v.* Brownson, 6 Iowa 410; Webster *v.* Munger, 8 Gray (Mass.) 584), yet the contrary has been held even in a state which prohibits such sales on the ground that the views of the citizens on the subject of prohibition are not fixed or uniform, differing in neighboring localities in the same state. Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205. See INTOXICATING LIQUORS.

Usury.— So it is almost universally held that there is no such fixed policy as to the rate of interest on money as to make an agreement made in another state to pay a higher rate than is allowed where the action is brought unenforceable.

Arkansas.— Matthews *v.* Paine, 47 Ark. 54, 14 S. W. 463.

Illinois.— Mumford *v.* Cantry, 50 Ill. 370, 99 Am. Dec. 525.

Iowa.— Bigelow *v.* Burnham, 83 Iowa 120, 49 N. W. 104, 32 Am. St. Rep. 294.

Michigan.— Mott *v.* Rowland, 85 Mich. 561, 48 N. W. 638.

New York.— Staples *v.* Nott, 128 N. Y. 403, 28 N. E. 515, 41 N. Y. St. 416, 26 Am. St. Rep. 480; Scofield *v.* Day, 20 Johns. 102.

Texas.— Bullard *v.* Thompson, 35 Tex. 313.

United States.— Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223, 5 C. C. A. 83; Van Vleet *v.* Sledge, 45 Fed. 743; Brown *v.* American Finance Co., 31 Fed. 516, 24 Blatchf. 384.

England.—Thompson *v.* Powles, 2 Sim. 194, 2 Eng. Ch. 194.

But see Sime *v.* Norris, 8 Phila. (Pa.) 84. And see USURY.

Sunday laws.— In Swann *v.* Swann, 21 Fed. 299. a contract made on Sunday in Tennessee was enforced in Arkansas, although such contracts were illegal there, the court saying that where a large class of citizens may, by the very terms of the Arkansas statute, make contracts and do work on Sunday, no fixed and great public policy on the subject was shown. See also Richardson *v.* Rowland, 40 Conn. 565; Said *v.* Stromberg, 55 Mo. App. 438. And see SUNDAY.

Lotteries.— In Com. *v.* Bassford, 6 Hill (N. Y.) 526, the state of Kentucky sued in New York on an agreement to sell lottery tickets. The action was allowed on the ground that although lotteries were illegal in New York, yet the policy of raising money for public lotteries in New York existed until ten years before that time. See also Thatcher *v.* Morris, 11 N. Y. 437; and, generally, LOTTERIES.

Slavery.— Prior to the abolition of slavery in this country the courts of the free states and of England recognized such contracts when made in slave states, because slavery was still recognized by the law of nations. See Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597; Com. *v.* Aves, 18 Pick. (Mass.) 193; Osborn *v.* Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689.

58. Rousillon *v.* Rousillon, 14 Ch. D. 351, 369, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623.

59. A widower and the sister of his deceased wife, both domiciled in England, while on a temporary visit to Denmark, were married. The marriage was valid according to the law of Denmark, but was invalid by the law of England, which prohibited the marriage of a man with the sister of a deceased wife. The house of lords held that it would not be recognized by the English court, such marriage being contrary to the public policy of England. Brook *v.* Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461. See MARRIAGE.

60. By the public policy of the former slave states of the Union on the question of mixed marriages, marriages between white and

other agreements between husband and wife;[61] to agreements involving champerty,[62] in restraint of trade,[63] or giving preferences to creditors;[64] to agreements to influence a public official;[65] to agreements binding the liability of a

colored people are prohibited, although in most of the Northern states and in all parts of Europe such marriages are perfectly legal. Nevertheless such marriages will not be recognized in these states; and such persons, indicted for living together in adultery in one of these states, cannot plead that they were legally married in another state or country. State *v.* Kennedy, 76 N. C. 251, 22 Am. Rep. 683; State *v.* Bell, 7 Baxt. (Tenn.) 9, 32 Am. Rep. 549; Newman *v.* Kimbrough, (Tenn. Ch. 1900) 59 S. W. 1061; Kinney *v.* Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690. See MISCEGENATION.

61. A husband and wife living in France made a contract in that country which provided for two things which by the law of England were illegal, viz., the collusive conduct of a divorce suit, and the abandonment by the husband of the custody of his children. The English courts refused to enforce any part of it, holding that if a court of one country is called upon to enforce a contract entered into in another it is not enough that the contract should be valid according to the laws of the latter, for if any part of the contract is inconsistent with the law and the policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed. Hope *v.* Hope, 8 De G. M. & G. 731, 3 Jur. N. S. 454, 26 L. J. Ch. 417, 5 Wkly. Rep. 387, 57 Eng. Ch. 565.

62. An agreement was made in France, between an English attorney and a French subject, that the attorney should recover a debt for the client in England and keep half of it for his fee. Such a contract was lawful by the law of France, which knows nothing of the English law of champerty. It was held that the contract being opposed to the policy of the English law could not be enforced in the English courts. Grell *v.* Levy, 16 C. B. N. S. 73, 10 Jur. N. S. 210, 9 L. T. Rep. N. S. 721, 12 Wkly. Rep. 378, 111 E. C. L. 73.

63. In Rousillon *v.* Rousillon, 14 Ch. D. 351, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623, parties had entered into an agreement in France in restraint of trade. The agreement was perfectly valid in France, where the common-law doctrine regarding such contracts as against public policy is unknown. It was held that the agreement, although good where made, would not be enforced by an English court. In Union Locomotive, etc., Co. *v.* Erie R. Co., 37 N. J. L. 23, a contract between a railroad company in New Jersey and certain individuals gave the latter the exclusive right of transporting certain kinds of freight over the railroad. The contract had been made in New York, and had been sustained by the courts of that state. But action was brought for the breach of some of its provisions in New Jersey. It was held that the contract was void because against the public policy of New Jersey; and would not be enforced, although valid where made.

64. In Varnum *v.* Camp, 13 N. J. L. 326, 25 Am. Dec. 476, a debtor had made in New York an assignment for the benefit of creditors, with preferences to a certain creditor. Such an assignment was valid by the law of New York. By statute in New Jersey assignments were declared fraudulent and void whenever by their terms a preference to any creditor or creditors was created. When the valldity of the assignment came before the New Jersey court, it was held illegal and void, because contrary to the statute of that state, which declared the public policy of the state as to preferences by debtors. See also Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280; Thurston *v.* Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Moore *v.* Bonnell, 31 N. J. L. 90. In Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 87, 58 N. E. 773, 8 Am. St. Rep. 708, decided by the court of appeals in New York in 1900, it was laid down that the true rule that transfers of property valid under the *lex domicilii* will be enforced by the courts of a foreign state does not apply where the domiciliary law conflicts with the policy of such state. And therefore a chattel mortgage given in another state, although valid there, which would be void as to creditors if made in New York, does not pass title as to property in New York as against a resident who has attached the property and will not be enforced. "Judicial comity," said Vann, J., "does not require us to enforce any clause of the instrument, which, even if valid under the *lex domicilii*, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors. . . . A transfer in another state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt. . . To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens, out of property within its boundaries and protected by its laws."

65. In Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539, the plaintiff, an officer of the Turkish government, had made a contract with the defendant, a manufacturer of fire-arms, under which he was to receive a commission on such as he could induce that government to purchase. In a suit on the contract, it was held by the supreme court of the United States, that, even were the contract made in Turkey and valid there, the Turkish government being

common carrier for negligence;[66] to gambling contracts;[67] to agreements

willing that its officers should receive bribes for official action, yet, contracts of this kind being against the public policy of this country, they would not be enforced in our courts.

66. The rule in the federal courts and in most of the states — a rule founded on public policy — is that a contract between carrier and customer that the carrier shall not be liable for the goods in his charge when they are negligently lost, destroyed, or damaged is void. In England such contracts are valid. In a number of cases in the federal courts stipulations of the kind contained in bills of lading made in England have been held no protection in our tribunals, on the ground that contracts against the public policy of this country cannot be upheld or enforced in our courts, wheresoever made. The New England, 110 Fed. 415; The Kensington, 94 Fed. 885, 36 C. C. A. 533; Botany Worsted Mills Co. *v.* Knott, 82 Fed. 471, 27 C. C. A. 326; The Guildhall, 58 Fed. 799; The Hugo, 57 Fed. 403; Lewiston *v.* National Steamship Co., 56 Fed. 602; The Energia, 56 Fed. 124; The Iowa, 50 Fed. 561; The Brantford City, 29 Fed. 373. *Contra*, Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 25 Am. St. Rep. 660, 12 L. R. A. 340; Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508, by divided court. In Chicago, etc., R. Co. *v.* Gardiner, 51 Nebr. 70, 70 N. W. 508, the supreme court of Nebraska held that a limitation of the liability of a common carrier, contained in a shipping contract, would not be recognized or enforced in that state, although valid in the state where made (Illinois), as such attempted restriction of liability is illegal, and contrary to the public policy of Nebraska. In Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788, a contract had been made in New York for the carrying of goods by water to England; and it exempted the carrier from liability for any negligent loss or damage to the goods. Such a stipulation was valid in New York. But the suit being brought in the federal court, the New York law was not permitted to interfere with the federal law on this subject — a judge-made law.

67. In Gooch *v.* Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835, a promissory note was given in Virginia to pay a bet on a horse-race run in that state, where the note was valid. It was held not enforceable in North Carolina where betting on horse-races was contrary to public policy. In Pope *v.* Hanke, 155 Ill. 617, 630, 40 N. E. 839, 28 L. R. A. 568, plaintiff sued in Illinois on promissory notes made in St. Louis, Missouri, payable to the order of the D. P. Grier Grain Company, and indorsed by the payee to plaintiff. The defense was that the notes were given in settlement of an option deal, and were void by the statute of Illinois. The reply was that they were made in Missouri whose statutes do not make notes of this character void if in the hands of a *bona fide* holder for value, and that the plaintiff was such. Plaintiff introduced the Missouri statute, and the case of Crawford *v.* Spencer, 92 Mo. 494, holding that under the law of Missouri the *bona fide* holder of such a note could recover. It was held under the statutes of Illinois notes based on gambling contracts of this kind were absolutely void, even in the hands of an innocent holder, and it made no matter that they were good by the law of Missouri where they were made and indorsed. "The enforcement of such foreign law," said the court, "would contravene the criminal code of this state; and would be in opposition to its public policy, and to the express prohibition of its statutory enactments, and would be prejudicial to the interests of its people." In Flagg *v.* Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308, a contract was made in New York whose object was the speculating in stocks upon margins. Suit was brought in New Jersey. The contract was against the statute of New Jersey as to gaming contracts, but was good in New York. It was held that the contract would not be enforced in New Jersey. Violett *v.* Mangold, (Miss. 1900) 27 So. 875; Lemonius *v.* Mayer, 71 Miss. 514, 14 So. 33. See also Minzesheimer *v.* Doolittle, (N. J. 1900) 45 Atl. 611. In Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928, the action was brought in Wisconsin by brokers to recover for moneys advanced and services performed in the purchase of grain for defendant on the Chicago board of trade. Both parties, as in the Missouri case, were residents of Wisconsin, and the service was in violation of the Wisconsin statute as to gaming. It was insisted by plaintiffs that the grain having been purchased in Chicago, the contract was an Illinois contract, and was not in violation of any law of Illinois. It was held that even if this were so it would not be enforced in Wisconsin.

Conflicting and anomalous decisions.— In Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516, 61 S. W. 617, defendant, in St. Louis, authorized plaintiff, a brokerage company, to purchase stocks for him on margin. Plaintiff purchased them in New York, but the market failing they were afterward sold out and plaintiff sued for money advanced and commissions. The transaction was illegal under the provisions of the Missouri statute concerning option sales. In a suit brought in Missouri, it was held that as it was legal in New York the agreement would be enforced. The real question in the case, viz., whether such a contract would be enforced in a state to whose public policy, as shown in the laws against option dealing, it was plainly contrary, was not discussed by the court at all. The attention of the judge who delivered the opinion was entirely engrossed with the question as to where the contract was made, and he decided it to be a New York contract when

compounding crime;[68] and to the contracts of married women[69] and other contracts.[70]

C. Agreements Relating to Realty. The *lex rei sitæ* — the law of the place in which the property is — controls the title to and the alienation and transfer of land, and the effect and construction which is to be accorded to agreements intending to convey or otherwise deal with it;[71] as for example mortgages of real

it was clearly a Missouri contract. The court entirely misapprehended the nature of the action, treating it as though it were an action by a third person against the principal on a contract made by the agent. But it was nothing of the kind; it was a suit on the contract of agency for services rendered and money expended for the principal's benefit and at his request. A simple illustration will demonstrate the error of the court. A and B are both residents in St. Louis. A enters into a contract with B in St. Louis authorizing him to purchase one hundred horses for him of a certain description. The contract provides for the payment by A of a certain commission to B and his expenses. Nothing is said about where the horses are to be bought. B starts out to look for the horses and purchases twenty in Missouri, twenty in Illinois, twenty in Louisiana, twenty in California, and twenty in Canada. B subsequently sues A on the contract for his commission and expenses. According to the Missouri doctrine the right to recover his commission and expenses on twenty horses would have to be determined by the law of Missouri and on the other eighty by the laws respectively of Illinois, Louisiana, California, and Canada. If the suit were by the seller of the horses in another state against A, the principal, then the law of the state where the sale was made would doubtless be relevant. But to apply this rule to an action on the contract of agency is to lose sight of the difference between the contractual relation which exists when A engaged B to represent him in a negotiation with C and the contractual relation which exists when B in the execution of his authority enters into an agreement with C on behalf of A.

68. Where a person brought a suit in Wisconsin for legal services rendered defendant and the proof was that the object of the service was the compounding of a crime, the defendant and others, being at the time under indictment in the federal courts for violation of the United States revenue laws, it was held that the agreement under which the service was rendered was void for illegality, such contracts being contrary to public policy of the state. On rehearing it was brought to the attention of the court that the federal statutes expressly authorize such compromises with the government, with the consent of the secretary of the treasury and the attorney-general. The supreme court admitted that the statute might be binding upon the federal judges in actions in their courts, but refused to give it any recognition in the state court, saying: "We could no more enforce contracts compounding or tending to compound crime coming from the federal jurisdiction, than contracts of polygamy from the jurisdiction of Utah or of Turkey." Wight *v.* Rindskopf, 43 Wis. 344, 364.

69. Where a contract for the purchase of goods was made in Maryland by a married woman and was valid there, but in North Carolina the common-law liability of married women to make contracts still existed, it was held that it would not be enforced in North Carolina, because contrary to the policy of the state as to the power of married women. Armstrong *v.* Best, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473, 25 L. R. A. 188. See also Rhue *v.* Buck, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178; and *supra*, note 57.

70. Where a promissory note made in Tennessee and providing for the payment of attorney's fees in case of suit was valid in that state, but in Kentucky was void as contrary to the policy of the laws which prescribed the amount of attorney's fees taxed against the unsuccessful litigant, and as an agreement to pay penalties tending to oppression of the debtor and to encourage litigation, it was held in a suit brought in Kentucky on the note that the attorney's fees would not be enforced. Rogers *v.* Rains, 100 Ky. 295, 38 S. W. 483, 18 Ky. L. Rep. 768; Clark *v.* Tanner, 100 Ky. 275, 38 S. W. 11, 19 Ky. L. Rep. 590; Witherspoon *v.* Musselman, 14 Bush (Ky.) 214, 29 Am. Rep. 404. The same conclusion was reached in Oregon in regard to a note made in Kansas but attempted to be enforced in Oregon (Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517); and in a Nebraska case where the note was made in Iowa. Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560.

71. *Alabama.*— Nelson *v.* Goree, 34 Ala. 565.

Indiana.— Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Wines *v.* Woods, 109 Ind. 291, 10 N. E. 399; Fisher *v.* Parry, 68 Ind. 465.

Missouri.— Depas *v.* Mayo, 11 Mo. 314, 49 Am. Dec. 88.

New York.— Abell *v.* Douglass, 4 Den. 305; Hawley *v.* James, 7 Paige 213, 32 Am. Dec. 623; Chapman *v.* Robertson, 6 Paige 627, 31 Am. Dec. 264.

Pennsylvania.— Jeter *v.* Fellowes, 32 Pa. St. 465; Ross *v.* Barclay, 18 Pa. St. 179, 55 Am. Dec. 616; Donaldson *v.* Phillips, 18 Pa. St. 170, 55 Am. Dec. 614.

Texas.— Cantu *v.* Bennett, 39 Tex. 303.

Vermont.— Baxter *v.* Willey, 9 Vt. 276, 31 Am. Dec. 623.

United States.— Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858.

estate,[72] or assignment of real estate for the benefit of creditors.[73] Where in the performance of a contract conveyances and transfers of property situated in several states are to be made, such conveyances and transfers must be made in accordance with the law of the place where the particular property is situated.[74]

D. Agreements Relating to Personalty— 1. In General. The legal *situs* of personalty follows the domicile of the owner,[75] and the character of property as real or personal is to be determined by the laws of the state into which it is removed.[76] As to a contract in relation to personal property situated at the date

See Deeds; Vendor and Purchaser.

In an action for a breach of covenant of warranty, where the grantor resided in Vermont, the grantee in New Hampshire, and the land was situated in Minnesota, it was held that the construction and force of the contract, including the rule as to damages, must be governed by the law of Minnesota; and where the referee failed to find what the law of Minnesota was, the supreme court of Vermont would not presume that it was the same as that of Vermont, but would recommit the case to the court below to determine the damages according to the rule in Minnesota. Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95. See Bethell *v.* Bethell, 54 Ind. 428, 23 Am. Rep. 650.

72. If the mortgage is valid where it is made, and is executed and recorded according to the laws of the state or country of its execution, it will be enforced in the courts of another state or country as a matter of comity, although it is not executed or recorded according to the requirements of the laws of the latter state. And this is because of the general principle of law that the law of the place of contract governs as to the nature, validity, construction, and effect thereof.

Alabama.—Beall *v.* Williamson, 14 Ala. 55.

Arkansas.— Hall *v.* Pillow, 31 Ark. 32.

Connecticut.— Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

Indiana —Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Blystone *v.* Burgett, 10 Ind. 28, 68 Am. Dec. 658.

Iowa.— Simms *v.* McKee, 25 Iowa 341; Smith *v.* McLean, 24 Iowa 322; Arnold *v.* Potter, 22 Iowa 194.

Maryland.— Wilson *v.* Carson, 12 Md. 54.

Massachusetts.— Rhode Island Cent. Bank *v.* Danforth, 14 Gray 123; Langworthy *v.* Little, 12 Cush. 109.

Mississippi.—Barker *v.* Stacy, 25 Miss. 471.

New Hampshire.— Ferguson *v.* Clifford, 37 N. H. 86; Offutt *v.* Flagg, 10 N. H. 46.

New York.— Edgerly *v.* Bush, 81 N. Y. 199; Nichols *v.* Mase, 25 Hun 640; Tyler *v.* Strang, 21 Barb. 198; Martin *v.* Hill, 12 Barb. 631; Whitman *v.* Connor, 40 N. Y. Super. Ct. 339.

South Carolina.— Ryan *v.* Clanton, 3 Strobh. 411.

See Mortgages.

The lex situs governs when a mortgage is executed in a state other than that in which the property is situated. Although it be executed according to the requirements of the law of the domicile of the owner in another state, the mortgage will be invalid as against attaching creditors in the state where the property is located, unless the mortgage conforms to the laws of the latter state. The mortgage to be valid must be executed, acknowledged, and recorded according to the laws of the place where the property is at the time.

Alabama.— Danner *v.* Brewer, 69 Ala. 191; Hardaway *v.* Semmes, 38 Ala. 657.

Indiana.—Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Thomas *v.* Edwards, 85 Ind. 414; Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258.

Kansas.— Denny *v.* Faulkner, 22 Kan. 89; Golden *v.* Cockrill, 1 Kan. 259, 81 Am. Dec. 510.

New Hampshire.—Clark *v.* Tarbell, 58 N. H. 88.

New Jersey.— Runyon *v.* Groshon, 12 N. J. Eq. 86.

New York.—Edgerly *v.* Bush, 81 N. Y. 199; Guillander *v.* Howell, 35 N. Y. 657; Whitman *v.* Connor, 40 N. Y. Super. Ct. 339.

Vermont.— Martin *v.* Potter, 34 Vt. 87; Rice *v.* Courtis, 32 Vt. 460, 78 Am. Dec. 597.

United States.— Green *v.* Van Buskirk, 7 Wall. 139, 19 L. ed. 109 [*overruling* 4 Abb. Dec. (N. Y.) 457, 2 Keyes (N. Y.) 119].

See Mortgages.

73. According to the weight of authority, an assignment of real estate for the benefit of creditors, which is invalid by the laws of the place where the land is situated, will not convey it, even though the assignment be valid under the law of the place of its execution, for conveyances of land are governed by the *lex rei sitæ*. Gardner *v.* Commercial Nat. Bank, 95 Ill. 298; Moore *v.* Church, 70 Iowa 208, 30 N. W. 855, 59 Am. Rep. 439; Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108; Sortwell *v.* Jewett, 9 Ohio 180. But see Chaffee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345; Butler *v.* Wendell, 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329; Bentley *v.* Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671. See also Assignments for Benefit of Creditors, 4 Cyc. 195.

74. Morgan *v.* New Orleans, etc., R. Co., 17 Fed. Cas. No. 9,804, 2 Woods 244.

75. Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540.

76. Minor *v.* Cardwell, 37 Mo. 350, 90 Am. Dec. 390. The law of New Jersey governs as to property brought into that state and the construction of contracts made elsewhere for its disposal. The Marina, 19 Fed. 760. And see Richardson *v.* Draper, 23 Hun

thereof in a foreign jurisdiction, the *lex loci contractus* governs.[77] Thus it was held that a contract made in Michigan for the purchase of a piano, construed by the courts of that state to be a mere bailment giving the buyer no right to mortgage it, would be so construed by the courts of Illinois upon his removal to that state and attempt to mortgage it.[78]

2. Contracts of Carriage. A contract of carriage of goods from one country to another is governed by the laws of the country where it is made.[79]

3. Sales of Personal Property. Where the subject of and the parties to a sale of personal property are within the jurisdiction of another state, and the contract is made and executed according to the laws of that state, the sale and the rights growing out of it must be tested by the laws of the place where the contract is made, and no subsequent removal of the property outside the state for a lawful purpose divests the jurisdiction.[80] Where an order is given and accepted

(N. Y.) 188; Hart *v.* Barney, etc., Mfg. Co., 7 Fed. 543. But bringing a wife's property from Mississippi into Alabama could not convert an equitable title into a legal one. Gluck *v.* Cox, 75 Ala. 310.

77. Partee *v.* Silliman, 44 Miss. 272; Cole *v.* Broom, Dudley (S. C.) 7; Cantu *v.* Bennett, 39 Tex. 303.

78. Waters *v.* Cox, 2 Ill. App. 129.

79. *Georgia.*— Western, etc., R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Illinois.—Pennsylvania Co. *v.* Fairchild, 69 Ill. 260.

Iowa.— Hazel *v.* Chicago, etc., R. Co., 82 Iowa 477, 48 N. W. 926; Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470; Talbott *v.* Merchants' Despatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589.

Missouri.— Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88.

New York.—Platt *v.* Richmond, etc., R. Co., 52 N. Y. Super. Ct. 496.

Pennsylvania.— Fairchild *v.* Philadelphia, etc., R. Co., 148 Pa. St. 527, 24 Atl. 79; Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508.

South Dakota.— Meuer *v.* Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81.

Texas.— Cantu *v.* Bennett, 39 Tex. 303.

United States.— Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

England.—Peninsular, etc., Steam Nav. Co. *v.* Shand, 11 Jur. N. S. 771, 12 L. T. Rep. N. S. 808, 3 Moore P. C. N. S. 272, 13 Wkly. Rep. 1049, 16 Eng. Reprint 103.

Illustrations.— In Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398, a steamboat was in the business of transporting goods from New York to Providence. The plaintiff owned carriages which he wished to have transported to Boston. The carriers received them in New York, to convey them to Providence or Boston, and they were lost in the sound, near Huntington, Long Island. It was held that the contract was governed by the laws of New York. In Toledo First Nat. Bank *v.* Shaw, 61 N. Y. 283, where a bill of lading was executed in Ohio, of merchandise there shipped to be transported to a place in New York, the bill being delivered in pursuance of a contract made in and by residents of Ohio to one there making advances upon the faith thereof, and to secure drafts drawn for such advances upon parties in New York, it was held an Ohio contract, to be construed by and under the laws and commercial usages of that state. See Talbott *v.* Merchant's Despatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589, where a contract under which a common carrier sought to limit his liability was made in Missouri for the carriage of goods from Missouri to Texas, and such a contract was valid under the Missouri law, but not under the Texas law, it was held that the law of Missouri prevailed. Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Conflict of laws as to validity of contracts limiting liability see Carriers, 6 Cyc. 410.

Place of performance.— In some cases it is laid down that so far as a contract of carriage is to be performed in a state other than that in which the contract was made, it is to be governed by the law of that state. Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; Brown *v.* Camden, etc., R. Co., 83 Pa. St. 316.

Place of loss.— In others it is said that rights of the parties are to be governed by the laws of the state in which the loss happens. Gray *v.* Jackson, 51 N. H. 9, 12 Am. Rep. 1; Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

80. Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765; Born *v.* Shaw, 29 Pa. St. 288, 72 Am. Dec. 633. See Sales.

Illustrations.— Where an agent sold goods to a person in Connecticut, subject to the approval of his principal, who resided in New York, and the principal approved the contract, and the goods were delivered in Connecticut, where payment was expected to be made to the agent, it was held that the contract was governed by the laws of the latter state. Lewis *v.* McCabe, 49 Conn. 141, 44 Am. Rep. 217. So where the agent of a Pennsylvania firm went to Rhode Island, and there effected a sale of whisky by sample to a citizen of Rhode Island, to whom the whisky

in a certain place and the goods delivered to a carrier for shipment, the contract is governed by the law of the place of shipment,[81] and it makes no difference that they are not to be paid for until they arrive in a state to which they are shipped,[82] unless the title is not to pass until they are received and paid for.[83] Where goods are ordered from one state to be sent from another state to the purchaser "C. O. D." there is a difference of opinion as to where the sale is made. Some courts hold that it is made in the state of the seller when the goods are delivered to the carrier;[84] and others that there is no sale until the goods arrive at their destination, and the price is collected by the carrier, and the property actually delivered to the purchaser.[85] If a vendor has no lien or privilege on goods at the place where he sells them, he acquires none by their removal elsewhere.[86] The sale of a vessel then at sea, valid by the law where the sale was made, and where the vendor and vendee reside, is valid, although the law of the forum controlling transfers was not complied with.[87]

4. Assignment of Personal Property. Voluntary assignments of personal property, if valid under the laws of the state where the assignor resides, will be valid everywhere, and will pass the assignor's personal property, wherever situated, unless limited or restrained by some law of the state where the property is found,[88] or unless injurious to the citizens of the latter state.[89]

was sent and delivered, it was held, in a suit in Massachusetts on an acceptance given by the buyer, that the illegality of the transaction was determinable by the Rhode Island law. Weil *v.* Golden, 141 Mass. 364, 6 N. E. 229. And where a citizen of New Jersey went to Pennsylvania, and there bought a safe on conditional sale, it being agreed that the title should remain in the seller until it was paid for, and the purchaser took the safe to New Jersey, and there sold it to a purchaser in good faith; and under the Pennsylvania law, the latter could not hold the safe against the original owner, while under the New Jersey law he could, it was held that the original owner could not maintain trover in New Jersey against him. Marvin Safe Co. *v.* Norton, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566.

81. Fred Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959; Engs *v.* Priest, 65 Iowa 232, 21 N. W. 580; Sullivan *v.* Sullivan, 70 Mich. 583, 38 N. W. 472.

82. Houghtaling *v.* Bell, 19 Mo. 84, 59 Am. Dec. 331.

83. McIlvaine *v.* Legare, 36 La. Ann. 359; Rindskopf *v.* De Ruyter, 39 Mich. 1, 33 Am. Dec. 341.

84. *Alabama.*— Pilgneen *v.* State, 71 Ala. 368.

Arkansas.— State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565.

Illinois.— Brechwald *v.* People, 21 Ill. App. 213.

Maine.— State *v.* Intoxicating Liquors, 73 Me. 278.

North Carolina.— Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

Pennsylvania.— Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

West Virginia.—State *v.* Flanger, 38 W. Va. 53, 17 S. E. 792, 45 Am. St. Rep. 832, 22 L. R. A. 430.

85. State *v.* Winfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; U. S. *v.* Clune, 26 Fed. 515; U. S. *v.* Shriver, 23 Fed. 134. See Higgins *v.* Murray, 73 N. Y. 252; Baker *v.* Bourcicault, 1 Daly (N. Y.) 23. And see Sales.

86. Whiston *v.* Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 281. See Sales.

87. Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508.

88. *Connecticut.*— Greene *v.* Sprague Mfg. Co., 52 Conn. 330.

Florida.— Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607.

Georgia.— Herchield *v.* Drexel, 12 Ga. 582.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Massachusetts.— Train *v.* Kendall, 137 Mass. 366.

Missouri.—Askew *v.* La Cygne Exch. Bank, 83 Mo. 366, 53 Am. Rep. 590; Zuppann *v.* Bauer, 17 Mo. App. 678.

New Jersey.— Bentley *v.* Whittemore, 19 N. J. Eq. 462, 97 Am. Dec. 671.

New York.— *In re* Waite, 99 N. Y. 433, 2 N. E. 440; Holmes *v.* Remsen, 4 Johns. Ch. 460, 9 Am. Dec. 581.

Pennsylvania.—Smith's Appeal, 104 Pa. St. 381.

Texas.— Weider *v.* Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617.

Vermont.— Hanford *v.* Paine, 32 Vt. 442, 78 Am. Dec. 586.

United States.— Livermore *v.* Jenckes, 21 How. 126, 16 L. ed. 55.

See Assignments for Benefit of Creditors, 4 Cyc. 194.

89. *Illinois.*— Rhawn *v.* Pearce, 110 Ill. 350, 51 Am. Rep. 691; Mumford *v.* Canty, 50 Ill. 370, 99 Am. Dec. 525.

Louisiana.— Pierce *v.* Musson, 17 La. 389.

Massachusetts.— Faulkner *v.* Hymen, 142 Mass. 53, 6 N. E. 846; Pierce *v.* O'Brien, 129 Mass. 314, 37 Am. Rep. 360; Martin *v.* Pot-

E. Performance in Several States. According to better opinion an entire contract to be performed partly in the state where made and partly in another state is governed by the law of the place of making,[90] although there is a decision to the effect that each portion is to be governed by the laws of the country in which that portion is performed.[91]

F. Presumptions and Proof. If the contract is void by the *lex fori*, it devolves on the party seeking to sustain it to show that it is valid by the law of the place of making;[92] but in the absence of proof on the subject, the court will generally presume that the common law is in force in such state.[93] When, however, the common law has never been in force in the place where the contract was made, and the foreign law is not proved, the court will follow the law of the forum.[94] On the other hand if the contract is legal by the *lex fori*, it will be presumed legal by the *lex loci contractus*.[95]

G. Law of Forum Governs Remedies. The remedy upon a contract both in substance and form is regulated by the *lex fori*, and not by the *lex loci contractus*.[96] And this is so even where the contract is to be performed at the place

ter, 11 Gray 37, 71 Am. Dec. 689; Boyd *v.* Rockport Steam Cotton Mills, 7 Gray 406; Zepcey *v.* Thompson, 1 Gray 243.

Missouri.— Bryan *v.* Brisbin, 26 Mo. 423, 72 Am. Dec. 219.

New Jersey.— Moore *v.* Bonnell, 31 N. J. L. 90; Varnum *v.* Camp, 13 N. J. L. 326, 329, 25 Am. Dec. 476.

New York.— Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; Guillander *v.* Howell, 35 N. Y. 657.

South Carolina.— *Ex p.* Dickinson, 29 S. C. 453, 7 S. E. 593, 13 Am. St. Rep. 749, 1 L. R. A. 685.

Vermont.— Rice *v.* Curtis, 32 Vt. 460, 78 Am. Dec. 597.

United States.— Le Roy *v.* Crowninshield, 14 Fed. Cas. No. 8,265, 2 Mason 157.

See *supra*, XI, B, 9, b, (III). *Compare* Wales *v.* Alden, 22 Pick. (Mass.) 245; Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540; Mowry *v.* Crocker, 6 Wis. 326.

90. Missouri, etc., R. Co. *v.* Harris, 1 Tex. App. Civ. Cas. § 1257; Morgan *v.* New Orleans, etc., R. Co., 17 Fed. Cas. No. 9,804, 2 Woods 244. Where an agreement for a loan of money was made in New York, and the money advanced there, and a note dated in Nebraska, payable in New York, and a mortgage on lands in Nebraska, were given to secure the debt, it was held the contract was to be governed by the laws of New York. Sands *v.* Smith, 1 Nebr. 108, 93 Am. Dec. 331.

91. Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118.

92. Thatcher *v.* Morris, 11 N. Y. 437; Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

93. See COMMON LAW, 8 Cyc. 366.

94. Norman *v.* Norman, (Cal. 1898) 54 Pac. 143; Mendenhall *v.* Gately, 18 Ind. 149; Hurdt *v.* Courteney, 4 Metc. (Ky.) 139; Allen *v.* Watson, 2 Hill (S. C.) 319.

95. Ellis *v.* Park, 8 Tex. 205.

96. *Alabama.*—Jones *v.* Jones, 18 Ala. 248.

Arkansas.— Laird *v.* Hodges, 26 Ark. 356; Jordan *v.* Thornton, 7 Ark. 224, 44 Am. Dec. 546.

Connecticut.— Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97.

Georgia.— Atlanta, etc., R. Co. *v.* Tanner, 68 Ga. 384; Cox *v.* Adams, 2 Ga. 158.

Illinois.— Burchard *v.* Dunbar, 82 Ill. 450, 25 Am. Rep. 334; Mumford *v.* Canty, 50 Ill. 570, 99 Am. Dec. 525; Roosa *v.* Crist, 17 Ill. 450, 65 Am. Dec. 679.

Kansas.— Denny *v.* Faulkner, 22 Kan. 89; Hefferlin *v.* Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593.

Louisiana.— Brent *v.* Shouse, 15 La. Ann. 110, 79 Am. Dec. 573.

Maine.— Everett *v.* Herrin, 46 Me. 357, 74 Am. Dec. 455.

Maryland.— Dakin *v.* Pomeroy, 9 Gill 1; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Massachusetts.— Pitkin *v.* Thompson, 13 Pick. 64.

Mississippi.— Ivey *v.* Lalland, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606; Coffman *v.* Kentucky Bank, 40 Miss. 29, 90 Am. Dec. 311.

Missouri.— Johnston *v.* Gawtry, 11 Mo. App. 322.

New Jersey.— Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711.

New York.— Allen *v.* Watson, 2 Hill 319; Andrews *v.* Herriot, 4 Cow. 508; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467; Bird *v.* Caritat, 2 Johns. 342, 3 Am. Dec. 433; Smith *v.* Spinolla, 2 Johns. 198; Holmes *v.* Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581.

Pennsylvania.— Thornton *v.* Western Reserve Farmers' Ins. Co., 31 Pa. St. 529; Watson *v.* Brewster, 7 Pa. St. 376.

Tennessee.— McKissick *v.* McKissick, 6 Humphr. 75.

Vermont.— Suffolk Bank *v.* Kidder, 12 Vt. 464, 30 Am. Dec. 354.

United States.— Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Alexandria Canal Co. *v.* Swann, 5 How. 83, 12 L. ed. 60; Wilcox *v.* Hunt, 13 Pet. 378, 10 L. ed. 209; U. S. Bank *v.* Donnally, 8 Pet. 361, 8 L. ed. 974; Camfranque *v.* Burnell, 4 Fed.

where it was made.[97] The *lex fori* governs in determining the mode of trial, including the form of pleading, the quality and degree of evidence, and the mode of redress.[98] And it determines whether a suit is to be brought in the name of the assignor of the contract to the use of the assignee, or whether it shall be brought in the name of the assignee.[99]

XII. ACTIONS FOR BREACH OF CONTRACT.

A. Nature and Form of Remedy — 1. WHERE SPECIAL CONTRACT IS OPEN AND SUBSISTING. It may be stated as a general rule that where there is a special agreement between the parties, open and subsisting at the time the cause of action arises, a general *indebitatus assumpsit* cannot be maintained.[1] For where there is an express contract, the plaintiff cannot abandon it and recover on an implied contract, until he proves the contract or gives secondary evidence of its contents, and also shows an excuse for his departure from it.[2] Until a contract has been rescinded, the injured party's remedy is an action for the breach, not an action to recover back the money paid.[3] Where damages are claimed for the breach of a special contract, the declaration must count upon the contract.[4]

2. CONTRACT FULLY PERFORMED. It is incontrovertibly settled that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract which has been fully performed on the plaintiff's part, and it is not necessary in such case to declare on the special contract, although the plaintiff may use the written agreement as evidence of the compensation due;[5] for where there is a special

Cas. No. 2,342, 1 Wash. 340; Hinkley *v.* Marean, 11 Fed. Cas. No. 6,523, 3 Mason 88; Willard *v.* Dorr, 29 Fed. Cas. No. 17,679, 3 Mason 91.

See *infra*, XII, B.

97. Garr *v.* Stokes, 1 Harr. (Del.) 403, 405; Bacon *v.* Dahlgreen, 7 La. Ann. 599; Roberts *v.* Wilkinson, 5 La. Ann. 379; Murray *v.* Gibson, 2 La. Ann. 311; Collins Iron Co. *v.* Burkam, 10 Mich. 283; Armour *v.* Michael, 36 N. J. L. 92; Harker *v.* Brink, 24 N. J. L. 333; Wood *v.* Malin, 10 N. J. L. 208; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711.

98. Questions of evidence are to be determined exclusively by the *lex fori*. Kirtland *v.* Wanzer, 2 Duer (N. Y.) 278; Bloomer *v.* Bloomer, 2 Bradf. Surr. (N. Y.) 339. The question whether a contract may be proved by parol or whether written evidence must be adduced, and the question whether parol evidence may be received to show the actual agreement of the parties to a blank indorsement of a negotiable instrument, must be determined by the law of the state where the action is brought, and not by that of the state where the contract was made. Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29.

Mode of redress.— Thraser *v.* Everhart, 3 Gill & J. (Md.) 234; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508; Warren *v.* Lynch, 5 Johns. (N. Y.) 239; Meredeth *v.* Hinsdale, 2 Cai. (N. Y.) 362; Watson *v.* Dickerson, 7 Pa. St. 376; Harrison *v.* Edwards, 12 Vt. 648, 36 Am. Dec. 364; U. S. Bank *v.* Donnelly, 8 Pet. (U. S.) 361, 8 L. ed. 974; Le Roy *v.* Beard, 8 How. (U. S.) 451, 12 L. ed. 1151; Adam *v.* Kers, 1 B. & B. 360. See *infra*, XII, B.

99. Glenn *v.* Busey, 5 Mackey (D. C.) 233.

1. *Alabama.*— Snedicor *v.* Leachman, 10 Ala. 330.

Colorado.— Alta Invest. Co. *v.* Worden, 25 Colo. 215, 53 Pac. 1047.

Indiana.— Hoagland *v.* Moore, 2 Blackf. 167.

Iowa.— Boyce *v.* Timpe, (1902) 89 N. W. 83.

Louisiana.— Mazureau *v.* Morgan, 25 La. Ann. 281.

Maine.— Weston *v.* Davis, 24 Me. 374.

Maryland.— Fairfax Forrest Min., etc., Co. *v.* Chambers, 75 Md. 604, 23 Atl. 1024.

Mississippi.— Drake *v.* Surget, 36 Miss. 458.

Missouri.— O'Brien *v.* Mayer, 23 Mo. App. 648.

Ohio.— Ginther *v.* Schultz, 40 Ohio St. 104.

United States.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463.

See 11 Cent. Dig. tit. "Contracts," § 1549 *et seq.*; *supra*, I, A, 2, note 6; ASSUMPSIT, ACTION OF, III, C, 2 [4 Cyc. 326].

2. Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161; Holden Steam Mill Co. *v.* Westervelt, 67 Me. 446.

3. Simmons *v.* Putnam, 11 Wis. 193.

4. Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

5. *Alabama.*— Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

California.— Friermuth *v.* Friermuth, 46 Cal. 42.

Georgia.— Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

Illinois.— Fowler *v.* Deakman, 84 Ill. 130.

Indiana.— Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Shilling *v.* Templeton, 66 Ind. 585.

agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied assumpsit or on the express agreement. A new cause of action, upon such performance, arises from this legal duty in like manner as if the act done had been done upon a general request, without an express agreement, and the plaintiff is not bound to declare specially on the agreement.[6] The same is true where the contract has been fully performed in respect to any one distinct subject included in it.[7] The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading.[8] Where the consideration of a simple contract for the payment of money has been executed it may be declared on in debt or assumpsit, according to the subject-matter.[9] But where the consideration has not been executed, the remedy is by special action on the case.[10]

3. Contract Substantially Performed. A party who has performed only a part of his side of a contract is not in all cases without remedy, for, although he can have no remedy on the contract as originally made, the circumstances may be such that the law will imply a new contract and give him a remedy on a *quantum meruit*.[11] Where a contractor fails to complete his contract in time and the work is taken out of his hands, he or his assignee may recover at contract rates for what has been done, less any damages the defendant may have sustained by reason of the contractor's failure to make complete performance.[12] In such case the contract furnishes the true measure of recovery on the part of the plaintiff. He can never recover more than the amount stipulated, but he may recover less,

Maryland.— Fairfax Forrest Min., etc., Co. *v.* Chambers, 75 Md. 604, 23 Atl. 1024.

Massachusetts.— Harrington *v.* Baker, 15 Gray 538.

Missouri.— Moore *v.* H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Mansur *v.* Botts, 80 Mo. 651; Yeats *v.* Ballentine, 56 Mo. 530; Barnett *v.* Severingen, 77 Mo. App. 64; Chapman *v.* Currie, 51 Mo. App. 40; Legg *v.* Girardi, 22 Mo. App. 149; Crump *v.* Redstock, 20 Mo. App. 37; Fox *v.* Pullman Palace Car Co., 16 Mo. App. 122.

New Jersey.— Weart *v.* Hoagland, 22 N. J. L. 517.

New York.— Higgins *v.* Newtown, etc., R. Co., 66 N. Y. 604; Farron *v.* Sherwood, 17 N. Y. 227; Gillies *v.* Manhattan Beach Imp. Co., 73 Hun 507, 26 N. Y. Suppl. 381, 56 N. Y. St. 206; Lamson Consol. Store-Service Co. *v.* Weil, 15 Daly 498, 8 N. Y. Suppl. 336, 29 N. Y. St. 307; Williams *v.* Sherman, 7 Wend. 109.

Pennsylvania.— Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; Wallace *v.* Floyd, 29 Pa. St. 184, 72 Am. Dec. 620; Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607; Kelly *v.* Foster, 2 Binn. 4. In Harris *v.* Ligget, 1 Watts & S. 301, Gibson, C. J., says that this is the only exception to the rule which excludes the implication of a contract where there is an express one, and that even this is an anomaly.

Texas.— Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454.

United States.— Dermott *v.* Jones, 2 Wall. 1, 17 L. ed. 762; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. 541, 9 L. ed. 222; Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463; Columbia Bank *v.* Patterson, 7 Cranch 299, 3 L. ed. 351.

England.— Cooke *v.* Munstone, 1 B. & P. N. R. 351; Brooke *v.* White, 1 B. & P. N. R. 330; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith 622; Mussen *v.* Price, 4 East 147; Gordon *v.* Martin, Fitzg. 302; Alcorn *v.* Westbrook, 1 Wils. C. P. 115.

See 11 Cent. Dig. tit. "Contracts," § 1549 *et seq.*; and Assumpsit, Action of, 4 Cyc. 328.

6. Hosley *v.* Black, 28 N. Y. 438; Keteltas *v.* Myers, 19 N. Y. 231; Moffet *v.* Sackett, 18 N. Y. 522; Farron *v.* Sherwood, 17 N. Y. 227; Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Clark *v.* Fairchild, 22 Wend. (N. Y.) 576; Mead *v.* Degolyer, 16 Wend. (N. Y.) 632; Feeter *v.* Heath, 11 Wend. (N. Y.) 477; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564. And this rule of pleading has not been changed by the code. Higgins *v.* Newtown, etc., R. Co., 66 N. Y. 604; Hosley *v.* Black, 28 N. Y. 438; Farron *v.* Sherwood, 17 N. Y. 227.

7. Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463.

8. Fells *v.* Vestvali, 2 Keyes (N. Y.) 152.

9. McVoy *v.* Wheeler, 6 Port. (Ala.) 201; Worthington *v.* Plymouth County R. Co., 168 Mass. 474, 47 N. E. 403; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181; Thompson *v.* French, 10 Yerg. (Tenn.) 452.

10. Thompson *v.* French, 10 Yerg. (Tenn.) 452.

11. Tandy *v.* Hatcher, 9 Ky. L. Rep. 150; Provost *v.* Carlin, 28 La. Ann. 595; Green *v.* Gilbert, 21 Wis. 395. See *supra*, IX, C, 3.

12. Howell *v.* Medler, 41 Mich. 641, 2 N. W. 911. See *supra*, IX, C, 3, 4.

for the defendant is entitled to set off whatever damage he may have sustained by reason of the plaintiff's failure fully to perform the contract.[13] The fact that work was defectively done is no defense to an action to recover the contract price, except by way of recoupment of damages sustained by the defendant by reason of the defects; and to get the benefit of this defense he must allege and prove his damages according to the rules by which such damages are measured.[14] A party who has substantially performed his contract may recover on a *quantum meruit* for what he has done, although he has failed to perform the contract in certain particulars.[15]

13. McClay *v.* Hedge, 18 Iowa 66; Moore *v.* H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975; Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225; Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439. Where a breach of contract on the part of the plaintiff can be compensated in damages, an action by the plaintiff against the defendant, who has received a partial benefit from the contract for non-performance, may be supported without averring performance by the plaintiff. Romel *v.* Alexander, 17 Ind. App. 257, 46 N. E. 595. If the cost of completing the contract, together with the damages for non-completion within the time specified, exceeds the amount of the contractor's claim, there can be no recovery. Winamac *v.* Hess, 151 Ind. 229, 50 N. E. 81.

14. Sheppard *v.* Dowling, 103 Ala. 563, 15 So. 846; Escott *v.* White, 10 Bush (Ky.) 169; Newman *v.* Fowler, 37 N. J. L. 89; Bouker *v.* Randles, 31 N. J. L. 335; Ives *v.* Van Epps, 22 Wend. (N. Y.) 155; Burton *v.* Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Spalding *v.* Vandercook, 2 Wend. (N. Y.) 431; Beecker *v.* Vrooman, 13 Johns. (N. Y.) 302; Frisbie *v.* Hoffnagle, 11 Johns. (N. Y.) 50.

15. Powell *v.* Howard, 109 Mass. 192; Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975; Wadleigh *v.* Sutton, 6 N. H. 15, 23 Am. Dec. 704. There is perhaps no more vexatious question in the adjustment of the rights of parties to contracts than the determining what if any compensation may be recovered by a party to a special contract who has performed services or furnished materials not in strict compliance with the terms of the contract, but which have been accepted and utilized by the other party. By the strict rules of the common law full performance was required as a condition precedent to the right of recovery, but the rigor of this rule has been relaxed in many jurisdictions, and the tendency is to administer equitable relief rather than to hold the parties to the very letter of their agreement. Accordingly when, under a special contract, the plaintiff has proceeded not in strict accordance with the stipulations of the agreement, yet if what he has done has been accepted and used by the defendant, it is held that the defendant is answerable for the benefit he has received on an implied promise to pay for the same, although no action can be maintained against him on the special contract.

Connecticut.— Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264.

Indiana.— Major *v.* McLester, 4 Ind. 591; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470; Johnson *v.* Heaton, 28 Ind. App. 475, 61 N. E. 959.

Kentucky.— Escott *v.* White, 10 Bush 169; Morford *v.* Mastin, 6 T. B. Mon. 609, 17 Am. Dec. 168.

Maine.— White *v.* Oliver, 36 Me. 92; Hayden *v.* Madison, 7 Me. 76.

Massachusetts.— Moulton *v.* McOwen, 103 Mass. 587; Smith *v.* Lowell First Cong. Meetinghouse, 8 Pick. 178; Hayward *v.* Leonard, 7 Pick. 181, 19 Am. Dec. 269.

New York.— Jewell *v.* Schroeppel, 4 Cow. 564.

Vermont.— Kelley *v.* Bradford, 33 Vt. 35.

England.— Basten *v.* Butter, 7 East 479.

See 11 Cent. Dig. tit. "Contracts," §§ 1555, 1556; and *supra*, IX, C, 3.

Where there has been no intentional departure from the contract or failure of performance, but the party has acted in good faith, endeavoring to fulfil it according to its terms, in case of failure of full performance he may recover what his services are actually worth, less the damage caused by such failure. Veazie *v.* Bangor, 51 Me. 509; Knowlton *v.* Plantation No. 4, 14 Me. 20; Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182; Snow *v.* Ware, 13 Metc. (Mass.) 42; Wadleigh *v.* Sutton, 6 N. H. 15, 23 Am. Dec. 704. Where a plaintiff declares on a special agreement and also on the common counts, he may at the trial waive the special agreement and proceed on the common counts. And where the evidence is sufficient to support the general count, supposing he had not declared on the special agreement, he is entitled to recover on such general count without any attempt to prove the special agreement. And it seems that the defendant may in such case give the special agreement in evidence in order to lessen the *quantum* of damages, but if it is offered merely to defeat the action by showing a failure of performance on the part of the plaintiff, it is immaterial and may be rejected. Linningdale *v.* Livingston, 10 Johns. (N. Y.) 36. Where a large amount of work was done in the grading of a street under a written contract, variant from that arising out of the proposal and specifications, which alone was authorized by the municipality, it was held that the work was not done under any contract, but was done at large, and that there was no ground for a *quantum meruit*, as there was nothing from which a request could be implied in law. Bonesteel *v.* New York, 22 N. Y. 162.

4. Full Performance Prevented by Defendant, or by the Act of God. According to the great weight of authority if a special agreement has been performed in part by the plaintiff and its further performance has been prevented by the act of the defendant, the plaintiff may at his option either sue for the breach and recover damages or abandon the contract altogether and recover upon a general *indebitatus assumpsit*.[16] And where a written contract under seal has been performed in part and its full performance has been prevented by the defendant, the plaintiff may maintain an action of covenant upon the writing, a complete performance on his part being excused by the act of the other party.[17]

Defense that plaintiff had failed to perform. — In an action for the balance due under a building contract, the statement showed that a portion of the work was torn down because of the alleged negligence of tbe architect, and the contract therefor was given to a third person, that the building was not completed within the specified time, an excuse therefor being alleged, and also that compensation for extra work was claimed. It was held that an affidavit of defense setting up a claim for the penalty for delay in completion of the building, alleging that the architect had allowed only a certain amount of extra work, that the plaintiff failed to finish the building according to the contract, and did especially fail to finish it to the satisfaction of the architect as required by the contract, was sufficient. Murphy *v.* Liberty Nat. Bank, 179 Pa. St. 295, 39 Wkly. Notes Cas. 526, 36 Atl. 283.

16. *Alabama.*— Hunt *v.* Test, 8 Ala. 713, 42 Am. Dec. 659.

Arkansas.—Prince *v.* Thomas, 15 Ark. 378.

California.— San Francisco Bridge Co. *v.* Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335; Adams *v.* Pugh, 7 Cal. 150; Reynolds *v.* Jourdan, 6 Cal. 108.

Illinois.— Guerdon *v.* Corbett, 87 Ill. 272; Sanger *v.* Chicago, 65 Ill. 506; McPherson *v.* Walker, 40 Ill. 371; Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161; Bishop *v.* Newton, 20 Ill. 175; Webster *v.* Enfield, 10 Ill. 298; Bannister *v.* Read, 6 Ill. 92; Butts *v.* Huntley, 2 Ill. 410; Kipp *v.* Massin, 15 Ill. App. 300.

Indiana.— Hoagland *v.* Moore, 2 Blackf. 167; Cranmer *v.* Graham, 1 Blackf. 406.

Iowa.— Dibol *v.* Minott, 9 Iowa 403.

Louisiana.— Brown *v.* The Laura Snow, 14 La. Ann. 848.

Maine.— Wright *v.* Haskell, 45 Me. 489; Davenport *v.* Hallowell, 10 Me. 317.

Maryland.— Bull *v.* Schuberth, 2 Md. 38.

Massachusetts.—Johnson *v.* Trinity Church Soc., 11 Allen 123; Bassett *v.* Sanborn, 9 Cush. 58; Canada *v.* Canada, 6 Cush. 15; Moulton *v.* Trask, 9 Mete. 577; Hill *v.* Green, 4 Pick. 114; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

Michigan.— Hemminger *v.* Western Assur. Co., 95 Mich. 355, 54 N. W. 949; Mooney *v.* York Iron Co., 82 Mich. 263, 46 N. W. 376; Cadman *v.* Markle, 76 Mich. 448, 43 N. W. 315, 15 L. R. A. 707; Howell *v.* Medler, 41 Mich. 641, 2 N. W. 911.

Missouri.— McCullough *v.* Baker, 47 Mo. 401.

Nebraska.— Thompson *v.* Gaffey, 52 Nebr. 317, 72 N. W. 314; Omaha Consol. Vinegar Co. *v.* Burns, 49 Nebr. 229, 68 N. W. 492.

New York.— Jones *v.* Judd, 4 N. Y. 411; Goodwin *v.* Kirker, 2 Hilt. 401; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. 285; Johnson *v.* Smith, Anth. N. P. 81.

North Carolina.— Jones *v.* Call, 93 N. C. 170; Buffkin *v.* Baird, 73 N. C. 283.

Rhode Island.— Parker *v.* Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; Greene *v.* Haley, 5 R. I. 260.

South Carolina.— Byers *v.* Bostwick, 2 Mill 75.

South Dakota.— Caldwell *v.* Myers, 2 S. D. 506, 51 N. W. 210.

Texas.— Devoe *v.* Stewart, 32 Tex. 712; Faut *v.* Andrews, (Civ. App. 1898) 46 S. W. 909.

Vermont.— Chamberlin *v.* Scott, 33 Vt. 80; Derby *v.* Johnson, 21 Vt. 17.

United States.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463; Hambly *v.* Delaware, etc., R. Co., 21 Fed. 541.

England.— Cort *v.* Ambergate, etc., R. Co., 17 Q. B. 127, 15 Jur. 877, 20 L. J. Q. B. 460, 79 E. C. L. 127; Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678; Ripley *v.* McClure, 4 Exch. 345, 18 L. J. Exch. 419.

See 11 Cent. Dig. tit. "Contracts," §§ 1555, 1556; and *supra*, IX, F, 5; Assumpsit, Action of, 4 Cyc. 329.

In Pennsylvania it has been held that if a contract has not been fully performed by the plaintiff, and be is excused from an entire performance by the act of the defendant, the action to recover compensation must be on the special agreement, with an averment of the plaintiff's readiness to perform as an excuse for the want of actual performance. Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607. And see Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; Harris *v.* Ligget, 1 Watts & S. 301; Algeo *v.* Algeo, 10 Serg. & R. 235.

If a party sues for damages for not being suffered to complete a special contract, he must declare specially and cannot rely on the common counts. Beecher *v.* Pettee, 40 Mich. 181.

17. Rankin *v.* Darnell, 11 B. Mon. (Ky.) 30, 52 Am. Dec. 557; Jewell *v.* Blandford, 7 Dana (Ky.) 472; Meysenburg *v.* Schlieper, 48 Mo. 456; Jarrell *v.* Farris, 6 Mo. 159; Young *v.* Preston, 4 Cranch (U. S.) 239, 2 L. ed. 607.

A party may also maintain assumpsit where the further performance of the contract has been abandoned by consent of both parties,[18] or where the full performance of an entire contract has been prevented by the act of God.[19] Where there is no provision to the contrary, the sickness or death of one who has been employed for a fixed time is a sufficient excuse for non-performance by him, and he, in case of sickness, or his personal representatives in case of his death, may recover *pro tanto* or upon a *quantum meruit* for the services actually performed.[20] The recovery in such a case, however, cannot exceed the contract price, or the rate of it for the part of the services performed,[21] and the amount of recovery is liable to a reduction to the extent of such damages as the employer has suffered by reason of the non-performance of the contract.[22]

5. Partial Performance Must Be Beneficial to Defendant. In order that an action may be maintained for a partial performance of a contract the defendant must have received the benefit of the partial performance.[23] The implication of a promise in all such cases is derived from the fact that the performance has been beneficial to him.[24] If there is a liability to pay for a partial performance where

But where the contract has not been repudiated by defendant, although he may have disregarded it, in preventing the plaintiff from fully performing it according to its terms and stipulations, the remedy by action of assumpsit upon the implied contract is merged in the remedy allowed upon the covenant, and as the written agreement is still obligatory upon the parties, the plaintiff's only remedy is an action of covenant upon the writing. Rankin *v.* Darnell, 11 B. Mon. (Ky.) 30, 52 Am. Dec. 557; Brown *v.* Gauss, 10 Mo. 265; Garred *v.* Macey, 10 Mo. 161; Little *v.* Mercer, 9 Mo. 218; Porter *v.* Rea, 6 Mo. 48; Crump *v.* Mead, 3 Mo. 233; Clendennen *v.* Paulsel, 3 Mo. 230, 25 Am. Dec. 435; Donaldson *v.* Fuller, 3 Serg. & R. (Pa.) 505; Young *v.* Preston, 4 Cranch (U. S.) 239, 2 L. ed. 607.

18. *Maryland.*— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

Massachusetts.— Freeman *v.* Foss, 145 Mass. 361, 14 N. E. 141, 1 Am. St. Rep. 467.

Minnesota.— Siebert *v.* Leonard, 17 Minn. 433; Marcotte *v.* Beaupre, 15 Minn. 152.

New York.— Smith *v.* Coe, 2 Hilt. 365.

United States.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463.

See 11 Cent. Dig. tit. "Contracts," § 1554 *et seq.*; and Assumpsit, Action of, 4 Cyc. 330.

Where a partial performance of a contract has been accepted by defendant, plaintiff may recover *pro tanto*. West *v.* Freeman, 76 Mo. App. 96.

19. Parker *v.* Macomber, 17 R. I. 674, 14 Atl. 464, 16 L. R. A. 858.

20. *Connecticut.*— Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Maine.— Lakeman *v.* Pollard, 43 Me. 463, 69 Am. Dec. 77.

Massachusetts.— Fuller *v.* Brown, 11 Metc. 440.

Missouri.— Haynes *v.* St. Louis Second Baptist Church, 12 Mo. App. 536.

Rhode Island.— Parker *v.* Macomber, 17 R. I. 674, 14 Atl. 464, 16 L. R. A. 858.

Vermont.— Hubbard *v.* Belden, 27 Vt. 645; Seaver *v.* Morse, 20 Vt. 620.

Virginia.— Bream *v.* Marsh, 4 Leigh 21.

England.— Farrow *v.* Wilson, L. R. 4 C. P. 744, 38 L. J. C. P. 326, 20 L. T. Rep. N. S. 810, 18 Wkly. Rep. 43.

See *supra*, IX, D, 5, c; and Master and Servant.

Decision to the contrary.— In an English case it was held that a special contract was not annulled by death, but there were circumstances connected with the transaction which gave color to that construction. The contract was to perform a voyage for a compensation, to be paid upon arrival, largely in excess of the ordinary wages for such services. The sailor died before the voyage was finished, and it was held that his administrator could not recover anything. The court of king's bench seemed to have felt the harshness of the rule they were bound by even in that case, and caused inquiry to be made if some custom of the maritime law might not be found to mitigate the severity of the contract. But at the end of the term no such usage having been found they rendered judgment for the defendant. Cutter *v.* Powell, 6 T. R. 320, 2 Smith Lead. Cas. 1212.

21. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; Coe *v.* Smith, 4 Ind. 79, 58 Am. Dec. 618; Allen *v.* McKibbin, 5 Mich. 449; Clark *v.* Gilbert, 26 N. Y. 279, 84 Am. Dec. 189 (where it was held that the compensation of the agent or servant employed under a special contract, a complete performance of which has been prevented by his sickness and death, is not confined to a *quantum meruit*, but is to be measured by the contract).

22. Patrick *v.* Putnam, 27 Vt. 759.

23. Allen *v.* Jarvis, 20 Conn. 38.

Where a contract is wrongfully terminated by one party after part performance by the other, the right of the party performing to recover the value of the labor performed or the materials furnished irrespective of the contract price depends upon whether, having regard to the contract, the party wrongfully terminating it would thereby enrich himself at the expense of the other. Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888 [*distinguishing* Doolittle *v.* McCullough, 12 Ohio St. 360].

24. Allen *v.* Jarvis, 20 Conn. 38.

it has not been beneficial to defendant, it is not on the ground of any promise which the law would imply, but is founded solely on the special contract between the parties.[25] It has been held, however, that where the plaintiff has been prevented from fully performing the contract by the voluntary act of the defendant, he is entitled to recover the reasonable value of what he has done, whether it is of value to the defendant or not.[26]

6. Contract For Act Other Than Payment of Money. A simple contract requiring the performance of some act other than the payment of money must as a general rule be declared on by a special action on the case.[27] Where one is to be paid in something else than money, he cannot abandon his contract and sue on a *quantum meruit*, and thereby convert into cash payment what according to the agreement was payable in something else.[28]

7. Contract Modified by Subsequent Agreement. Where a contract is varied by subsequent agreement so as to require more time and greater expenditure on the part of the plaintiff to complete the performance of it, he is not obliged to sue on the original contract, but may recover on the common counts.[29]

B. What Law Governs — 1. In General. Although the execution, validity, and interpretation of contracts are generally governed by the laws of the country or state where they are made,[30] the forms of remedies and the course of judicial proceedings are governed exclusively by the laws of the place where they are sought to be enforced.[31] And the remedy upon a contract, both in substance and form, is

25. Allen *v.* Jarvis, 20 Conn. 38.

26. San Francisco Bridge Co. *v.* Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335; Southern Pac. Co. *v.* American Well Works, 172 Ill. 9, 49 N. E. 575 [*affirming* 67 Ill. App. 512]; Mooney *v.* New York Iron Co., 82 Mich. 263, 46 N. W. 376.

27. Thompson *v.* French, 10 Yerg. (Tenn.) 452.

28. Roberts *v.* Wilkinson, 34 Mich. 129; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See Assumpsit, Action of, 4 Cyc. 330.

29. Hutchisson *v.* Cullum, 23 Ala. 622.

30. See *supra*, XI, B.

31. *Alabama.*— Swink *v.* Dechard, 41 Ala. 258; Jones *v.* Jones, 18 Ala. 248; Goodman *v.* Munks, 8 Port. 84.

Arkansas.— Laird *v.* Hodges, 26 Ark. 356.

Connecticut.— Fanton *v.* Middlebrook, 50 Conn. 44; Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Medbury *v.* Hopkins, 3 Conn. 472.

Georgia.— Thurman *v.* Kyle, 71 Ga. 628.

Kansas.— Hefferlin *v.* Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593.

Kentucky.— Davis *v.* Morton, 5 Bush 160, 96 Am. Dec. 345; Woodson *v.* Gallipolis Bank, 4 B. Mon. 203; Grubbs *v.* Harris, 1 Bibb 567; Stevens *v.* Gregg, 10 Ky. L. Rep. 267; Gibson *v.* Sublett, 4 Ky. L. Rep. 730.

Louisiana.— Tatum *v.* Wright, 7 La. Ann. 358; Jackson *v.* Tiernan, 15 La. 485; Ohio Ins. Co. *v.* Edmondson, 5 La. 295.

Maine.— Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250.

Maryland.— Dakin *v.* Pomeroy, 9 Gill 1; Trasher *v.* Everhart, 3 Gill & J. 234; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Massachusetts.— Pitkin *v.* Thompson, 13 Pick. 64; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.

Minnesota.— Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113.

Missouri.— Ruhe *v.* Buck, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178.

New Jersey.— Cronan *v.* Fox, 50 N. J. L. 417, 14 Atl. 119; Harker *v.* Brink, 24 N. J. L. 333; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Bullock *v.* Bullock, 51 N. J. Eq. 444, 27 Atl. 435.

New York.— Union Nat. Bank *v.* Chapman, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L. R. A. 513 [*reversing* 52 N. Y. App. Div. 57, 64 N. Y. Suppl. 1053]; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732, 36 N. Y. St. 8; Gans *v.* Frank, 36 Barb. 320; Hodges *v.* Shuler, 24 Barb. 68; Stoddart *v.* Key, 62 How. Pr. 137; Peck *v.* Hozier, 14 Johns. 346; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467; Lodge *v.* Phelps, 1 Johns. Cas. 139.

Ohio.— The Baltimore *v.* Levi, 2 Handy 30, 12 Ohio Dec. (Reprint) 314; Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134.

Pennsylvania.— Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540; Watson *v.* Brewster, 1 Pa. St. 381; Hoag *v.* Dessan, 1 Pittsb. 390; Gilbert *v.* Black, 1 Leg. Chron. 132.

South Carolina.— Pegram *v.* Williams, 4 Rich. 219.

Vermont.— Cartwright *v.* New York, etc., R. Co., 59 Vt. 675, 9 Atl. 370; Porter *v.* Munger, 22 Vt. 191; Pickering *v.* Fisk, 6 Vt. 102.

Virginia.— Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

West Virginia.— Stevens *v.* Brown, 20 W. Va. 450.

United States.— Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Wadsworth

regulated by the *lex fori* and not by the *lex loci contractus*, even where the contract was to be performed in the place where it was made.[32] But matters connected with the performance are to be regulated by the laws of the place of performance.[33] A contract made in a foreign country or state, but to be wholly performed in the place where it is sought to be enforced, is governed in all respects by the law of the forum.[34]

2. Particular Matters Affecting Remedy — a. Statutes of Limitations. Statutes of limitations, unless they discharge the debt, go to the remedy merely, and questions arising under them are to be determined by the law of the forum.[35] And this rule applies to actions on foreign judgments or those of courts of record of sister states as well as to actions on conventional contracts.[36] But if the

v. Henderson, 16 Fed. 447; *Ex p.* Heidelback, 2 Lowell 526, 11 Fed. Cas. No. 6,322; Burrows *v.* Hannegan, 1 McLean 315, 4 Fed. Cas. No. 2,206; Hinkley *v.* Marean, 3 Mason 88, 12 Fed. Cas. No. 6,523; Nicolls *v.* Rodgers, 2 Paine 437, 18 Fed. Cas. No. 10,260; Consequa *v.* Willings, Pet. C. C. 225, 6 Fed. Cas. No. 3,128.

England.— Bullock *v.* Caird, L. R. 10 Q. B. 276, 44 L. J. Q. B. 124, 32 L. T. Rep. N. S. 814, 23 Wkly. Rep. 827; De la Vega *v.* Vianna, 1 B. & Ad. 284, 8 L. J. K. B. O. S. 388, 20 E. C. L. 487; British Linen Co. *v.* Drummond, 10 B. & C. 903, 9 L. J. K. B. O. S. 213, 21 E. C. L. 377; Trimbey *v.* Vignier, 1 Bing. N. Cas. 159, 27 E. C. L. 584, 6 C. & P. 25, 25 E. C. L. 303, 4 Moore & S. 695; Robinson *v.* Bland, 2 Burr. 1077; Meyer *v.* Dresser, 16 C. B. N. S. 646, 33 L. J. C. P. 289, 10 L. T. Rep. N. S. 612, 12 Wkly. Rep. 983, 111 E. C. L. 646; Don *v.* Lippman, 5 Cl. & F. 1, 7 Eng. Reprint 303.

See 11 Cent. Dig. tit. "Contracts," § 1558 *et seq.*; and *supra*, XI, G.

Form of action.— In an action to enforce a foreign contract, the form of action and the course of judicial proceedings are governed by the law of the place where the action is brought. Trasher *v.* Everhart, 3 Gill & J. (Md.) 234; Ayres *v.* Audubon, 2 Hill (S. C.) 601.

Form of judgment or decree.—And the same is true of the form of judgment or decree and the method of carrying it into execution. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587. See also Denny *v.* Faulkner, 22 Kan. 89; Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130.

32. Harker *v.* Brink, 24 N. J. L. 333.

33. Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; *Ex p.* Heidelback, 2 Lowell (U. S.) 526, 11 Fed. Cas. No. 6,322.

34. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Everett *v.* Vendryes, 19 N. Y. 436; Thompson *v.* Ketcham, 4 Johns. (N. Y.) 285; Byers *v.* Brannon, (Tex. Civ. App. 1894) 30 S. W. 492. See *supra*, XI, B, 2.

35. *Arkansas.*— Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

Connecticut.— Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97; Medbury *v.* Hopkins, 3 Conn. 472.

District of Columbia.— Willard *v.* Wood, 4 Mackey 538.

Georgia.— O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 79.

Kentucky.— Labatt *v.* Smith, 83 Ky. 599 [*overruling* Allen *v.* Hill, 78 Ky. 119]; Farmers', etc., Nat. Bank *v.* Lovell, 1 S. W. 426, 8 Ky. L. Rep. 261.

Maine.— Thompson *v.* Reed, 75 Me. 404; Thibodeau *v.* Lavassuer, 36 Me. 362.

Maryland.— Attrill *v.* Huntington, 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779.

Missouri.— Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387; Stirling *v.* Winters, 80 Mo. 141; Carson *v.* Hunter, 46 Mo. 467, 2 Am. Rep. 529; King *v.* Lane, 7 Mo. 241, 37 Am. Dec. 187; Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675; Morgan *v.* Metropolitan St. R. Co., 51 Mo. App. 523.

Montana.— Chevrier *v.* Robert, 6 Mont. 319, 12 Pac. 702.

New York.— Beer *v.* Simpson, 65 Hun 17, 19 N. Y. Suppl. 578, 47 N. Y. St. 219; Lincoln *v.* Battelle, 6 Wend. 475; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482; Nash *v.* Tupper, 1 Cai. 402, 2 Am. Dec. 197; Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478.

Pennsylvania.— Sea Grove Bldg., etc., Assoc. *v.* Stockton, 148 Pa. St. 146, 23 Atl. 1063.

South Carolina.— Burrows *v.* French, 34 S. C. 165, 13 S. E. 355, 27 Am. St. Rep. 811; Sawyer *v.* Macaulay, 18 S. C. 543; Pegram *v.* Williams, 4 Rich. 219.

Utah.— Crofoot *v.* Thatcher, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725.

United States.— Mayer *v.* Walsh, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338; M'Elmoyle *v.* Cohen, 13 Pet. 312, 10 L. ed. 177; U. S. Bank *v.* Donnally, 8 Pet. 361, 8 L. ed. 974; Canadian Pac. R. Co. *v.* Johnston, 61 Fed. 745, 9 C. C. A. 587, 25 L. R. A. 470; Munos *v.* Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Van Reimsdyk *v.* Kane, 1 Gall. 371, 28 Fed. Cas. No. 16,871; Le Roy *v.* Crowninshield, 2 Mason 151, 15 Fed. Cas. No. 8,269; Nicolls *v.* Rodgers, 2 Paine 437, 18 Fed. Cas. No. 10,260.

England.—British Linen Co. *v.* Drummond, 10 B. & C. 903, 9 L. J. K. B. O. S. 213, 21 E. C. L. 377.

See Limitations of Actions.

36. Fanton *v.* Middlebrook, 50 Conn. 44; Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Rice *v.* Moore, 48

statute has run its course in the jurisdiction where the contract was made, and its effect there is to extinguish the obligation, this goes to the right and not merely to the remedy, and no action can thereafter be maintained on the contract in another jurisdiction.[37]

b. Exemption Laws. Exemption laws are considered as statutes affecting the remedy only, and have no extraterritorial force. Questions of exemption therefore are to be determined solely by the laws of the forum.[38] Thus it is well settled that the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor.[39]

c. Discharge in Bankruptcy or Insolvency. In an action on a contract the defendant cannot set up as a defense a discharge under the bankruptcy or insolvency laws of another state or country, unless the debt was created within the jurisdiction of the court granting the discharge, or unless the creditor voluntarily submitted himself to the jurisdiction of such court.[40] A discharge under the federal bankruptcy law, however, is available in any state.[41]

d. Protection From Civil Arrest. The *lex fori*, and not the *lex loci contractus*, applies in regard to the defendant's protection from arrest on civil process, inasmuch as such arrest is of the remedy and not of the right.[42]

Kan. 590, 30 Pac. 10, 30 Am. St. Rep. 318, 16 L. R. A. 198; Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. 1051; Packer *v.* Thompson, 25 Nebr. 688, 41 N. W. 650.

37. *California.*— Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

Dakota.— Rathbone *v.* Coe, 6 Dak. 91, 50 N. W. 620.

Minnesota.— Luce *v.* Clarke, 49 Minn. 356, 51 N. W. 1162.

Missouri.— Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387; Lyman *v.* Campbell, 34 Mo. App. 213.

Pennsylvania.— Sea Grove Bldg., etc., Assoc. *v.* Stockton, 148 Pa. St. 146, 23 Atl. 1063.

Washington.— McCain *v.* Gibbons, 7 Wash. 314, 35 Pac. 64.

United States.— Le Roy *v.* Crowninshield, 2 Mason 151, 15 Fed. Cas. No. 8,269; Canadian Pac. R. Co. *v.* Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470.

See LIMITATIONS OF ACTIONS.

Statutory provisions.—In some of the states there are statutes permitting foreign statutes of limitations to be pleaded.

Alabama.— Minniece *v.* Jeter, 65 Ala. 222.

Illinois.— Wooley *v.* Yarnell, 142 Ill. 442, 32 N. E. 891.

Kansas.— Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270.

Kentucky.— Labatt *v.* Smith, 83 Ky. 599; Northwestern Mut. L. Ins. Co. *v.* Lowry, 20 S. W. 607, 14 Ky. L. Rep. 600.

Maine.— Frye *v.* Parker, 84 Me. 251, 24 Atl. 844.

Massachusetts.— McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666.

See LIMITATIONS OF ACTIONS.

38. *Alabama.*— Seay *v.* Palmer, 93 Ala. 381, 9 So. 601, 30 Am. St. Rep. 57.

Iowa.— Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343.

Kansas.—Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497.

Mississippi.— Illinois Cent. R. Co. *v.* Smith, 70 Miss. 344, 12 So. 461, 35 Am. St. Rep. 651, 19 L. R. A. 577.

Tennessee.— Carson *v.* Memphis, etc., R. Co., 88 Tenn. 646, 13 S. W. 588, 17 Am. St. Rep. 921, 8 L. R. A. 412; Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623; Emmett *v.* Emmett, 14 Lea 369; Lisenbee *v.* Holt, 1 Sneed 42; Hawkins *v.* Pearce, 11 Humphr. 44.

United States.— Mason *v.* Beebee, 44 Fed. 556.

See EXEMPTIONS; HOMESTEADS.

39. *Alabama.*—East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 355.

Colorado.— Atchison, etc., R. Co. *v.* Maggard, 6 Colo. App. 85, 39 Pac. 985.

Illinois.— Wabash R. Co. *v.* Dougan, 142 Ill. 248, 31 N. E. 596, 34 Am. St. Rep. 74.

Iowa.— Lyon *v.* Callopy, 87 Iowa 567, 54 N. W. 476, 43 Am. St. Rep. 396; Broadstreet *v.* Clark, 65 Iowa 670, 22 N. W. 919; Leiber *v.* Union Pac. R. Co., 49 Iowa 688; Newell *v.* Hayden, 8 Iowa 140.

Kansas.— Missouri Pac. R. Co. *v.* Maltby, 34 Kan. 125, 8 Pac. 235; Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497.

Michigan.— Detroit First Nat. Bank *v.* Burch, 80 Mich. 242, 45 N. W. 93; Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382.

Pennsylvania.— Morgan *v.* Neville, 74 Pa. St. 52.

See also EXEMPTIONS.

40. Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97; Medbury *v.* Hopkins, 3 Conn. 472; Phelps *v.* Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755. See also BANKRUPTCY, 5 Cyc. 407; INSOLVENCY.

41. See BANKRUPTCY, 5 Cyc. 390 *et seq.*

42. Smith *v.* Healy, 4 Conn. 49; Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97; Woodbridge *v.* Wright, 3 Conn. 523; Freeman *v.* Kolarek, 3 N. Y. St. 283; Whitte-

e. Whether an Instrument Is a Specialty. The remedy on a contract under seal, and the question whether a contract is under seal, is determined by the *lex fori*.[43] If an instrument has a scrawl instead of a seal, it must be treated as a simple contract and sued on as such in a jurisdiction where a scrawl is not regarded as sufficient to create a specialty, whatever may be the *lex loci contractus*.[44]

f. Whether Remedy Is at Law or in Equity. If, where a contract is sought to be enforced, the remedy is in equity, a suit in equity must be brought, although the remedy may be at law in the jurisdiction where the contract was made.[45] But, although the contract must be enforced, if at all, according to the local form of proceeding, it should be enforced in such a manner as to give effect to the same according to the law which gave it validity.[46]

g. Parties. So also the question as to who are the proper parties to the action is to be determined by the *lex fori*.[47]

h. Admissibility of Evidence. And questions as to the admissibility and effect of evidence relate to the remedy and are to be determined by the *lex fori*.[48]

C. Defenses — 1. In General. Nothing need be said in this connection in regard to such defenses as fraud, misrepresentation not amounting to fraud, mistake, duress, undue influence, illegality, incapacity to contract, want of consideration, or failure of consideration, for these have already been fully treated.[49] An agreement between the defendant and a third party to which the plaintiff has not

more *v.* Adams, 2 Cow. (N. Y.) 626; Peck *v.* Hozier, 14 Johns. (N. Y.) 346; Smith *v.* Spinolla, 2 Johns. (N. Y.) 198; Titus *v.* Hobart, 5 Mason (U. S.) 378, 23 Fed. Cas. No. 14,063; Hinkley *v.* Marean, 3 Mason (U. S.) 88, 12 Fed. Cas. No. 6,523; De la Vega *v.* Vianna, 1 B. & Ad. 284, 8 L. J. K. B. O. S. 388, 20 E. C. L. 487; Imlay *v.* Ellefsen, 2 East 453.

43. *Maryland.*— Trasher *v.* Everhart, 3 Gill & J. 234.

New Hampshire.— Douglas *v.* Oldham, 6 N. H. 150.

New York.— Andrews *v.* Herriot, 4 Cow. 508 [*overruling* Meredith *v.* Hinsdale, 2 Cai. 362].

United States.— Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151; U. S. Bank *v.* Donnally, 8 Pet. 361, 8 L. ed. 974.

England.— Adam *v.* Kers, 1 B. & P. 360.

44. Douglas *v.* Oldham, 6 N. H. 150; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508.

45. Burchard *v.* Dunbar, 82 Ill. 450, 25 Am. Rep. 334; Halley *v.* Ball, 66 Ill. 250.

46. Camfranque *v.* Burnell, 1 Wash. (U. S.) 340, 4 Fed. Cas. No. 2,342.

47. Wilson *v.* Clark, 11 Ind. 385; Lynch *v.* Postlethwaite, 7 Mart. (La.) 69, 12 Am. Dec. 495. Thus the *lex fori*, and not the *lex loci contractus*, determines the question as to whether the action should be brought in the name of the assignor of a contract to the use of the assignee, or by the assignee in his own name. Glenn *v.* Busey, 5 Mackey (D. C.) 233.

48. *Alabama.*— Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

Connecticut.— Downer *v.* Chesebrough, 36 Conn. 39, 4 Am. Rep. 29.

Georgia.— Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77, 18 S. E. 290.

Kentucky.— Steele *v.* Curle, 4 Dana 381.

Massachusetts.— Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

New York.— Genet *v.* Delaware, etc., Canal Co., 56 N. Y. Super. Ct. 27, 4 N. Y. Suppl. 880.

Pennsylvania.— Musser *v.* Stauffer, 192 Pa. St. 398, 44 Wkly. Notes Cas. 331, 43 Atl. 1018.

Rhode Island.— Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

Virginia.— Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

United States.— Pritchard *v.* Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. ed. 104.

England.— Wiedemann *v.* Walpole, [1891] 2 Q. B. 534, 60 L. J. Q. B. 762, 40 Wkly. Rep. 114; Brown *v.* Thornton, 6 A. & E. 185, 6 L. J. K. B. 82, 1 N. & P. 339, W. W. & D. 11, 33 E. C. L. 117; Acebal *v.* Levy, 10 Bing. 376, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180; Leroux *v.* Brown, 12 C. B. 801, 16 Jur. 1021, 22 L. J. C. P. 1, 1 Wkly. Rep. 22, 74 E. C. L. 801; Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289. In Bain *v.* Whitehaven, etc., R. Co., 3 H. L. Cas. 1, 19, Lord Brougham said: "Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises."

49. As to fraud in inception of contract see *supra*, VI, D.

As to misrepresentation not amounting to fraud see *supra*, VI, C.

As to mistake see *supra*, VI, B.

As to duress see *supra*, VI, E.

As to undue influence see *supra*, VI, F.

As to illegality see *supra*, VII.

As to incapacity to contract see *supra*, V, B.

As to want of consideration see *supra*, IV.

As to failure of consideration see *supra*, IV, H.

given his assent cannot be made a matter of defense.[50] Although the defendant might have claimed that the plaintiff forfeited his contract, yet if the defense was not placed upon that ground the rights of the parties must be determined by the terms of the contract.[51] If he who is to be benefited by another's performance of his contract is himself the occasion of its not being carried into execution, the contract is thereby dissolved and the defense is complete.[52] The mere assignment of one excuse for not performing a contract is no evidence of a waiver of any other defense, unless the excuse assigned is inconsistent with the subsequent defense.[53] Where a verbal contract is the consideration for a written one, a breach thereof may be shown in defense to an action on the written contract as a failure of consideration,[54] and such evidence is not open to the objection that it varies the terms of the written contract.[55] A previous attempted repudiation of the contract on the part of the plaintiff which has been successfully resisted by the defendant is no defense when the plaintiff seeks to enforce performance. The defense in the former suit amounts to a constant tender of performance and a waiver of any demand of performance if any were necessary.[56] If a contract is legal the motive of a party who enters into it is not the subject of judicial inquiry and can be no defense to an action on the contract.[57] The fact that there is an illegal and champertous agreement between the plaintiff and his attorney is no defense. Such defense can arise only when the champertous agreement itself is sought to be enforced.[58] A debtor who is primarily liable cannot object that another who is jointly liable with him has not been sued at an earlier day upon a separate security given by the latter.[59] The plaintiff's breach of contract with a third person is no defense, although such contract was a part of the arrangement under which the defendant incurred the debt.[60] Nor will the plaintiff's surrender and cancellation of a contract with a third person on the best terms possible relieve the defendant from the payment of such damages as are the direct and natural result of his own breach of contract.[61] Where the defendant's breach of contract is complete and the damages have accrued, the fact that the plaintiff afterward puts it out of his power to tender performance is no defense.[62]

2. Equitable Defenses. In a large and increasing number of jurisdictions, equitable defenses may under statutes be set up in actions at law, although they must be tried in the manner prescribed for the trial of actions at law, unless the defendant seeks affirmative equitable relief.[63] And under the head of equitable defenses are included all matters which before would have authorized an application to the court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar.[64] At common law the rule is settled by a

50. Pugh *v.* Barnes, 108 Ala. 167, 19 So. 370; Dimmick *v.* Register, 92 Ala. 458, 9 So. 79; Carver *v.* Eads, 65 Ala. 190; Mason *v.* Hall, 30 Ala. 599; Huckabee *v.* May, 14 Ala. 263.

51. Taylor *v.* New York, 83 N. Y. 625.

52. Coke Litt. 210; Little *v.* Frost, 3 Mass. 106. See *supra*, IX, F, 4.

53. Parr *v.* Johnson, 37 Minn. 457, 35 N. W. 176; Clement *v.* Clement, 8 N. H. 210.

54. Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145; Trayer *v.* Reeder, 45 Iowa 272; Puttman *v.* Haltey, 24 Iowa 425.

55. Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145.

56. Sampson *v.* Warner, 48 Vt. 247.

57. Neel *v.* Bartow County, 94 Ga. 216, 21 S. E. 516.

58. *Georgia.*— Robison *v.* Beall, 26 Ga. 17.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

New Jersey.— Whitney *v.* Kirtland, 27 N. J. Eq. 333.

United States.— Courtright *v.* Burnes, 3 McCrary 60, 13 Fed. 317.

England.— Elborough *v.* Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. Rep. N. S. 68, 18 Wkly. Rep. 913; Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105.

See Champerty and Maintenance, 6 Cyc. 880.

59. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

60. Linden *v.* Black, 6 Colo. App. 174, 40 Pac. 241.

61. Blagen *v.* Thompson, 23 Oreg. 239, 31 Pac. 647, 18 L. R. A. 315.

62. Crane *v.* Powell, 19 N. Y. Suppl. 220, 46 N. Y. St. 668.

63. Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881; Buford *v.* Louisville, etc., R. Co., 82 Ky. 286. And see Actions, 1 Cyc. 737 *et seq.*; Commercial Paper, 8 Cyc. 26.

64. Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152. See Actions, 1 Cyc. 737 *et seq.*

long line of cases that equitable defenses cannot be set up in an action at law on a contract.[65]

3. Agreement Not to Sue — a. In General. According to many of the earlier cases, an agreement to extend the time of payment of a debt or not to sue for a certain time cannot be pleaded in bar of an action brought before the expiration of the time stipulated;[66] and upon this principle it has been held that an agreement made *pendente lite* that the suit shall abide the event of another action cannot be set up as a bar to the suit if the plaintiff afterward chooses to proceed.[67] The rule does not apply to a covenant never to sue. Such a covenant amounts to a release and may be pleaded in bar of a subsequent action.[68] Even in the case of an agreement not to sue for a limited time the tendency of modern decisions is to maintain that the new agreement operates directly on the original contract, and

Taking advantage of one's pecuniary distress to obtain from him an undue sacrifice may be sufficient for an equitable defense when he is sued at law on the contract. Buford *v.* Louisville, etc., R. Co., 82 Ky. 286.

Statutory provision.— Iowa Code (1873), § 2740, providing that in an action at law defendant may set forth in his answer as many causes of defense, "whether legal or equitable," as he may have, in an action at law on a contract whereby plaintiff transferred to defendant his interest in a partnership, defendant may answer that the contract was procured by fraud and entered into through mistake as to the liabilities of the firm; no affirmative relief being asked. Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881.

65. *Illinois.*— Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511.

Maine.— Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.

Michigan.— Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. 63.

Missouri.— Martin *v.* Turnbaugh, 153 Mo. 172, 54 S. W. 515.

New Jersey.— Stryker *v.* Vanderbilt, 25 N. J. L. 482.

North Carolina.— Dempsey *v.* Rhodes, 93 N. C. 120.

United States.— Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052; Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Robinson *v.* Campbell, 3 Wheat. 212, 4 L. ed. 372; Courtright *v.* Burnes, 3 McCrary 60, 13 Fed. 317 (holding that the defense of want of consideration may ordinarily be made at law, but that when a determination of the question of consideration depends upon the settlement of the affairs of a partnership some of the members of which are not before the court, it is a question for equitable jurisdiction, and such a defense cannot be made to an action at law).

England.— Scholey *v.* Mearns, 7 East 147.

See Actions, 1 Cyc. 737, note 91.

66. *California.*—Howland *v.* Marvin, 5 Cal. 501.

Colorado.—Walling *v.* Warren, 2 Colo. 434.

Illinois.— Ralph *v.* Baxter, 66 Ill. 416; Archibald *v.* Argall, 53 Ill. 307; Hill *v.* Enders, 19 Ill. 163; Guard *v.* Whiteside, 13 Ill. 7; H. B. Pitts' Sons' Mfg. Co. *v.* Commercial Nat. Bank, 21 Ill. App. 483.

Indiana.— Mills *v.* Todd, 83 Ind. 25; Irons *v.* Woodfill, 32 Ind. 40; Newkirk *v.* Neild, 19 Ind. 194, 81 Am. Dec. 383; Murphy *v.* Robbins, 17 Ind. 422; Lowe *v.* Blair, 6 Blackf. 282; Mendenhall *v.* Lenwell, 5 Blackf. 125, 33 Am. Dec. 458; Berry *v.* Bates, 2 Blackf. 118; Brown *v.* Shelby, 4 Ind. App. 477, 31 N. E. 89; Huggins *v.* Tinsman, Wils. 291.

Maryland.—Clopper *v.* Union Bank, 7 Harr. & J. 92, 16 Am. Dec. 294.

Massachusetts.— Rodocanachi *v.* Buttrick, 125 Mass. 134; Foster *v.* Purdy, 5 Metc. 442; Allen *v.* Kimball, 23 Pick. 473; Fullam *v.* Valentine, 11 Pick. 156; Perkins *v.* Gilman, 8 Pick. 229; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94; Brigham *v.* Eveleth, 9 Mass. 538.

Missouri.— Wesson *v.* Horner, 25 Mo. 81.

New Jersey.—Hoffman *v.* Brown, 6 N. J. L. 429.

New York.— Winans *v.* Huston, 6 Wend. 471; Chandler *v.* Herrick, 19 Johns. 129.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

Virginia.— Ward *v.* Johnson, 6 Munf. 6, 8 Am. Dec. 729.

Wisconsin.— Illinois State Bank *v.* Corwith, 6 Wis. 551; Millett *v.* Hayford, 1 Wis. 401.

England.— Webb *v.* Spicer, 13 Q. B. 886, 66 E. C. L. 886; Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852; Ayliff *v.* Scrimsheire, 1 Show. 46, 2 Salk. 573. In Ayliff *v.* Scrimsheire, *supra*, the obligee covenanted with the obligor not to put his bond in suit for ninety-nine years, and it was held that the covenant could not be pleaded in bar to an action on the bond.

See 11 Cent. Dig. tit. "Contracts," §§ 1572, 1573; and Commercial Paper, 7 Cyc. 875.

The reason for the rule is that if the defendant be allowed to plead such covenant in bar and succeed on his plea, the plaintiff will be precluded from bringing a second action after the time limited has expired. Walling *v.* Warren, 2 Colo. 434; Guard *v.* Whiteside, 13 Ill. 7; Foster *v.* Purdy, 5 Metc. (Mass.) 442; Winans *v.* Huston, 6 Wend. (N. Y.) 471.

67. Jewett *v.* Cornforth, 3 Me. 107.

68. *Connecticut.*— Jones *v.* Quinnipiack Bank, 29 Conn. 25.

Georgia.—Marietta Sav. Bank *v.* Janes, 66 Ga. 286.

is intended by the parties to be a mere modification of the rights and obligations incident to that contract, and not a distinct and independent undertaking upon which a separate action must be brought; and that it is therefore a good defense to an action brought on the original contract before the time limited has expired.[69]

b. Action For the Breach. In the case of an agreement or covenant not to sue for a limited time the defendant's remedy, according to the earlier cases above referred to, is upon the covenant or agreement, by a direct action to recover damages for the breach thereof.[70] And it has been held that such breach cannot be set up by way of counter-claim.[71]

c. Plea in Abatement. If there is a binding agreement for an extension of the time of payment, and the plaintiff proceeds prematurely, the defendant may plead the agreement in abatement of the action.[72]

d. Agreement Not to Sue One of Several Joint Contractors. A covenant or agreement not to sue one of several joint obligors or promisors will operate as a discharge of the obligation or debt as to him;[73] but it will not operate as a discharge or release of the other obligors or promisors, and it cannot be pleaded as a bar to an action against them to recover on the original contract.[74]

4. Who May Urge Defenses. A defendant who is bound by the contract sued on is in no position to object to the misjoinder of a co-defendant who is not

Illinois.— Guard *v.* Whiteside, 13 Ill. 7.
Indiana.— Harvey *v.* Harvey, 3 Ind. 473; Reed *v.* Shaw, 1 Blackf. 245.
Maine.— McAllester *v.* Sprague, 34 Me. 296; Walker *v.* McCulloch, 4 Me. 421.
Massachusetts.— Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; Foster *v.* Purdy, 5 Metc. 442; Shed *v.* Pierce, 17 Mass. 623; Sewall *v.* Sparrow, 16 Mass. 24; Upham *v.* Smith, 7 Mass. 265; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.
Michigan.— Morgan *v.* Butterfield, 3 Mich. 615.
Mississippi.— Stebbins *v.* Niles, 25 Miss. 267.
New York.— Brown *v.* Williams, 4 Wend. 360; Jackson *v.* Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Chandler *v.* Herrick, 19 Johns. 129; Cuyler *v.* Cuyler, 2 Johns. 186.
Wisconsin.—Millett *v.* Hayford, 1 Wis. 401.
United States.— Garnett *v.* Mason, 2 Brock 185, 10 Fed. Cas. No. 5,245, 6 Call (Va.) 308.

A covenant not to sue generally without any limitation as to time is construed as a covenant never to sue. Reed *v.* Shaw, 1 Blackf. (Ind.) 245; Lane *v.* Owings, 3 Bibb (Ky.) 247; Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Phelps *v.* Johnson, 8 Johns. (N. Y.) 54.

69. *California.*— Leslie *v.* Conway, 59 Cal. 442.
Maine.— Smith *v.* Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464.
Michigan.— Morgan *v.* Butterfield, 3 Mich. 615; Robinson *v.* Godfrey, 2 Mich. 408.
Minnesota.— Lyman *v.* Rasmussen, 27 Minn. 384, 7 N. W. 687.
New York.— Pearl *v.* Wells, 6 Wend. 291, 21 Am. Dec. 328.
Pennsylvania.— Blackburn *v.* Ormsby, 41 Pa. St. 97.
Texas.— Blair *v.* Reid, 20 Tex. 310.
Washington.— Staver *v.* Missimer, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142.
See 11 Cent. Dig. tit. "Contracts," §§ 1572, 1573.

70. *California.*—Howland *v.* Marvin, 5 Cal. 501.
Illinois.— Ralph *v.* Baxter, 66 Ill. 416; Guard *v.* Whiteside, 13 Ill. 7.
Indiana.— Berry *v.* Bates, 2 Blackf. 118.
Maryland.— Clopper *v.* Union Bank, 7 Harr. & J. 92, 16 Am. Dec. 294.
Massachusetts.— Rodocanachi *v.* Buttrick, 125 Mass. 134.
New Jersey.—Hoffman *v.* Brown, 6 N. J. L. 429.
New York.— Winans *v.* Huston, 6 Wend. 471.
England.— Deux *v.* Jefferies, Cro. Eliz. 352.

71. Newkirk *v.* Neild, 19 Ind. 194, 81 Am. Dec. 383. But in Blair *v.* Reid, 20 Tex. 310, it was held that the debtor might plead the covenant not to sue in suspension of the action; and that he might also plead in reconvention against the covenantor, damages accruing from the breach of it. See also Recoupment, Set-Off, and Counter-Claim.

72. Culver *v.* Johnson, 90 Ill. 91; Archibald *v.* Argall, 53 Ill. 307; H. B. Pitts' Sons' Mfg. Co. *v.* Commercial Nat. Bank, 21 Ill. App. 483; Millett *v.* Hayford, 1 Wis. 401.

73. Goodnow *v.* Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; Sewall *v.* Sparrow, 16 Mass. 24; Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

74. *Maine.*—McLellan *v.* Cumberland Bank, 24 Me. 566; Walker *v.* McCulloch, 4 Me. 421.
Massachusetts.— Shed *v.* Pierce, 17 Mass. 623; Tuckerman *v.* Newhall, 17 Mass. 581.
Missouri.— Carondelet *v.* Desnoyer, 27 Mo. 36.
New Hampshire.— Durell *v.* Wendell, 8 N. H. 369.
New York.— Couch *v.* Mills, 21 Wend. 424; Chenango Bank *v.* Osgood, 4 Wend. 607; Catskill Bank *v.* Messenger, 9 Cow. 37; Row-

bound.[75] One debtor who is primarily liable cannot urge that another, who is jointly liable with him, has not been sued at an earlier day upon a separate security given by him.[76] But in an action to recover damages for breach of the defendant's agreement to do certain acts necessary to fix the liability of a third party upon a contract between him and the plaintiff, the defendant may avail himself of any defense which such third party could have set up, since, if such defense is established, the plaintiff could not have recovered of the third party, even if the defendant had done his duty.[77] Where a party, not himself bound by a contract because of non-compliance with statutory provisions, seeks to enforce it against one who is bound, or does not rely on the statute, the defendant cannot set up in defense the voidability of the obligation as to the plaintiff.[78] An agreement among creditors not to sue their debtor without the concurrence of a majority of the creditors does not inure to the benefit of the debtor, and he cannot plead it in bar of an action against him by one of the creditors.[79] A contractor who agrees with another contractor to go on and complete the work stands in the original contractor's shoes, and can recover nothing except what the latter would have been entitled to recover.[80] But if he makes a contract with the owner to go on and complete the work according to the original specifications, his action to recover the contract price for doing the same is not subject or defenses which might have been set up against the original contractor.[81] To enable a party to use a set-off, it must exist in his own favor and not in the favor of a third person.[82]

5. Inconsistent Defenses. If a defendant sets up inconsistent defenses he may properly be compelled to elect upon which he will stand,[83] unless, as in some jurisdictions, a statute allows inconsistent defenses to be pleaded.[84] The test of inconsistent defenses is whether the proof of one will necessarily disprove the other.[85]

D. Time to Sue — 1. When Time For Performance Arrives. Parties have the right to make their contracts as stringent as they please, and to make time of the very essence of the contract; and if one party without the consent of the other allows the specified time to pass, no matter from what cause, without performing the condition, the stipulated consequences must follow.[86] A contract to pay money upon the happening of a given event matures on the instant the event happens,[87] but no cause of action accrues until the happening of the event.[88]

ley *v.* Stoddard, 7 Johns. 207; Harrison *v.* Close, 2 Johns. 448, 3 Am. Dec. 444.

See *supra*, X, D, 1, c.

75. Ruffatti *v.* Société Anonyme Des Mines De Lexington, 10 Utah 386, 37 Pac. 591.

76. Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.

77. Reed *v.* Darlington, 19 Iowa 349.

78. Evans *v.* Williamson, 79 N. C. 86; Green *v.* North Carolina R. Co., 77 N. C. 95.

79. Johnson *v.* Bamberger, (Ark. 1892) 19 S. W. 920.

80. Philadelphia Hydraulic Works *v.* Schenck, 80 Pa. St. 334.

81. Philadelphia Hydraulic Works *v.* Schenck, 80 Pa. St. 334.

82. Reed *v.* Darlington, 19 Iowa 349. See Recoupment, Set-Off, and Counter-Claim.

83. Conway *v.* Wharton, 13 Minn. 158, holding thus where the defendant pleaded that the contract sued on had been "recouped, annulled, and modified." And see Pleading.

84. Societa Italiana Di Beneficenza *v.* Sulzer, 138 N. Y. 468, 34 N. E. 193. 52 N. Y. St. 904; Goodwin *v.* Wertheimer, 99 N. Y. 149; Bruce *v.* Burr, 67 N. Y. 237; Wendling *v.* Pierce, 27 N. Y. App. Div. 517, 50 N. Y. Suppl. 500; Buhler *v.* Wentworth, 17 Barb. (N. Y.) 649; Mott *v.* Burnett, 2 E. D. Smith (N. Y.) 50 [*reversing* 1 Code Rep. N. S. (N. Y.) 225]; Siriani *v.* Deutsch, 12 Misc. (N. Y.) 213, 34 N. Y. Suppl. 26, 67 N. Y. St. 892; Ross *v.* Duffy, 12 N. Y. St. 584; Stiles *v.* Comstock, 9 How. Pr. (N. Y.) 48; Otis *v.* Ross, 8 How. Pr. (N. Y.) 193, 11 N. Y. Leg. Obs. 343.

85. Cox *v.* Bishop, 55 Mo. App. 135; McCormick *v.* Kaye, 41 Mo. App. 263. By this test it has been held that a plea of *non est factum*, and non-performance by the plaintiff, are not so inconsistent that they cannot stand together. Cox *v.* Bishop, 55 Mo. App. 135. See also Pleading.

86. Heckard *v.* Sayre, 34 Ill. 142; Chrisman *v.* Miller, 21 Ill. 227; Bodine *v.* Glading, 21 Pa. St. 50, 59 Am. Dec. 749; Shaw *v.* Lewistown, etc., Tp. Co., 2 Penr. & W. (Pa.) 454; Hipwell *v.* Knight, 4 L. J. Exch. Eq. 52, 1 Y. & C. Exch. 401.

Maturity of bills and notes see Commercial Paper, 7 Cyc. 838 *et seq.*

87. Green *v.* Robertson, 64 Cal. 75, 28 Pac. 446.

88. Litsey *v.* Whittemore, 111 Ill. 267; Crandall *v.* Payne, 54 Ill. App. 644.

2. Action Prematurely Brought. As a rule an action on a contract commenced before the time of performance arrives is premature and the defendant may plead in abatement.[89]

3. When Defendant Has Put It Out of His Power to Perform. But where a party bound to the future performance of a contract puts it out of his power to perform it, the other party may treat this as a breach and sue him at once, for there is an immediate right of action for a breach of the contract by anticipation.[90]

4. When Defendant Declares His Intention Not to Perform. And the cases go a step further. Although strictly and technically speaking there can be no breach of contract until the time for performance has arrived, yet if, before that time arrives, the promisor expressly renounces the contract and declares his intention not to perform it, the promisee may, in most jurisdictions, treat this as a breach, and may at once bring an action for damages. That is, positive notice of an intended breach of a contract to be performed *in futuro* may be treated as an actual breach.[91] There is, however, another course open to the promisee. He

89. *Alabama.*— Friedman *v.* McAdory, 85 Ala. 61, 4 So. 835; Thompson *v.* Gordon, 72 Ala. 455.

Colorado.— Walling *v.* Warren, 2 Colo. 434.

Georgia.— Hall *v.* Page, 4 Ga. 428, 48 Am. Dec. 235.

Illinois.— Culver *v.* Johnson, 90 Ill. 91; Palmer *v.* Gardiner, 77 Ill. 143; Archibald *v.* Argall, 53 Ill. 307; Snydacker *v.* Madill, 24 Ill. 138; Dunn *v.* Moore, 16 Ill. 151; Crandall *v.* Payne, 54 Ill. App. 644.

Iowa.— Litchfield Mfg. Co. *v.* Gallagher, 98 Iowa 390, 67 N. W. 371; Woodworth *v.* Williams, 66 Iowa 86, 23 N. W. 276.

Kentucky.— Triplett *v.* Mockbees, 5 J. J. Marsh. 219.

Massachusetts.— Gaffney *v.* Hicks, 124 Mass. 301.

Mississippi.—Fugate *v.* Hendricks, 31 Miss. 306.

Missouri.— Tobin *v.* McCann, 17 Mo. App. 481.

New Hampshire.— Knowlton *v.* Tilton, 38 N. H. 257.

New York.— Campbell *v.* Campbell, 65 Barb. 639; Childs *v.* Smith, 38 How. Pr. 328.

North Carolina.—Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698; Lawing *v.* Rintels, 97 N. C. 350, 2 S. E. 252; Brewer *v.* Tysor, 48 N. C. 180.

Ohio.— Voelckel *v.* Banner Brewing Co., 9 Ohio Cir. Ct. 318, 6 Ohio Cir. Dec. 180.

Pennsylvania.— Gordon *v.* Kennedy, 2 Binn. 287.

Tennessee.— Arnold *v.* Elliott, 7 Humphr. 354.

Wisconsin.— Bannister *v.* Patty, 35 Wis. 215; Smith *v.* Malbon, 4 Wis. 300.

United States.— Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. 419, 13 L. ed. 479.

Action on last day for performance.—Where the plaintiff has performed the contract on his part, an action brought on the last day appointed for the defendant's performance is premature, because the defendant has the whole of that day in which to make performance. Harris *v.* Blen, 16 Me. 175. See Commercial Paper, 7 Cyc. 842, 873.

90. *Illinois.*— Lee *v.* Pennington, 7 Ill. App. 247.

Iowa.— Crabtree *v.* Messersmith, 19 Iowa 179.

Massachusetts.— Jewett *v.* Brooks, 134 Mass. 505; Heard *v.* Bowers, 23 Pick. 455; Trask *v.* Vinson, 20 Pick. 105.

New York.— Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227; Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561, 51 N. Y. St. 277; Ferris *v.* Spooner, 102 N. Y. 10, 5 N. E. 773; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Crist *v.* Armour, 34 Barb. 378.

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

See *supra*, IX, F, 4.

Performance rendered impossible.— When a person agrees to do an act by a certain time, and before that time arrives does something which renders it impossible for him to perform the act, there is an immediate breach of contract, on which an action may be brought before the time of performance arrives. Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Fox *v.* Kitton, 19 Ill. 519; Lee *v.* Pennington, 7 Ill. App. 247; Lovelock *v.* Franklyn, 8 Q. B. 371, 10 Jur. 246, 15 L. J. Q. B. 146, 55 E. C. L. 371; Bowdell *v.* Parsons, 10 East 359.

91. *Iowa.*— Holloway *v.* Griffith, 32 Iowa 409, 7 Am. Rep. 208; Crabtree *v.* Messersmith, 19 Iowa 179.

Kansas.— Thurber *v.* Ryan, 12 Kan. 453; Kennedy *v.* Rodgers, 2 Kan. App. 764, 44 Pac. 47.

Maine.— Hobbs *v.* Moore, 86 Me. 517, 30 Atl. 110.

Maryland.— Eckenrode *v.* Canton Chemical Co., 55 Md. 51; Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

Minnesota.— Smith *v.* Barringer, 37 Minn. 94, 33 N. W. 116.

New Hampshire.— Lamoreaux *v.* Rolfe, 36 N. H. 33.

New York.— Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Burtis *v.* Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Lee *v.*

may if he pleases treat the notice of intended breach as inoperative and await the time when the contract is to be performed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as himself, and he remains subject to all his own obligations and liabilities under the contract, and enables the other party not only to complete the contract, notwithstanding his previous repudiation of it, but also to take advantage of any intervening circumstance which would justify him in declining to complete it.[92]

E. Fulfilment of Conditions Precedent — 1. In General. If the plaintiff's right of action depends upon a condition precedent, he must allege and prove the fulfilment of the condition or a legal excuse for its non-fulfilment. And if he omits such allegation, his declaration, complaint, or petition will be bad on demurrer.[93]

2. Performance Dependent Upon Happening of Contingency. If a party agrees

Decker, 3 Abb. Dec. 53, 2 Transcr. App. 248, 6 Abb. Pr. N. S. 392; Clegg *v.* New York Newspaper Union, 72 Hun 395, 25 N. Y. Suppl. 565, 55 N. Y. St. 464.

United States.— Horst *v.* Roehm, 84 Fed. 565.

England.— Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Elderton *v.* Emmons, 6 C. B. 160, 60 E. C. L. 160; Danube, etc., R. Co. *v.* Xenos, 11 C. B. N. S. 152, 31 L. J. C. P. 84, 5 L. T. Rep. N. S. 527, 103 E. C. L. 152 [*affirmed* in 13 C. B. N. S. 825, 8 Jur. N. S. 439, 31 L. J. C. P. 284, 10 Wkly. Rep. 320, 106 E. C. L. 825]; Bowdell *v.* Parsons, 10 East 359; Avery *v.* Bowden, 5 E. & B. 714, 85 E. C. L. 714; Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 20 Eng. L. & Eq. 157, 75 E. C. L. 678.

See 11 Cent. Dig. tit. "Contracts," § 1587; and *supra*, IX, F, 3.

Contrary rule.— The rule in regard to the effect of notice of intended breach is not uniform. In Massachusetts it is held that in order to charge one in damages for breach of an executory personal contract the other party must show a refusal or neglect to perform at a time when and under such circumstances that he is or may be entitled to require performance. Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384; Carpenter *v.* Holcomb, 105 Mass. 280; Hapgood *v.* Shaw, 105 Mass. 276; Pomroy *v.* Gold, 2 Metc. (Mass.) 500; Frazier *v.* Cushman, 12 Mass. 277. In Daniels *v.* Newton, 114 Mass. 530, 19 Am. Rep. 384, Wells, J., said that this was undoubtedly the interpretation of the common law in all the earlier decisions, and cited Lovelock *v.* Franklyn, 8 Q. B. 371, 10 Jur. 246, 15 L. J. Q. B. 146, 55 E. C. L. 371; Ripley *v.* McClure, 4 Exch. 345, 18 L. J. Exch. 419; Phillpotts *v.* Evans, 5 M. & W. 475, 9 L. J. Exch. 33. But when a part only of the goods has been delivered under an entire contract of sale, and one party refuses to complete it by delivering or accepting the remainder, the other party may then elect to treat such refusal as a repudiation or rescission of the unfulfilled part of the contract. Mansfield *v.* Trigg, 113 Mass. 350. If the seller refuse to deliver, the purchaser may recover back any excess of purchase-money that has been paid by him beyond the price of what has been delivered. Mansfield *v.* Trigg, 113 Mass. 350; Hill *v.* Rewee, 11 Metc. (Mass.) 268. If the breach of contract on the part of the seller is only in the quality of the goods, the other party cannot convert that into a rescission, but must, if he intends to rescind at all, rescind *in toto*. Barrie *v.* Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91; Mansfield *v.* Trigg, 113 Mass. 350; Morse *v.* Brackett, 98 Mass. 205; Clark *v.* Baker, 5 Metc. (Mass.) 452. This distinction, and the principle upon which it rests, is applicable to a defendant resisting payment as well as to a plaintiff seeking to recover back what he has overpaid. Mansfield *v.* Trigg, 113 Mass. 350.

92. New Brunswick, etc., R. Co. *v.* Wheeler, 12 Fed. 377; Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Barrick *v.* Buba, 2 C. B. N. S. 563, 89 E. C. L. 563; Reid *v.* Hoskins, 6 E. & B. 953, 3 Jur. N. S. 238, 26 L. J. Q. B. 5, 5 Wkly. Rep. 45, 88 E. C. L. 953; Avery *v.* Bowden, 5 E. & B. 714, 26 L. J. Q. B. 3, 5 Wkly. Rep. 45, 85 E. C. L. 714.

93. *Alabama.*— Flouss *v.* Eureka Co., 80 Ala. 30.

Arkansas.—McLaughlin *v.* Hutchins, 3 Ark. 207.

California.— Muller *v.* Ohm, 66 Cal. 475, 6 Pac. 102; Fisher *v.* Pearson, 48 Cal. 472.

Colorado.— Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236; McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014.

Illinois.— Meyers *v.* Phillips, 72 Ill. 460; Aledo *v.* Vincent, 59 Ill. App. 179.

Indiana.— Wheeler *v.* Hawkins, 101 Ind. 486.

Iowa.— Chicago, etc., R. Co. *v.* Burlington, etc., Elevator Co., 73 Iowa 629, 35 N. W. 654.

Kentucky.— Johnson *v.* Stokes, 9 Bush 279; Keys *v.* Powell, 2 A. K. Marsh. 253.

Massachusetts.— Newton Rubber Works *v.* Graham, 171 Mass. 352, 50 N. E. 547; Read

to pay money or do a particular thing on the happening of a contingeney, its happening is essential to give rise to an action on the contract.[94]

3. Condition to Be Performed by Stranger to Contract — a. In General. If a party undertake that a condition shall be performed by a stranger and the latter refuses, this is no excuse unless such refusal be procured by the other party.[95] That an obligation to pay money may be dependent upon the action of a third person over whom neither party has any control, and that payment cannot be exacted unless the specified act is performed, is familiar law.[96] According to the strict rules of the eommon law, if there be a condition precedent to do an impossible thing, the obligation being single, however impossible the thing may be, it must be eomplied with, or the right which was to attach on its being performed does not vest.[97] If a contraet provides for partial payments upon estimates, an allegation that the estimate was duly made is essential in an action to recover any stipulated partial payment.[98]

b. Certificates of Engineers and Architects. So if the contract is to be performed to the satisfaetion of a third person, as where the certificate of an engineer or architeet is required, or the price to be paid is dependent upon his deeision as to the quantity, quality, or price of materials, or the quality of workmanship, it must be alleged that the person designated has performed the stipulated condition, since until this is done or its performance excused the plaintiff was no right of action.[99] And if the plaintiff fails to allege performance of the

v. Smith, 1 Allen 519; Couch *v.* Ingersoll, 2 Pick. 292.

Missouri.— Connelly *v.* Priest, 72 Mo. App. 673.

New Hampshire.— Batchelder *v.* Wendell, 36 N. H. 204.

New Jersey.— Turner *v.* Wells, 64 N. J. L. 269, 45 Atl. 641; Bruen *v.* Ogden, 18 N. J. L. 124; Wolf *v.* Liverpool, etc., Ins. Co., 10 N. J. L. 325.

New York.— Duschnes *v.* Heyman, 2 N. Y. App. Div. 354, 37 N. Y. Suppl. 841, 73 N. Y. St. 53 [*affirmed* on opinion below in 158 N. Y. 735, 53 N. E. 1125]; Fogg *v.* Suburban Rapid Transit Co., 90 Hun 274, 35 N. Y. Suppl. 954, 70 N. Y. St. 627; Hatch *v.* Peet, 23 Barb. 575; Hand *v.* Shaw, 20 Misc. 698, 46 N. Y. Suppl. 528; Yorston *v.* Bouton, 4 N. Y. St. 36; Relyea *v.* Drew, 1 Den. 561; Dodge *v.* Coddington, 3 Johns. 146.

Tennessee.— Hyde *v.* Darden, 3 Heisk. 515.

Texas.— Thompson *v.* Houston, 31 Tex. 610.

Virginia.— Daniel *v.* Morton, 4 Munf. 120.

West Virginia.— Harris *v.* Lewis, 5 W. Va. 575.

Wisconsin.— Levis *v.* Black River Imp. Co., 105 Wis. 391, 81 N. W. 669; Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53; Smith *v.* Chicago, etc., R. Co., 19 Wis. 326.

United States.— Garrow *v.* Davis, 15 How. 272, 14 L. ed. 692; McDonald *v.* Hobson, 7 How. 745, 12 L. ed. 897; Wilcox *v.* Cohn, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640; Hart *v.* Rose, Hempst. 238, 11 Fed. Cas. No. 6,154*a*; Gill *v.* Stebbins, 2 Paine 417, 10 Fed. Cas. No. 5,431.

Canada.— Dufresne *v.* Jacques Cartier Bldg. Soc., 5 Rev. Lég. 235; Wood *v.* Higginbotham, 2 Rev. Lég. 28.

See *supra*, IX, C, 5; IX, F, 5; *infra*, XII, G, I, e.

94. Root *v.* Childs, 68 Minn. 142, 70 N. W. 1087; Wilson *v.* Clarke, 20 Minn. 367; Husenetter *v.* Gullikson, 55 Nebr. 32, 75 N. W. 41. See *supra*, IX, C, 5; *infra*, XII, G, 1, f.

95. Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 3 Rev. Rep. 323; Doughty *v.* Neal, 1 Saund. 215; Hesketh *v.* Gray, Say. 185; Hotham *v.* East India Co., 1 T. R. 638, 1 Rev. Rep. 333; Gruit *v.* Pinnell, 5 Vin. Abr. 27.

96. Miller *v.* Wilson, 37 Ill. App. 399; Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 3 Rev. Rep. 323.

97. Lord Kenyon, C. J., in Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 718, 3 Rev. Rep. 323.

98. Loup *v.* California Southern R. Co., 63 Cal. 97; Milton, etc., Turnpike Co. *v.* Hall, 10 Ind. 389.

99. *Alabama.*— Caldwell *v.* Harrison, 11 Ala. 755.

Illinois.— Gilmore *v.* Courtney, 158 Ill. 438; Arnold *v.* Burnique, 144 Ill. 132; Michaelis *v.* Wolf, 136 Ill. 68; Barney *v.* Giles, 120 Ill. 154; Coey *v.* Lehman, 79 Ill. 173; McAuley *v.* Carter, 22 Ill. 53; McAvoy *v.* Long, 13 Ill. 147; Illinois, etc., Canal *v.* Lynch, 10 Ill. 521; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204; Vincent *v.* Stiles, 77 Ill. App. 200; Miller *v.* Wilson, 37 Ill. App. 399.

Indiana.— New Telephone Co. *v.* Foley, 28 Ind. App. 418, 63 N. E. 56.

Missouri.— Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Dinsmore *v.* Livingston County, 60 Mo. 241.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— National Contracting Co. *v.* Hudson River Water Power Co., 170 N. Y. 439, 63 N. E. 450; Weeks *v.* O'Brien, 141

condition in declaring on the contract, he must be nonsuited on the ground of variance, the contract alleged being absolute, while that proved is conditional. So if the contract is truly stated, but the averment of a performance of the condition is omitted, the pleading will be held bad on demurrer or in arrest of judgment as showing no cause of action, or the plaintiff will be nonsuited because his evidence shows no right of action.[1] And a certificate given after the commencement of the action comes too late to save the plaintiff's case.[2]

c. Bad Faith of Arbiter. Bad faith and collusion on the part of the arbiter will absolve the contractor from further effort to procure a certificate, and if he alleges and proves these, he may recover on the special contract without the certificate, provided he also proves performance in other respects in accordance with the terms of the agreement,[3] or if the work has been fully performed, he may sue on the common counts and make any proof showing his right to recover,[4] for a party is not precluded from recovery merely because the arbiter agreed on by the parties in their contract refuses to act when duly requested.[5]

d. Obstruction by Defendant. If the party sued has by his own act or neglect prevented the performance of a condition precedent, he cannot take advantage of his own wrongful act, and the averment and proof of this fact will have the same effect as to the right of action as an award or decision according to the terms of the agreement; and for this purpose the acts of the defendant's agents and of persons for whose conduct he is responsible will have the same effect as his own.[6] But no evidence of the defendant's wrongful interference to prevent

N. Y. 199, 36 N. E. 185, 56 N. Y. St. 813; McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153; Fay *v.* Muhlker, 1 Misc. 321, 20 N. Y. Suppl. 671, 48 N. Y. St. 690; Diehl *v.* Schmalcker, 57 N. Y. Suppl. 244; Schencke *v.* Rowell, 3 Abb. N. Cas. 42; Smith *v.* Briggs, 3 Den. 73; Butler *v.* Tucker, 24 Wend. 447.

Pennsylvania.— Citizens' Trust, etc., Co. *v.* Howell, 19 Pa. Super. Ct. 255.

Wisconsin.— Coorsen *v.* Ziehl, 103 Wis. 381, 79 N. W. 562; John Pritzlaff Hardware Co. *v.* Berghoefer, 103 Wis. 359, 79 N. W. 564; Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980.

United States.— Low *v.* Fisher, 27 Fed. 542.

England.— Lowndes *v.* Stamford, 18 Q. B. 425, 16 Jur. 903, 21 L. J. Q. B. 371, 14 Eng. L. & Eq. 24, 83 E. C. L. 425; Brown *v.* Overbury, 34 Eng. L. & Eq. 610; Grafton *v.* Eastern Counties R. Co., 8 Exch. 699, 22 Eng. L. & Eq. 557; Thurnell *v.* Balbirnie, 1 Jur. 847, 6 L. J. Exch. 255, M. & H. 255, 2 M. & W. 786; Ess *v.* Trescott, 1 Jur. 358, 6 L. J. Exch. 144, M. & H. 75, 2 M. & W. 385; Marryat *v.* Broderick, 2 M. & W. 369.

See *supra*, IX, C, 5, g.

1. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402; Smith *v.* Briggs, 3 Den. (N. Y.) 73; Morgan *v.* Birnie, 9 Bing. 672, 3 Moore & S. 76, 23 E. C. L. 754; Ughtred's Case, 7 Coke 9*b*; Coombe *v.* Greene, 2 Dowl. N. S. 1023, 12 L. J. Exch. 58, 10 M. & W. 480.

2. De Mattos *v.* Jordan, 20 Wash. 315, 55 Pac. 118.

3. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449]; Fowler *v.* Deakman, 84 Ill. 130; Wicker *v.* Messinger, 22 Ohio Cir. Ct. 712, 12 Ohio Cir. Dec. 425; Pittsburg Terra Cotta Lumber Co. *v.* Sharp, 190 Pa. St. 256, 44 Wkly. Notes Cas. (Pa.) 5, 42 Atl. 685.

Evidence of bad faith.— The former membership of the architect in the board of directors of one of the contracting parties is not conclusive evidence on the question as to whether his conduct will excuse the other party from obtaining his certificate. Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

4. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449]; Fowler *v.* Deakman, 84 Ill. 130; Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Bollin *v.* Hooper, 127 Mich. 287, 86 N. W. 795; Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320.

5. Potter *v.* Holmes, 72 Minn. 153, 75 N. W. 591; Happel *v.* Marasco, 37 Misc. (N. Y.) 314, 75 N. Y. Suppl. 461.

6. *Connecticut.*— Miller *v.* Ward, 2 Conn. 494.

Kentucky.— Jones *v.* Walker, 13 B. Mon. 163, 56 Am. Dec. 557.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Kenniston *v.* Ham, 29 N. H. 501.

New York.— Mains *v.* Haight, 14 Barb. 76; Smith *v.* Gugerty, 4 Barb. 614; New York *v.* Butler, 1 Barb. 325; Taylor *v.* Bullen, 6 Cow. 624; Moakley *v.* Riggs, 19 Johns. 69, 10 Am. Dec. 196; Fleming *v.* Gilbert, 3 Johns. 528.

Oregon.— Meyers *v.* Pacific Constr. Co., 20 Oreg. 603, 27 Pac. 584.

Texas.— Putman *v.* Wheeler, 65 Tex. 522.

Vermont.— Camp *v.* Barker, 21 Vt. 469.

United States.— Williams *v.* U. S. Bank, 2 Pet. 96, 7 L. ed. 360.

England.— Thomas *v.* Fredericks, 10 Q. B.

the performance of the condition will be admissible, unless the proper averments are found in the plaintiff's pleadings.[7] If the defendant, before the action is brought, refuses to pay, not on the ground of the non-production of the certificate of the arbitrator, but for other reasons, the plaintiff need not allege or prove anything in regard to arbitration.[8]

F. Parties — 1. General Rule as to Who May Sue or Be Sued — a. At Common Law. There is no principle better settled at common law than that an action upon a contract, either express or implied, must be brought in the name of the party in whom the legal interest in such contract is vested.[9]

b. By Statute. But it is now provided by statute in many jurisdictions that actions shall be brought in the names of the real parties in interest.[10] The real party in interest is the person legally entitled to the proceeds of the claim in litigation.[11]

c. Stranger to Contract Cannot Be Sued Thereon. As a rule no one can incur liabilities under a contract to which he was not a party; and this proposition is a part of a wider rule to the effect that liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a person otherwise than by his act or consent.[12]

775, 11 Jur. 942, 16 L. J. Q. B. 393, 59 E. C. L. 775; Carpenter *v.* Blandford, 8 B. & C. 575, 7 L. J. K. B. O. S. 58, 3 M. & R. 93, 15 E. C. L. 285; Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 Moore & S. 51; Hotham *v.* East India Co., 1 T. R. 638, 1 Rev. Rep. 333.

See *supra*, IX, F, 5, d.

7. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Crandall *v.* Clark, 7 Barb. (N. Y.) 169; Baldwin *v.* Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Freeman *v.* Adams, 9 Johns. (N. Y.) 115; Phillips *v.* Rose, 8 Johns. (N. Y.) 392; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528.

8. Smith *v.* Alker, 102 N. Y. 87, 5 N. E. 791; Porter *v.* Swan, 14 Misc. (N. Y.) 406, 35 N. Y. Suppl. 1037, 70 N. Y. St. 758 [*affirmed* without opinion in 156 N. Y. 701, 51 N. E. 1093].

9. *Alabama.*—Callison *v.* Little, 2 Port. 89.

Arkansas.— Yell *v.* Snow, 24 Ark. 554; Hardie *v.* Mills, 20 Ark. 153; Dickinson *v.* Burr, 7 Ark. 34; Roane *v.* Lafferty, 5 Ark. 465; Phillips *v.* Pennywit, 1 Ark. 59.

Connecticut.— Potter *v.* Yale College, 8 Conn. 52.

Georgia.— Caruthers *v.* Wardlaw, Dudley 189.

Illinois.— Larned *v.* Carpenter, 65 Ill. 543; Dix *v.* Mercantile Ins. Co., 22 Ill. 272.

North Carolina.—Whitehead *v.* Reddick, 34 N. C. 95.

Ohio.— Miller *v.* Beebe, Wright 431.

Vermont.— Fugure *v.* St. Joseph Mut. Soc., 46 Vt. 362.

United States.— Hennessy *v.* Bond, 77 Fed. 403, 23 C. C. A. 203.

See 11 Cent. Dig. tit. "Contracts," § 1591 *et seq.*

10. *Alabama.*—Hirschfelder *v.* Mitchell, 54 Ala. 419; Moody *v.* Robertson, 46 Ala. 432.

California.— Western Development Co. *v.* Emery, 61 Cal. 611.

Indiana.— Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; State *v.* Ruhlman, 111 Ind. 17, 11 N. E. 793; Hancock *v.* Ritchie, 11 Ind. 48.

Missouri.— Cable *v.* St. Louis Mar. R., etc., Co., 21 Mo. 133.

Nebraska.— Farmers', etc., Ins. Co. *v.* Moore, 48 Nebr. 713, 67 N. W. 764; Kinsella *v.* Sharp, 47 Nebr. 664, 66 N. W. 634.

Nevada.— Smith *v.* Logan, 18 Nev. 149, 1 Pac. 678.

New York.— King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332, 15 N. Y. St. 996; Greene *v.* Niagara F. Ins. Co., 6 Hun 128.

Wisconsin.— Mann *v.* Ætna Ins. Co., 38 Wis. 114.

United States.—Elliot *v.* Teal, 5 Sawy. 188, 8 Fed. Cas. No. 4,389, Oregon statute.

11. *California.*— O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236; Western Development Co. *v.* Emery, 61 Cal. 611.

Colorado.— Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788; Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

Iowa.— Hewitt *v.* Young, 82 Iowa 224, 47 N. W. 1084; Phillips *v.* Bush, 15 Iowa 64.

Kentucky.— Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 11 Ky. L. Rep. 738, 25 Am. St. Rep. 536, 7 L. R. A. 77.

Missouri.— Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341; Williams *v.* Whitlock, 14 Mo. 552.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New York.— Avery *v.* New York Cent., etc., R. Co., 7 N. Y. Suppl. 341, 26 N. Y. St. 279.

North Carolina.—Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767.

Oregon.— Kimball Co. *v.* Bleick, 24 Oreg. 59, 32 Pac. 766.

See Parties.

The party in whose name a written contract is made, although it is made partly for the benefit of another, may sue thereon without joining the latter. Graham *v.* Franke, (Cal. 1894) 38 Pac. 455; Faust *v.* Goodnow, 4 Colo. App. 352, 36 Pac. 71.

12. Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Bolles *v.* Carli, 12 Minn. 113; Rossman *v.* Townsend, 17 Wis. 95, 85

Thus as a general proposition of law, a subcontractor cannot pass by his immediate employer and sue the principal or proprietor of the property upon which the work was done,[13] unless the latter has expressly assumed the obligation.[14]

2. Actions Upon Joint Contracts — a. Parties Plaintiff — (i) *General Rule at Common Law.* It is a well-settled principle of the common law that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-joinder of plaintiffs, not only by demurrer, but in arrest of judgment and under the plea of the general issue.[15] The non-joinder of a co-promisee as a plaintiff has also been held

Am. Dec. 733; Schmaling *v.* Thomlinson, 1 Marsh. 500, 6 Taunt. 147, 1 E. C. L. 549. A man cannot of his own will pay another man's debt without his consent, and thereby convert himself into a creditor. Hearn *v.* Cullin, 54 Md. 533; Durnford *v.* Messiter, 5 M. & S. 446. See *supra*, II.

13. Lake Erie, etc., R. Co. *v.* Eckler, 13 Ind. 67; McCluskey *v.* Cromwell, 11 N. Y. 593.

14. Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184. Thus where the principal contractor has made himself primarily liable to pay approved time-checks issued by a subcontractor the latter is not a necessary party to an action on the checks. San Antonio, etc., R. Co. *v.* Cockrill, 72 Tex. 613, 10 S. W. 702.

15. *Alabama.*— Masterson *v.* Phinizy, 56 Ala. 336; Fry *v.* Carter, 25 Ala. 479; Boyd *v.* Martin, 10 Ala. 700; Gayle *v.* Martin, 3 Ala. 593.

Arkansas.— McLeod *v.* Scott, 38 Ark. 72; Yell *v.* Snow, 24 Ark. 554; Beller *v.* Block, 19 Ark. 566.

California.— Mayo *v.* Stansbury, 3 Cal. 465; McGilvery *v.* Moorhead, 3 Cal. 267.

Colorado.— Davis *v.* Wannamaker, 2 Colo. 637.

Connecticut.—Wright *v.* Post, 3 Conn. 142; Beach *v.* Hotchkiss, 2 Conn. 697.

Delaware.— Reynolds *v.* Grier, 7 Houst. 329, 32 Atl. 172; Cannon *v.* Maull, 4 Harr. 223.

District of Columbia.— Snyder *v.* Finley, 1 MacArthur 220.

Illinois.— Tully *v.* Excelsior Iron-works, 115 Ill. 544, 5 N. E. 83; Phillips *v.* Singer Mfg. Co., 88 Ill. 305; Cottingham *v.* Owens, 71 Ill. 397; Archer *v.* Bogue, 4 Ill. 526; Connolly *v.* Cottle, 1 Ill. 364; Burns *v.* Follansbee, 20 Ill. App. 41.

Indiana.— Beard *v.* Lofton, 102 Ind. 408, 2 N. E. 129; Hansel *v.* Morris, 1 Blackf. 307.

Iowa.— McNamee *v.* Carpenter 56 Iowa 276, 9 N. W. 218; Linder *v.* Lake, 6 Iowa 164.

Kentucky.— Quisenberry *v.* Artis, 1 Duv. 30; Allen *v.* Lucket, 3 J. J. Marsh. 164; Jarman *v.* Howard, 3 A. K. Marsh. 383.

Louisiana.— Buckner *v.* Beaird, 32 La. Ann. 226; Alling *v.* Woodruff, 16 La. Ann. 6.

Maine.— Holyoke *v.* Loud, 69 Me. 59; Blanchard *v.* Dyer, 21 Me. 111, 38 Am. Dec. 253; Moody *v.* Sewall, 14 Me. 295; Jewett *v.* Weston, 11 Me. 346.

Massachusetts.—Brewer *v.* Stone, 11 Gray 228; Jellison *v.* Lafonta, 19 Pick. 244; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162.

Michigan.— Hallett *v.* Gordon, 122 Mich. 567, 81 N. W. 556, 82 N. W. 827; Osburn *v.* Farr, 42 Mich. 134, 3 N. W. 299.

Mississippi.— McMahon *v.* Webb, 52 Miss. 424.

Missouri.—Slaughter *v.* Davenport, 151 Mo. 26, 51 S. W. 471; Ryan *v.* Riddle, 78 Mo. 521; State *v.* Hesselmeyer, 34 Mo. 76; Rainey *v.* Smizer, 28 Mo. 310; Clark *v.* Cable, 21 Mo. 223; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Thieman *v.* Goodnight, 17 Mo. App. 429.

New Hampshire.— Titus *v.* Ash, 24 N. H. 319; Moore *v.* Chelsey, 17 N. H. 151.

New Jersey.— Field *v.* Runk, 22 N. J. L. 525; Suydam *v.* Combs, 15 N. J. L. 133.

New York.— Marie *v.* Garrison, 83 N. Y. 14; Smith *v.* Kerr, 3 N. Y. 144; Coster *v.* New York, etc., R. Co., 6 Duer 43; Union Ins. Co. *v.* Central Trust Co., 13 N. Y. Suppl. 17, 36 N. Y. St. 435; Emery *v.* Hitchcock, 12 Wend. 156; Tylee *v.* McLean, 10 Wend. 373; Ehle *v.* Purdy, 6 Wend. 629.

North Carolina.— Brown *v.* Bostian, 51 N. C. 1; Haughton *v.* Bayley, 31 N. C. 337.

Pennsylvania.— Meason *v.* Kaine, 67 Pa. St. 126; Marys *v.* Anderson, 24 Pa. St. 272, 2 Grant 446; Paul *v.* Witman, 3 Watts & S. 407; Morse *v.* Chase, 4 Watts 456; Boggs *v.* Curtin, 10 Serg. & R. 211; Sweigart *v.* Berk, 8 Serg. & R. 308.

Rhode Island.— Clapp *v.* Pawtucket Sav. Inst., 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915; Westgate *v.* Healy, 4 R. I. 523.

South Carolina.— Ellis *v.* McLemoor, 1 Bailey 13; Sims *v.* Tyre, 3 Brev. 249.

Tennessee.—McNairy *v.* Thompson, 1 Sneed 141.

Texas.— Stachely *v.* Peirce, 28 Tex. 328.

Vermont.— Lillie *v.* Lillie, 55 Vt. 470.

West Virginia.— Johnson *v.* McClung, 26 W. Va. 659.

Wisconsin.— Martin *v.* Martin, 3 Pinn. 272, 3 Chandl. 303.

United States.— Seymour *v.* Western R. Co., 106 U. S. 320, 1 S. Ct. 123, 27 L. ed. 103; Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67; Young *v.* Black, 1 Cranch C. C. 432, 30 Fed. Cas. No. 18,153.

England.— Petrie *v.* Bury, 3 B. & C. 353, 5 D. & R. 152, 3 L. J. K. B. O. S. 29, 27 Rev. Rep. 383, 10 E. C. L. 165; Scott *v.* Godwin, 1 B. & P. 67; Lucas *v.* Beale, 10 C. B. 739, 20 L. J. C. P. 134, 70 E. C. L. 739; Joll *v.* Howe, 4 C. B. 249, 4 D. & L. 810, 11 Jur. 737, 16 L. J. C. P. 172, 56

ground for a nonsuit.[16] The general rule holds, even though the amount due equitably belongs to one only of the joint obligees.[17] In an action of debt on a bond to joint obligees, the demand is for the penalty. The condition of the bond is no part of the obligation, and if by the condition the money to be recovered be not for the joint benefit of all, the suggestion of that fact cannot alter the obligation, but will show only that although all the parties to it should join in the suit and show a legal title to recover, the judgment will be for the use of the party named in the condition and equitably entitled to the money.[18] It is sufficient if all parties to the original contract with the defendant be joined as plaintiffs. Those who subsequently become interested without the defendant's privity are neither necessary nor proper parties.[19] The rule in short may be reduced to this: In actions *ex contractu* there must not be too many or too few parties plaintiff, and if there be either, the misjoinder or non-joinder will be fatal to a recovery.[20]

(II) *Right To Make Recalcitrant Obligee a Defendant.* Unless all living obligees agree to join, there can be no action on the contract; and this rule cannot be affected at common law, or the obligor deprived of the benefit of it, by bringing an action in the name of one joint obligee and making the other a defendant.[21] This hardship, however, has been very generally removed by statutes authorizing an aggrieved party to make any proper party plaintiff a defendant if he refuses to join in the capacity of a plaintiff, at the same time alleging in his pleadings the reason for doing so.[22]

(III) *Contract Joint in Form But Several in Interest.* Where a party makes a contract for the joint benefit of himself and another, the action may be maintained either in the name of the person with whom the contract was actually made or in the names of the parties really interested.[23] But where the interest is several the action must be several.[24] The rule is well settled by the decisions that although a man covenant with two or more jointly, yet if the inter-

E. C. L. 249; Anderson *v.* Martindale, 1 East 497, 6 Rev. Rep. 334; Bradburne *v.* Botfield, 14 L. J. Exch. 330, 14 M. & W. 559.

See 11 Cent. Dig. tit. "Contracts," § 1598 *et seq.*

16. Allen *v.* Lucket, 3 J. J. Marsh. (Ky.) 164; Holyoke *v.* Loud, 69 Me. 59. See Dismissal and Nonsuit. But see Trenor *v.* Central Pac. R. Co., 50 Cal. 222, holding that the objection will be considered as waived if not specially pleaded.

17. Farni *v.* Tesson, 1 Black (U. S.) 309, 17 L. ed. 67.

Want of interest in contract.— An action on a written contract made with two persons jointly may be brought in the names of both, although one had parted with his interest therein to the other before the contract was signed. Brewer *v.* Stone, 11 Gray (Mass.) 228.

18. Farni *v.* Tesson, 1 Black (U. S.) 309, 17 L. ed. 67.

19. *Louisiana.*— Torian *v.* Weeks, 46 La. Ann. 1502, 16 So. 405; McCord *v.* West Feliciana R. Co., 1 Rob. 519.

Maine.— Barstow *v.* Gray, 3 Me. 409.

Maryland.— Oelrichs *v.* Artz, 21 Md. 524.

Texas.— Maverick *v.* Maury, 79 Tex. 435, 15 S. W. 686.

Vermont.— Dennison *v.* Boylston, 48 Vt. 439.

See 11 Cent. Dig. tit. "Contracts," § 1600.

20. Starrett *v.* Gault, 165 Ill. 99, 46 N. E. 220; Tully *v.* Excelsior Iron-works, 115 Ill. 544, 5 N. E. 83; Snell *v.* De Land, 43 Ill. 323; Murphy *v.* Orr, 32 Ill. 489; Blakey *v.* Blakey, 2 Dana (Ky.) 460; Scott *v.* Patton, 1 A. K. Marsh. (Ky.) 441.

21. Eastman *v.* Wright, 6 Pick. (Mass.) 316; Clark *v.* Cable, 21 Mo. 223. But it has been held that where an instrument is jointly executed to several, one of the joint payees or obligees or his assignee may sue in the names of all without their consent. Wright *v.* McLemore, 10 Yerg. (Tenn.) 235.

22. *Colorado.*— Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788.

Georgia.— Fletcher *v.* Collier, 61 Ga. 653.

Indiana.— Wall *v.* Galvin, 80 Ind. 447; Hill *v.* Marsh, 46 Ind. 218; Shoemaker *v.* Grant County, 36 Ind. 175.

Kentucky.— Jones *v.* Johnson, 10 Bush 649.

Missouri.— McAllen *v.* Woodcock, 60 Mo. 174.

New York.— Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262; Cole *v.* Reynolds, 18 N. Y. 74; Coster *v.* New York, etc., R. Co., 6 Duer 43.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644.

Oregon.— State Ins. Co. *v.* Oregon R., etc., Co., 20 Oreg. 563, 26 Pac. 838.

Texas.— Houston, etc., R. Co. *v.* Hollingsworth, 2 Tex. App. Civ. Cas. § 173.

23. McCord *v.* Love, 3 Ala. 107; Skinner *v.* Stocks, 4 B. & Ald. 437, 23 Rev. Rep. 337, 6 E. C. L. 550.

24. Masterson *v.* Phinizy, 56 Ala. 336; No. 5 Min. Co. *v.* Bruce, 4 Colo. 293; Starrett

est and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant be joint.[25] And where the plaintiffs sue jointly, proof of a liability from the defendant to one plaintiff alone will not support the cause of action disclosed in the declaration.[26] In other words where parties sue jointly, they must show a joint interest in the subject-matter of the action.[27] And although a contract be in form, or by its terms, joint, yet if it be to pay a definite sum or to perform a distinct duty to each of the covenantees, the distinct interest of each in the separate subject-matter will give him a several right of action for the recovery of his own particular damages.[28]

(IV) *DEATH OF A JOINT OBLIGEE.* Where there is a joint interest in a contract and one of the parties interested dies before an action is brought, the action must be brought in the name of the survivor, and the declaration must set out the contract as it existed and show the interest of the plaintiff to be that of the survivor;[29] or as has been said: "If one of the joint covenantees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors."[30] And the personal representative of the deceased obligee or promisee is not a proper party to the action.[31]

(V) *INSOLVENCY OF A JOINT OBLIGEE.* A joint obligee who has made an assignment for the benefit of creditors under the insolvent laws of the forum cannot subsequently be joined as a plaintiff in an action on the instrument. The assignment divests the title of the insolvent, and disables him afterward to sue in his own name, and consequently the action must be prosecuted in the names of

v. Gault, 165 Ill. 99, 46 N. E. 220; Osborn v. Martha's Vineyard R. Co., 140 Mass. 549, 5 N. E. 486.

25. *District of Columbia.*— Fowler v. Great Falls Ice Co., 1 MacArthur 14.

Missouri.— Robbins v. Ayres, 10 Mo. 538, 47 Am. Dec. 125.

New Hampshire.— Gray v. Johnson, 14 N. H. 414.

South Carolina.— Ellis v. McLemoor, 1 Bailey 13.

England.— Withers v. Bircham, 3 B. & C. 254, 5 D. & R. 106, 3 L. J. K. B. O. S. 30, 27 Rev. Rep. 350, 10 E. C. L. 123; Windham's Case, 5 Coke 7*a*; James v. Emery, 2 Moore C. P. 195, 5 Price 529, 8 Taunt. 245, 19 Rev. Rep. 503, 4 E. C. L. 129; Eccleston v. Clipsham, 1 Saund. 153.

26. Strickland v. Burns, 14 Ala. 511.

27. Snell v. De Land, 43 Ill. 323.

28. *District of Columbia.*—Fowler v. Great Falls Ice Co. 1 MacArthur 14.

Indiana.— McIntosh v. Zaring, (1894) 38 N. E. 321.

Kansas.— Curry v. Kansas, etc., R. Co., 58 Kan. 6, 48 Pac. 579.

Kentucky.— Ford v. Bronaugh, 11 B. Mon. 14.

Louisiana.— Irish v. Wright, 12 Rob. 563.

Maryland.— Owings v. Owings, 1 Harr. & G. 484.

Massachusetts.— Carter v. Carter, 14 Pick. 424.

Michigan.— Rorabacher v. Lee, 16 Mich. 169.

New Hampshire.— Gray v. Johnson, 14 N. H. 414.

Pennsylvania.— Flinn v. McGonigle, 9 Watts & S. 75; Titus v. Catawissa R. Co., 5 Phila. 360, 21 Leg. Int. 37.

Vermont.— Parker v. Bryant, 40 Vt. 291.

United States.—Jewett v. Cunard, 3 Woodb. & M. 277, 13 Fed. Cas. No. 7,310.

See 11 Cent. Dig. tit. "Contracts," § 1598 *et seq.*

29. *Alabama.*— Callison v. Little, 2 Port. 89; Bebee v. Miller, Minor 364; Waters v. Creagh, Minor 128.

Arkansas.— Roane v. Lafferty, 5 Ark. 465.

Colorado.— Smith v. Salomon, 1 Colo. 176, 91 Am. Dec. 711.

Indiana.— Indiana, etc., R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5.

Kentucky.— Brown v. King, 1 Bibb 462; Morrison v. Winn, Hard. 480.

Massachusetts.— Donnell v. Manson, 109 Mass. 576; Smith v. Franklin, 1 Mass. 480.

Michigan.— Jackson v. People, 6 Mich. 154.

New Jersey.— Stowell v. Drake, 23 N. J. L. 310.

South Carolina.— Kinsler v. McCants, 4 Rich. 46, 53 Am. Dec. 711.

United States.— Robinson v. Hintrager, 36 Fed. 752; Dana v. Parker, 27 Fed. 263.

England.— Anderson v. Martindale, 1 East 497, 6 Rev. Rep. 334; Rolls v. Yate, Yelv. 177.

See 11 Cent. Dig. tit. "Contracts," § 1591 *et seq.*

30. Grier, J., in Farni v. Tesson, 1 Black (U. S.) 309, 17 L. ed. 67.

31. *Alabama.*— Bebee v. Miller, Minor 364.

Kentucky.— Clark v. Parish, 1 Bibb 547; Brown v. King, 1 Bibb 462; Morrison v. Winn, Hard. 480.

Massachusetts.—Smith v. Franklin, 1 Mass. 480; Walker v. Maxwell, 1 Mass. 104.

New York.— Daby v. Ericsson, 45 N. Y. 786.

North Carolina.— Bond v. Hilton, 51 N. C. 180.

the solvent obligee and the assignee.[32] It is otherwise if one of the plaintiffs is a foreign bankrupt[33] or has made his assignment under the laws of another state.[34]

(vi) *Severance by Agreement.* Where all the parties in interest in a joint contract agree to a severance of the joint interest and the obligor promises to pay each his several share, each may sue therefor, the action being based upon the promise to pay each severally, and not on the original joint promise; but the joint obligees cannot render the obligor liable to separate actions without his consent, by any agreement among themselves.[35] A debtor may, however, by his own act, render himself liable to a several action, as where he settles with a part of his joint creditors and refuses to settle with the rest.[36]

b. Parties Defendant — (i) *General Rule at Common Law.* In an action on a joint contract, all the obligors or makers must be made defendants according to the rule at common law.[37] If in an action properly brought against all the joint contractors, some of them are defaulted and others make a successful defense, no judgment can be rendered in favor of the plaintiff against the defendants who were in default, for judgment must be rendered against all or none.[38] If a joint promisor who is living at the time the action is commenced be not joined as a defendant, the non-joinder can ordinarily be taken advantage of only by a plea in abatement.[39] But if it appears on the face of the pleadings that an omitted party to a contract is living and jointly bound, the non-joinder may be taken advantage of by special demurrer, motion in arrest of judgment, or by writ of

See 11 Cent. Dig. tit. "Contracts," § 1598.

32. Willink *v.* Renwick, 23 Wend. (N. Y.) 63; Murray *v.* Murray, 5 Johns. Ch. (N. Y.) 60; Eckhardt *v.* Wilson, 8 T. R. 140, 4 Rev. Rep. 618; Graham *v.* Robertson, 2 T. R. 282.

33. Abraham *v.* Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738; Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433; Bird *v.* Pierpoint, 1 Johns. (N. Y.) 118.

34. Raymond *v.* Johnson, 11 Johns. (N. Y.) 488.

35. Beach *v.* Hotchkiss, 2 Conn. 697; Peters *v.* Davis, 7 Mass. 257; Austin *v.* Walsh, 2 Mass. 401; Angus *v.* Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758; Cummings *v.* Blaisdell, 43 Vt. 382. See also Buckner *v.* Beaird, 32 La. Ann. 226.

36. Beach *v.* Hotchkiss, 2 Conn. 697; Holland *v.* Weld, 4 Me. 255; Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Austin *v.* Walsh, 2 Mass. 401.

37. *Idaho.*— People *v.* Sloper, 1 Ida. 158.

Illinois.— Page *v.* Brant, 18 Ill. 37; Phillips *v.* Pitcher, 80 Ill. App. 219.

Indiana.— Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088; Beard *v.* Lofton, 102 Ind. 408, 2 N. E. 129; Bledsoe *v.* Irvin, 35 Ind. 293.

Louisiana.— Willis *v.* Wascy, 42 La. Ann. 876, 8 So. 591, 879; Beale *v.* Trudeau, 18 La. Ann. 129; Dougard *v.* Desangle, 10 Rob. 430; Bird *v.* Doiron, 7 Rob. 181; Duggan *v.* De Lizardi, 5 Rob. 224; Van Wyck *v.* Hills, 4 Rob. 140; Drew *v.* Atchison, 3 Rob. 140; Thompson *v.* Chrétien, 3 Rob. 26; New Orleans *v.* Ripley, 5 La. 120, 35 Am. Dec. 175.

Michigan.—Van Leyen *v.* Wreford, 81 Mich. 606, 45 N. W. 1116; Searles *v.* Reed, 63 Mich. 485, 29 N. W. 884.

Nebraska.— Perkins County *v.* Miller, 55 Nebr. 141, 75 N. W. 577.

New York.— Eaton *v.* Balcom, 33 How. Pr. 80.

South Carolina.— McCall *v.* Price, 1 McCord 82; Boykin *v.* Watson, 1 Treadw. 157.

Texas.— Hinchman *v.* Riggins, 1 Tex. App. Civ. Cas. § 294.

Vermont.— Smith *v.* Kellogg, 46 Vt. 560.

See 11 Cent. Dig. tit. "Contracts," § 1606.

38. Tuttle *v.* Cooper, 10 Pick. (Mass.) 281; Shirreff *v.* Wilks, 1 East 48, 5 Rev. Rep. 509.

39. *Arkansas.*—Hamilton *v.* Buxton, 6 Ark. 24.

Illinois.— Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

Indiana.— Bledsoe *v.* Irvin, 35 Ind. 293.

Kentucky.— Allen *v.* Lucket, 3 J. J. Marsh. 164; Mackall *v.* Roberts, 3 T. B. Mon. 130.

Maine.—Holyoke *v.* Loud, 69 Me. 59; Winslow *v.* Merrill, 11 Me. 127; Robinson *v.* Robinson, 10 Me. 240; Harwood *v.* Roberts, 5 Me. 441.

Maryland.—Cruzen *v.* McKaig, 57 Md. 454; Sittig *v.* Birkestack, 38 Md. 158; Merrick *v.* Metropolis Bank, 8 Gill 59.

Massachusetts.—Kendall *v.* Weaver, 1 Allen 277; Canfield *v.* Miller, 13 Gray 274; Edler *v.* Thompson, 13 Gray 91; Shelton *v.* Banks, 10 Gray 401; Wilson *v.* Nevers, 20 Pick. 20.

New Hampshire.— Gove *v.* Lawrence, 24 N. H. 128; Nealley *v.* Moulton, 12 N. H. 485; Powers *v.* Spear, 3 N. H. 35.

New York.— Williams *v.* Allen, 7 Cow. 316.

Ohio.— McArthur *v.* Ladd, 5 Ohio 514.

Pennsylvania.— Potter *v.* McCoy, 26 Pa. St. 458; Horton *v.* Cook, 2 Watts 40; Geddis *v.* Hawk, 1 Watts 280.

South Carolina.— Exum *v.* Davis, 10 Rich. 357.

Vermont.— McGregor *v.* Balch, 17 Vt. 562; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

United States.—Barry *v.* Foyles, 1 Pet. 311, 7 L. ed. 157.

England.— Rice *v.* Shute, 5 Burr. 2611, 2

error.[40] The non-joinder cannot be given in evidence under the general issue[41] or in covenant under the plea of covenants performed.[42] Misjoinder of parties defendant in actions *ex contractu* is fatal in whatever stage of a cause it is shown. The plaintiff must show a joint subsisting liability of all the defendants or he cannot recover against any.[43]

(II) *Where a Joint Obligor Is Dead.* If one of the joint contractors is dead, the survivors only should be made parties, and the personal representative of the decedent is not a proper party.[44]

(III) *Statutes Allowing Part to Be Sued.* By statute in some jurisdictions, in all cases of joint obligations, the action may be brought against all or any one or more of the persons liable.[45]

(IV) *Effect of Entering Judgment Against One Joint Debtor.* At common law, a judgment against one upon a joint contract of several persons, bars an action against the others, although the latter may have been dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when the action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, and the whole cause of action having passed *in rem judicatam*, their liability is entirely extinguished. They cannot be sued separately, for they have incurred no several liability; and they cannot be sued jointly with the others, because judgment has already been recovered against the latter, who would be subjected to two suits for the same cause of action, if they could be made joint parties in a second action.[46] But in a number of jurisdictions statutes commonly known as joint-debtor acts have been enacted, whereby it is provided in substance that in an action to recover a money judgment against two or more defendants alleged to be jointly liable, if the summons is served upon

W. Bl. 695; Cabell *v.* Vaughan, 1 Saund. 291; Abbot *v.* Smith, 2 W. Bl. 947.

See 11 Cent. Dig. tit. "Contracts," § 1605 *et seq.*

40. *Arkansas.*—Hamilton *v.* Buxton, 6 Ark. 24.

Illinois.— Dinet *v.* Reilly, 2 Ill. App. 316.

Indiana.— Bledsoe *v.* Irvin, 35 Ind. 293.

Kentucky.— Allen *v.* Lucket, 3 J. J. Marsh. 164.

New York.— Burgess *v.* Abbott, 6 Hill 135.

Vermont.— McGregor *v.* Balch, 17 Vt. 562.

41. Horton *v.* Cook, 2 Watts (Pa.) 40; Ives *v.* Hulet, 12 Vt. 314.

42. Horton *v.* Cook, 2 Watts (Pa.) 40.

43. Walcott *v.* Canfield, 3 Conn. 194; Kimmel *v.* Shultz, 1 Ill. 169; Erwin *v.* Devine, 2 T. B. Mon. (Ky.) 124; Max *v.* Roberts, 2 B. & P. N. R. 454, 12 East 89; Siffkin *v.* Walker, 2 Campb. 308, 11 Rev. Rep. 715; Barton *v.* Hanson, 2 Campb. 97, 2 Taunt. 49, 11 Rev. Rep. 524; Cooper *v.* Whitehouse, 6 C. & P. 545, 25 E. C. L. 568; Weall *v.* King, 12 East 452; Shirreff *v.* Wilks, 1 East 48, 5 Rev. Rep. 509; Jaques *v.* Whitcomb, 1 Esp. 361; Coope *v.* Eyre, 1 H. Bl. 37; Porter *v.* Harris, 1 Lev. 63; Mansell *v.* Burredge, 7 T. R. 352.

44. Stevens *v.* Catlin, 44 Ill. App. 114.

45. Bradford *v.* Toney, 30 Ark. 763; Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767; Exchange Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449; Kaestner *v.* Chicago First Nat. Bank, 170 Ill. 322, 48 N. E. 998 [*affirming* 68 Ill. App. 460]; Davis *v.* Sanderlin, 23 N. C. 389. Under the Arkansas statute, in an action upon a joint contract, the plaintiff may sue all or as many of the joint contractors as he may think proper. Johnson *v.* Byrd, Hempst. (U. S.) 434, 13 Fed. Cas. No. 7,376.

46. *California.*—Brady *v.* Reynolds, 13 Cal. 31.

Delaware.— Sydam *v.* Cannon, 1 Houst. 431.

Florida.— Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293.

Illinois.— Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850; People *v.* Harrison, 82 Ill. 84; Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Indiana.— Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Root *v.* Dill, 38 Ind. 169; Maghee *v.* Collins, 27 Ind. 83; Henderson *v.* Reeves, 6 Blackf. 101.

Massachusetts.— Kingsley *v.* Davis, 104 Mass. 178; Ward *v.* Johnson, 13 Mass. 148.

Michigan.— Candee *v.* Clark, 2 Mich. 255.

New York.— Suydam *v.* Barber, 18 N. Y. 468, 75 Am. Dec. 254; Averill *v.* Loucks, 6 Barb. 19; Benson *v.* Paine, 17 How. Pr. 407; Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227; Thomas *v.* Rumsey, 6 Johns. 26.

Ohio.— Sloo *v.* Lea, 18 Ohio 279.

Pennsylvania.— Smith *v.* Black, 9 Serg. & R. 142, 11 Am. Dec. 686.

Wisconsin.— Lauer *v.* Bandow, 48 Wis. 638, 4 N. W. 774.

United States.— U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295; Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; Woodworth *v.* Spafford, 2 McLean 168, 30 Fed. Cas. No. 18,020; Trafton

one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants, unless the court otherwise directs; and if he recovers final judgment, it may be taken against all the defendants thus jointly indebted, and enforced against the joint property of all and the individual property of those personally served or who voluntarily appeared.[47] Such judgment does not merge the cause of action as against defendants not served, and consequently cannot be pleaded in bar by them.[48] It is no evidence of a personal liability on their part outside of the state where the judgment was rendered;[49] but it is conclusive as to the liability of those served and will sustain an action against them in any other state.[50]

3. Actions Upon Joint and Several Contracts — a. Parties Defendant at Common Law. In an action upon a joint and several contract the obligee may, at common law, sue all or any one of the obligors, but he cannot join an intermediate number in the same action; that is, he must proceed either jointly against all or severally against each.[51] If, however, one of the obligors is dead, the obligee may sue the survivors without joining the personal representative of the deceased obligor.[52]

b. Effect of Judgment Against One. In the case of a joint and several contract, a recovery against one without satisfaction is no bar to an action against another. To constitute a bar it must be shown that the judgment has been fully satisfied, and a plea stopping short of this is not good.[53]

v. U. S., 3 Story 646, 24 Fed. Cas. No. 14,135.

England.— Kendall *v.* Hamilton, 4 App. Cas. 504; *Ex p.* Higgins, 3 De G. & J. 33, 4 Jur. N. S. 595, 27 L. J. Bankr. 27, 6 Wkly. Rep. 406, 60 Eng. Ch. 26; King *v.* Hoare, 2 D. & L. 382, 13 M. & W. 494, 14 L. J. Exch. 29.

Canada.— Harris *v.* Dunn, 18 U. C. Q. B. 352.

Decisions to the contrary.— In Sheeby *v.* Mandeville, 6 Cranch (U. S.) 253, Chief Justice Marshall announced a different conclusion, and there are a few cases in accord with his opinion. See Sneed *v.* Wiester, 2 A. K. Marsh. (Ky.) 277; Union Bank *v.* Hodges, 11 Rich. (S. C.) 480; State Treasurers *v.* Bates, 2 Bailey (S. C.) 362; Collins *v.* Lemasters, 1 Bailey (S. C.) 348, 21 Am. Dec. 469; Beazley *v.* Sims, 81 Va. 644. But the decision was distinctly overruled in Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783, where the rule is laid down as stated in the text.

47. Cal. Code Civ. Proc. § 413; Minn. Stats. (1894), § 5207; N. Y. Code Civ. Proc. §§ 1932–1935.

Judgment should be rendered against all. Sternberger *v.* Bernheimer, 121 N. Y. 194, 24 N. E. 311, 30 N. Y. St. 751; Kentucky Northern Bank *v.* Wright, 5 Rob. (N. Y.) 604; Niles *v.* Battershall, 2 Rob. (N. Y.) 146; Lahey *v.* Kingon, 13 Abb. Pr. (N. Y.) 192; Stannard *v.* Mattice, 7 How. Pr. (N. Y.) 4.

Such statutes are constitutional, if they go no further than to authorize the enforcement of the judgment against the joint property of all, and the individual property of the defendants served with process. Johnson *v.* Lough, 22 Minn. 203; Harker *v.* Brink, 24 N. J. L. 333; Patten *v.* Cunningham, 63 Tex. 666; Burnett *v.* Sullivan, 58 Tex. 535; Sugg *v.* Thornton, 132 U. S. 524, 10 S. Ct. 163, 33 L. ed. 447.

48. Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90; Mason *v.* Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; D'Arcy *v.* Ketchum, 11 How. (U. S.) 165, 13 L. ed. 648.

49. *Arkansas.*— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Iowa.— Newlon *v.* Heaton, 42 Iowa 593.

Massachusetts.— Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56.

Pennsylvania.— Rogers *v.* Burns, 27 Pa. St. 525; Steel *v.* Smith, 7 Watts & S. 447.

Virginia.—Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.

United States.— Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. ed. 648.

50. Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629.

51. *Maine.*— Bangor Bank *v.* Treat, 6 Me. 207, 19 Am. Dec. 210.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59.

Tennessee.— Claiborne *v.* Goodlove, Cooke 391.

Vermont.— Wright *v.* Hicks, Brayt. 22.

Virginia.— Leftwich *v.* Berkeley, 1 Hen. & M. 61.

United States.— Deloach *v.* Dixon, Hempst. 428, 7 Fed. Cas. No. 3,775.

England.— Enys *v.* Donnithorne, 2 Burr. 1190; Constable *v.* Clobery, Poph. 161; Streatfield *v.* Halliday, 3 T. R. 779.

52. Claiborne *v.* Goodloe, Cooke (Tenn.) 391.

53. *Colorado.*— Fitzgerald *v.* Burke, 14 Colo. 559, 23 Pac. 993.

Iowa.— Harlan *v.* Berry, 4 Greene 212.

Kentucky.— Elliot *v.* Porter, 5 Dana 299, 30 Am. Dec. 689.

c. Statutory Modification of Common-Law Rule. By statute in some jurisdictions the plaintiff may, upon a joint and several contract, sue all or any number of the obligors in one action.[54] Where this is so, the plaintiff may, after bringing suit against all, discontinue as to any defendant at any time before final judgment; and this will not operate as a discontinuance of the action, nor can the other defendants avail themselves of it.[55]

4. Actions by Assignees of Non-Negotiable Choses in Action — a. At Common Law Cannot Sue in His Own Name. It is a well-known rule at common law that a non-negotiable chose in action cannot be assigned so as to enable the assignee to sue on it in his own name.[56]

b. Otherwise in Equity. But this rule is of less importance than it might at first sight appear to be, for the assignee may go into chancery in his own name, if the case be a proper one for equitable jurisdiction.[57]

c. Action in Name of Original Creditor. And it has long been the rule that the assignee, as the equitable owner of the claim, may maintain an action at law in the name of the original creditor in whom the legal title to the claim is vested.[58] And the assignment of a chose in action is not defeated by the death of the assignor, for the assignee is entitled to sue in the name of his personal representative.[59] It does not lie in the mouth of the debtor to object to such use of the original creditor's name;[60] and a necessary nominal plaintiff can raise no valid

Massachusetts.—Ward *v.* Johnson, 13 Mass. 148; Simonds *v.* Center, 6 Mass. 18.

Nebraska.— McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

North Carolina.— Hix *v.* Davis, 68 N. C. 231.

South Carolina.— McMahon *v.* Murphy, 1 Bailey 535.

Tennessee.— Gratz *v.* Stump, Cooke 494.

United States.— Trafton *v.* U. S., 3 Story 646, 24 Fed. Cas. No. 14,135; U. S. *v.* Cushman, 2 Sumn. 310, 25 Fed. Cas. No. 14,907.

England.— Lechmere *v.* Fletcher, 1 Cr. & M. 623, 2 L. J. Exch. 219, 3 Tyrw. 450; Brown *v.* Wootton, Cro. Jac. 73; King *v.* Hoare, 2 D. & L. 382, 13 M. & W. 494, 14 L. J. Exch. 29; Claxton *v.* Swift, 3 Mod. 86, 2 Show. 494.

54. Hurlbutt *v.* N. W. Spalding Saw Co., 93 Cal. 55, 28 Pac. 795; People *v.* Love, 25 Cal. 520; Fitzgerald *v.* Burke, 14 Colo. 559, 23 Pac. 993; Deloach *v.* Dixon, Hempst. (U. S.) 428, 7 Fed. Cas. No. 3,775 (Arkansas).

55. Deloach *v.* Dixon, Hempst. (U. S.) 428, 7 Fed. Cas. No. 3,775, Arkansas.

56. Clark *v.* Parker, 4 Cush. (Mass.) 361; Jones *v.* Carter, 8 Q. B. 134, 10 Jur. 33, 15 L. J. Q. B. 96, 55 E. C. L. 134; Young *v.* Hughes, 4 H. & N. 76, 5 Jur. N. S. 102, 28 L. J. Exch. 161, 32 L. T. Rep. N. S. 259; Master *v.* Miller, 4 T. R. 320. See Assignments, 4 Cyc. 92.

57. Diccy Parties to Actions (2d ed.), p. 84; Rowe *v.* Dawson, Tudor L. Cas. in Eq. (2d ed.) 612, 651. And see Assignments, 4 Cyc. 95, 96.

58. *Georgia.*— Bowe *v.* Gress Lumber Co., 86 Ga. 17, 12 S. E. 177.

Illinois.— American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257; Henderson *v.* Welch, 8 Ill. 340; Chapman *v.* Shattuck, 8 Ill. 49.

Maine.— Ballard *v.* Greenbush, 24 Me. 336; Matthews *v.* Houghton, 10 Me. 420; Hackett *v.* Martin, 8 Me. 77.

Maryland.— Hampson *v.* Owens, 55 Md. 583; McNulty *v.* Cooper, 3 Gill & J. 214.

Massachusetts.—Rogers *v.* Union Stone Co., 134 Mass. 31; Williams *v.* Fowle, 132 Mass. 385; Mayhew *v.* Pentecost, 129 Mass. 332; Hall *v.* Dorchester Mut. F. Ins. Co., 111 Mass. 53, 15 Am. Rep. 1; Rockwood *v.* Brown, 1 Gray 261; Pitts *v.* Holmes, 10 Cush. 92, 97; Stone *v.* Hubbard, 7 Cush. 595; Clark *v.* Parker, 4 Cush. 361; Grover *v.* Grover, 24 Pick. 261, 35 Am. Dec. 319; Hodges *v.* Holland, 19 Pick. 43.

Michigan.— Park *v.* Toledo, etc., R. Co., 41 Mich. 352, 1 N. W. 1032; Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; Farwell *v.* Dewey, 12 Mich. 436.

Mississippi.— Eckford *v.* Hogan, 44 Miss. 398; Taylor *v.* Reese, 44 Miss. 89; Pearce *v.* Twichell, 41 Miss. 344.

New Hampshire.— Webb *v.* Steele, 13 N. H. 230.

New York.— Frear *v.* Evertson, 20 Johns. 142.

North Carolina.—Waterman *v.* Williamson, 35 N. C. 198.

Virginia.— Crews *v.* Farmers' Bank, 31 Gratt. 348.

United States.— Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299; York Bank *v.* Asbury, 1 Biss. 230, 30 Fed. Cas. No. 18,142; Suydam *v.* Ewing, 2 Blatchf. 359, 23 Fed. Cas. No. 13,655.

See Assignments, 4 Cyc. 92 *et seq.*

59. Sigourney *v.* Severy, 4 Cush. (Mass.) 176; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72. See Assignments, 4 Cyc. 94.

60. Pitts *v.* Holmes, 10 Cush. (Mass.) 92; Peters *v.* Gallagher, 37 Mich. 407; Gage *v.*

objection to the use of his name, even without his consent, if he is adequately protected against costs,[61] for it has long been the practice of courts of law to look beyond the nominal parties to the rights of the real parties in interest, and where a necessary nominal party, either plaintiff or defendant, refuses the use of his name, the court will, upon proper indemnity against costs and damages, permit the real party in interest to use the name of the nominal party, even against his protest.[62] And a nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit upon a collusive agreement with the defendant, create a valid bar against a subsequent suit upon the same cause of action.[63] The question whether a suit on a chose in action shall be brought in the name of the assignor or of the assignee is a question of the form of the remedy only and is to be determined by the *lex fori*.[64]

d. Actions on Bills and Notes Payable in Specific Articles. A bill or note payable in specific articles, being non-negotiable, must at common law be sued in the name of the drawer or payee for the use of the holder.[65] But if the maker of such a note expressly promises to pay to an assignee of the note the amount due thereon, the assignee may maintain the action in his own name.[66] And the holder may sue in his own name the payee who has passed the note with the indorsement, "Pay the bearer."[67] So if the note is in terms payable to the payee or bearer, the bearer may recover in his own name, provided he alleges and proves that the note was delivered to him for a good consideration.[68] The effect of a statute by which bills or notes for specific articles are made assignable is simply to give the assignee a right of action in his own name.[69]

e. Statutory Right of Real Party in Interest to Sue in His Own Name. It should be observed in this connection that the trend of modern legislation is to give the real party in interest a right to sue in his own name, and where such legislation exists, the assignee of any claim which is legally assignable may maintain an action at law thereon in his own name, whether the evidence of debt be negotiable or non-negotiable.[70] Each successive assignee by indorsement may

Kendall, 15 Wend. (N. Y.) 640; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52.

61. *Connecticut.*— Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Georgia.— Hargraves *v.* Lewis, 6 Ga. 207.

Illinois.— Henderson *v.* Welch, 8 Ill. 340; Chapman *v.* Shattuck, 8 Ill. 49.

Massachusetts.— Walker *v.* Brooks, 125 Mass. 241; Foss *v.* Lowell Five Cent Sav. Bank, 111 Mass. 285; Bates *v.* Kempton, 7 Gray 382; Rockwood *v.* Brown, 1 Gray 261; Dennis *v.* Twitchell, 10 Metc. 180.

Mississippi.— Anderson *v.* Miller, 7 Sm. & M. 586.

Missouri.— Asher *v.* St. Louis, etc., R. Co., 89 Mo. 116, 1 S. W. 123.

New Hampshire.— Gordon *v.* Drury, 20 N. H. 353; Webb *v.* Steele, 13 N. H. 230; Farnsworth *v.* Swett, 5 N. H. 267.

See ASSIGNMENTS, 4 Cyc. 92 *et seq.*

62. Sumner *v.* Sleeth, 87 Ill. 500.

63. Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79. See also Penobscot R. Co. *v.* Mayo, 60 Me. 306; Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586.

64. Mayhew *v.* Pentecost, 129 Mass. 332; Foss *v.* Nutting, 14 Gray (Mass.) 484; Warren *v.* Copelin, 4 Metc. (Mass.) 594.

65. Fahnestock *v.* Schoyer, 9 Watts (Pa.) 102; Sanford *v.* Huxley, 18 Vt. 170. See COMMERCIAL PAPER, 8 Cyc. 77.

66. Smith *v.* Berry, 18 Me. 122. See COMMERCIAL PAPER, 8 Cyc. 77.

67. Elkinton *v.* Fennimore, 13 Pa. St. 173.

68. Byington *v.* Geddings, 2 Ohio 227.

69. Moore *v.* Weir, 3 Sneed (Tenn.) 46.

70. *Alabama.*—Alabama Terminal, etc., Co. *v.* Knox, 115 Ala. 567, 21 So. 495; Kansas City, etc., R. Co. *v.* Cobb, 100 Ala. 228, 13 So. 938; Flexner *v.* Dickerson, 65 Ala. 72; Leonard *v.* Storrs, 31 Ala. 488.

California.— Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611; McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59.

Colorado.— Layton *v.* Kirkendall, 20 Colo. 236, 38 Pac. 55; Jackson *v.* Hamm, 14 Colo. 58, 23 Pac. 88; Limberg *v.* Higenbotham, 11 Colo. 156, 17 Pac. 481; Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423; Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

Idaho.— Brumback *v.* Oldham, 1 Ida. 709.

Indiana.— Root *v.* Moriarty, 39 Ind. 85; Hays *v.* Branham, 36 Ind. 219; Mewherter *v.* Price, 11 Ind. 199; Hancock *v.* Ritchie, 11 Ind. 48.

Iowa.— Abell Note Brokerage, etc., Co. *v.* Hurd, 85 Iowa 559, 52 N. W. 488; Rising *v.* Teabout, 73 Iowa 419, 35 N. W. 499; Miller *v.* Wolbert, 71 Iowa 539, 29 N. W. 620, 32 N. W. 402; Warnock *v.* Richardson, 50 Iowa 450; Knadler *v.* Sharp, 36 Iowa 232; Barthol *v.* Blakin, 34 Iowa 452; Cottle *v.* Cole, 20 Iowa 481.

maintain an action in his own name.[71] And where there is an indorsement in blank by one having the legal title any subsequent holder may fill it up and sue in his own name.[72]

G. Pleading — 1. Declaration, Complaint, or Petition — a. General Requisites. A declaration, complaint, or petition which shows the making of a contract between the plaintiff and the defendant, and its violation by the defendant, and alleges the amount of damages resulting to the plaintiff from the breach, contains the essential elements of a good cause of action *ex contractu*.[73] The plaintiff

Kansas.— Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372; Schnier *v.* Fay, 12 Kan. 184; Williams *v.* Norton, 3 Kan. 295.

Kentucky.—Brooking *v.* Clarke, 2 Litt. 197; Rogge *v.* Cassidy, 13 S. W. 716, 12 Ky. L. Rep. 54.

Massachusetts.— Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438, 37 Am. Rep. 376; Spofford *v.* Norton, 126 Mass. 533; National Pemberton Bank *v.* Porter, 125 Mass. 333, 28 Am. Rep. 235; Beekman *v.* Wilson, 9 Metc. 434.

Minnesota.— Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930; Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777; White *v.* Phelps, 14 Minn. 27, 100 Am. Dec. 190.

Mississippi.—Peebles *v.* Murphy, (1895) 17 So. 278; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280.

Missouri.— Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632; State *v.* Shelby, 75 Mo. 482; Long *v.* Heinrich, 46 Mo. 603; Simmons *v.* Belt, 35 Mo. 461; Hutchings *v* Weems, 35 Mo. 285; Brady *v.* Chandler, 31 Mo. 28; Willard *v.* Moies, 30 Mo. 142; Bennett *v.* Pound, 28 Mo. 598; Beattie *v.* Lett, 28 Mo. 596; Boeka *v.* Nuella, 28 Mo. 180; Thornton *v.* Crowther, 24 Mo. 164; Van Doren *v.* Relfe, 20 Mo. 455; Long *v.* Constant, 19 Mo. 320, 61 Am. Dec. 559; Walker *v.* Mauro, 18 Mo. 564; Webb *v.* Morgan, 14 Mo. 428; Haysler *v.* Dawson, 28 Mo. App. 531; Buffington *v.* South Missouri Land Co., 25 Mo. App. 492.

New York.— Sheridan *v.* New York, 68 N. Y. 30; Eaton *v.* Alger, 47 N. Y. 345; Meeker *v.* Claghorn, 44 N. Y. 349; Cummings *v.* Morris, 25 N. Y. 625; St. John *v.* American Mut. L. Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Devol *v.* Barnes, 7 Hun 342; Allgoever *v.* Edmunds, 66 Barb. 579; Clark *v.* Titcomb, 42 Barb. 122; Main *v.* Davis, 32 Barb. 461; Main *v.* Feathers, 21 Barb. 646; Billings *v.* Jane, 11 Barb. 620; Combs *v.* Bateman, 10 Barb. 573; Freeman *v.* Falconer, 45 N. Y. Super. Ct. 383; Houghton *v.* Dodge, 5 Bosw. 326; Baggott *v.* Boulger, 2 Duer 160; James *v.* Chalmers, 5 Sandf. 52; Sharp *v.* Edgar, 3 Sandf. 379; Bearns *v.* Gould, 8 Daly 384; Carpenter *v.* Cummings, 18 Misc. 587, 42 N. Y. Suppl. 239; Burtnett *v.* Gwynne, 2 Abb. Pr. 79.

North Carolina.— Swepson *v.* Harvey, 69 N. C. 387; Andrews *v.* McDaniel, 68 N. C. 385.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; Clawson *v.* Cone, 2 Handy 67, 12 Ohio Dec. (Reprint) 333.

Oregon.— Gregoire *v.* Rourke, 28 Oreg. 275, 42 Pac. 996; Dawson *v.* Pogue, 18 Oreg. 94, 22 Pac. 637, 6 L. R. A. 176.

South Dakota.— Coughran *v.* Sundback, 9 S. D. 483, 70 N. W. 644.

Texas.— Merlin *v.* Manning, 2 Tex. 351; McCarty *v.* Brackenridge, 1 Tex. Civ. App. 170, 20 S. W. 997.

Utah.— Wilson *v.* Kiesel, 9 Utah 397, 35 Pac. 488.

Washington.— Seattle Nat. Bank *v.* Emmons, 16 Wash. 585, 48 Pac. 262; McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209.

Wisconsin.— Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287; Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59; Gates *v.* Northern Pac. R. Co., 64 Wis. 64, 24 N. W. 494.

United States.— Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Dexter *v.* Sayward, 51 Fed. 729.

See Assignments, 4 Cyc. 96, 97.

71. Flexner *v.* Dickerson, 65 Ala. 72.

72. Flexner *v.* Dickerson, 65 Ala. 72; Phillips *v.* Sellers, 42 Ala. 658; Henley *v.* Bush, 33 Ala. 636; Skinner *v.* Bedell, 32 Ala. 44. See Commercial Paper, 8 Cyc. 75.

73. *Alabama.*— Hart *v.* Steele, (1891) 10 So. 243.

California.— Dunton *v.* Niles, 95 Cal. 494, 30 Pac. 762; Mann *v.* Higgins, 83 Cal. 66, 23 Pac. 206; Barber *v.* Cazalis, 30 Cal. 92.

Connecticut.—Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

Georgia.— Casey, etc., Mfg. Co. *v.* Dalton Ice Co., 94 Ga. 407, 20 S. E. 333; Mann *v.* Bowen, 85 Ga. 616, 11 S. E. 862; Brantley *v.* Mayo, 85 Ga. 606, 11 S. E. 864.

Indiana.— O'Neal *v.* Hines, 145 Ind. 32, 43 N. E. 946; Lines *v.* Wilson, 40 Ind. 111; Scobey *v.* Finton, 39 Ind. 275; Wolf *v.* Schofield, 38 Ind. 175; Jewett *v.* Siddons, 9 Ind. 455; Smith *v.* Miami County, 6 Ind. App. 153, 33 N. E. 243; Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139.

Iowa.— Wallace *v.* Ryan, 93 Iowa 115, 61 N. W. 395.

Kansas.— Myer *v.* Moon, 45 Kan. 580, 26 Pac. 40.

Kentucky.— Asher *v.* Stacey, 65 S. W. 603, 23 Ky. L. Rep. 1586.

Louisiana.— Miller *v.* Kline, 108 La. 31, 32 So. 197.

Maine.— Bean *v.* Ayers, 69 Me. 122.

Massachusetts.— Parker *v.* Russell, 133 Mass. 74.

Minnesota.— Deering *v.* Johnson, 86 Minn. 172, 90 N. W. 363; Lathrop *v.* O'Brien, 44 Minn. 15, 46 N. W. 147.

should allege clearly what was agreed to be done, what has been done, and what has been omitted, together with the damages resulting from the omission.[74]

b. Allegation or Statement of Contract or Promise — (i) *In General.* In declaring on a contract, the declaration, complaint, or petition must show a binding agreement between the parties,[75] and must state facts to show that the defendant is under a legal obligation or duty to the plaintiff.[76] An averment that by reason of a contract it became the duty of the defendant to do certain acts is insufficient. The facts must be stated from which the duty arose.[77] A chief object of formal written pleadings is to apprise the opposite party of the real cause of complaint against him, so that he may in like manner interpose the proper answer on his part, and that on the trial he may not be taken by surprise. This requires that the injury complained of should be stated with such fulness and certainty as to leave no reasonable doubt of the particular transaction on which the plaintiff relies, and which he intends to prove to establish his right of action. These are fundamental principles and apply to every pleading which is required to be special in its nature.[78] Consequently there must be an allegation that a contract was made between the parties or a statement of facts upon which a contract can be predicated.[79]

(ii) *Execution of Contract.* If the plaintiff declares on a written instrument he must allege that it was duly executed.[80] This averment is equivalent to

Nebraska.— Bryant *v.* Barton, 32 Nebr. 613, 49 N. W. 331; Lewis *v.* Owen, 26 Nebr. 156, 42 N. W. 285; Davenport *v.* Jennings, 25 Nebr. 87, 40 N. W. 952; Kelley *v.* Peterson, 9 Nebr. 76, 2 N. W. 346.

New York.— Austin *v.* Rawdon, 44 N. Y. 63; Crook *v.* Scott, 65 N. Y. App. Div. 139, 72 N. Y. Suppl. 516; Randolph *v.* Murray, 73 Hun 572, 26 N. Y. Suppl. 182, 56 N. Y. St. 224; Rowley *v.* Swift, 67 Hun 95, 22 N. Y. Suppl. 35, 51 N. Y. St. 377; Michel *v.* Colegrove, 61 N. Y. Super. Ct. 275, 19 N. Y. Suppl. 715, 47 N. Y. St. 937; Vanderbeek *v.* Hemmel, 25 Misc. 299, 54 N. Y. Suppl. 562.

North Carolina.— Fagg *v.* Southern Bldg., etc., Assoc., 113 N. C. 364, 18 S. E. 655.

Ohio.— Nott *v.* Johnson, 7 Ohio St. 270.

Texas.— Texas, etc., R. Co. *v.* Ross, 62 Tex. 447; Arkansas Constr. Co. *v.* Eugene, 20 Tex. Civ. App. 601, 50 S. W. 736; Beville *v.* Rush, (Civ. App. 1894) 25 S. W. 1022; Gribble *v.* Harry, 2 Tex. App. Civ. Cas. § 798.

Utah.— Musser *v.* Meears, 8 Utah 367, 31 Pac. 985.

Virginia.— Payne *v.* Grant, 81 Va. 164; Clark *v.* Franklin, 7 Leigh 1.

Washington.— Hanna *v.* Savage, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269.

Wisconsin.— Waterman *v.* Waterman, 81 Wis. 17, 50 N. W. 668.

United States.— Streeper *v.* Victor Sewing Mach. Co., 112 U. S. 676, 5 S. Ct. 327, 28 L. ed. 852; Hecker *v.* Fowler, 2 Wall. 123, 17 L. ed. 759.

See 11 Cent. Dig. tit. "Contracts," § 1623 *et seq.*

Erroneous theory of damages.—A complaint setting forth the contract and its breach may state a good cause of action, although the theory of damages predicated thereon may be erroneous. Kraft *v.* Rice, 45 N. Y. App. Div. 569, 61 N. Y. Suppl. 368.

74. Martin *v.* Woodall, 1 Stew. & P. (Ala.) 244; Woodward *v.* Gould, 27 Fed. 182.

75. *Alabama.*— Jones *v.* Powell, 15 Ala. 824.

Maryland.— Berry *v.* Harper, 4 Gill & J. 467.

Minnesota.— Starkey *v.* Minneapolis, 19 Minn. 203.

New York.— Lester *v.* Jewett, 12 Barb. 502.

Oregon.— Bowen *v.* Emmerson, 3 Oreg. 452.

See 11 Cent. Dig. tit. "Contracts," § 1640.

Complaint held insufficient.— A complaint in an action for breach of contract which alleges that the plaintiff has a contract with the defendant which he has always performed on his part, whereby the defendant was to deliver to him, at an agreed price and upon agreed terms, such newspapers as he might order, is insufficient as a statement of a valid, subsisting agreement, as neither the contract price nor the terms are stated, and it is not shown that the contract was binding on the other party. Collins *v.* American News Co., 74 N. Y. Suppl. 1123 [*affirming* 34 Misc. (N. Y.) 260, 69 N. Y. Suppl. 638].

76. Brewer *v.* Swartz, 94 Mo. App. 392, 68 S. W. 362; Lombardo *v.* Case, 45 Barb. (N. Y.) 95.

77. Buffalo *v.* Holloway, 7 N. Y. 493, 57 Am. Dec. 550.

78. Relyea *v.* Drew, 1 Den. (N. Y.) 561.

79. Hayden *v.* Steadman, 3 Oreg. 550; Martin *v.* Atkinson, 64 Wis. 493, 25 N. W. 655. An averment that the defendant signed and delivered to the plaintiff an agreement in writing is equivalent to an averment that the defendant entered into such agreement with the plaintiff. Waukon, etc., R. Co. *v.* Dwyer, 49 Iowa 121.

80. Elliott *v.* Champ, 91 Ind. 398; Petty *v.* Church of Christ, 70 Ind. 290; Bergmeier *v.* Eisenmenger, 59 Minn. 175, 60 N. W. 1097; Wiley *v.* San Pedro, etc., Co., 5 N. M. 111, 20 Pac. 115.

an averment of its delivery, because the execution of a written contract includes its delivery to the proper party.[81]

(III) *CERTAINTY OF STATEMENT.* The plaintiff must set for the subject-matter of the contract with sufficient certainty to make a possible adverse judgment a bar to another action.[82] Every material part of the contract must be averred or the action fails;[83] and it will not do to set forth the evidence of the contract instead of the contract itself.[84] A contract to do one or the other of two things must be stated in the alternative according to its terms. If it be stated as an absolute contract to do the thing actually done the variance will be fatal.[85] And a conditional contract must not be set forth as an absolute one, although the condition has been performed.[86] Stipulations necessary to make a contract reasonable will be implied and need not be alleged.[87] If, however, the contract be in restraint of trade, and it does not appear on the face of it that it is reasonable, it can be enforced only when it is made to appear from the pleadings and proof that the restraint is founded on a valuable consideration, and that it is reasonably necessary to protect the party in his business, and not oppressive.[88] And the burden of showing this rests on the party seeking to enforce the contract.[89]

(IV) *MODE OF STATING CONTRACT.* The plaintiff may if he chooses set out the contract in suit *in hæc verba*,[90] but this is not necessary, for it is sufficient to plead a contract according to its legal effect.[91] This rule is of very extensive

81. Prindle *v.* Caruthers, 15 N. Y. 425; Peets *v.* Bratt, 6 Barb. (N. Y.) 662; Churchill *v.* Gardner, 7 T. R. 596. Where it was alleged that the defendants were partners, that they executed the contract in suit, and that it was delivered to the plaintiff, it was held not necessary to aver also a delivery to the defendants. Bates *v.* Scheik, 47 Mo. App. 642.

82. Phillips *v.* Knight, 20 R. I. 624, 40 Atl. 762.

83. Dalton City Co. *v.* Johnson, 57 Ga. 398; Howard *v.* Chiles, 8 B. Mon. (Ky.) 377; Rose *v.* Jackson, 40 Mich. 29; Hatch *v.* Adams, 8 Cow. (N. Y.) 35.

84. Brunson *v.* Brunson, 2 Root (Conn.) 73; Dibblee *v.* Corbett, 9 Abb. Pr. (N. Y.) 200.

85. Stone *v.* Knowlton, 3 Wend. (N. Y.) 374; Hatch *v.* Adams, 8 Cow. (N. Y.) 35.

86. Stanwood *v.* Scovel, 4 Pick. (Mass.) 422; Lower *v.* Winters, 7 Cow. (N. Y.) 263; Couch *v.* Hooper, 2 Leigh (Va.) 557.

Defeasance of contract.—A conditional contract must not be set out as an absolute one, unless the condition be merely a defeasance of the contract. Stanwood *v.* Scovel, 4 Pick. (Mass.) 422.

87. Biggerstaff *v.* Briggs, (Cal. 1884) 4 Pac. 371.

88. *California.*— Callahan *v.* Donnolly, 45 Cal. 152, 13 Am. Rep. 172.

Georgia.— Holmes *v.* Martin, 10 Ga. 503.

Illinois.— Union Strawboard Co. *v.* Bonfield, 193 Ill. 420, 62 N. E. 1038, 86 Am. St. Rep. 346 [*affirming* 96 Ill. App. 413].

Massachusetts.— Taylor *v.* Blanchard, 13 Allen 370, 90 Am. Dec. 203.

New York.— Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Weller *v.* Hersee, 10 Hun 431; Holbrook *v.* Waters, 9 How. Pr. 335; Chappel *v.* Brockway, 21 Wend. 157.

Ohio.— Lange *v.* Werk, 2 Ohio St. 519.

Wisconsin.— Richards *v.* American Desk, etc., Co., 87 Wis. 503, 58 N. W. 787; Berlin Mach. Works *v.* Perry, 71 Wis. 495, 38 N. W. 82, 5 Am. St. Rep. 236; Kellogg *v.* Larkin, 3 Pinn. 123, 3 Chandl. 133, 56 Am. Dec. 164.

England.— Horner *v.* Graves, 7 Bing. 735, 9 L. J. C. P. O. S. 192, 5 M. & P. 768, 20 E. C. L. 326; Homer *v.* Ashford, 3 Bing. 322, 11 E. C. L. 162; Stuart *v.* Nicholson, 3 Bing. N. Cas. 113, 2 Hodges 191, 6 L. J. C. P. 66, 3 Scott 536, 32 E. C. L. 60; Chesman *v.* Nainby, 1 Bro. P. C. 234, 1 Eng. Reprint 536; Sainter *v.* Ferguson, 7 C. B. 716, 13 Jur. 828, 18 L. J. C. P. 217, 62 E. C. L. 716; Gale *v.* Reed, 8 East 80, 9 Rev. Rep. 376; Green *v.* Price, 9 Jur. 857, 14 L. J. Exch. 105, 13 M. & W. 695; Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 853; Ward *v.* Burne, 3 Jur. 1175, 9 L. J. Exch. 14, 5 M. & W. 548; Mitchel *v.* Reynolds, 1 P. Wms. 181, 24 Eng. Reprint 347; Davis *v.* Mason, 5 T. R. 118, 2 Rev. Rep. 562.

89. Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166.

90. Berry *v.* Kowalsky, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101; White *v.* Soto, 82 Cal. 654, 23 Pac. 210; Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Stoddard *v.* Treadwell, 26 Cal. 294; North *v.* Kizer, 72 Ill. 172.

91. *Alabama.*— Adams *v.* Davis, 16 Ala. 748.

California.— White *v.* Soto, 82 Cal. 654, 23 Pac. 210; Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602; Stoddard *v.* Treadwell, 26 Cal. 294.

Idaho.— Bray *v.* Elmore County Irr. Co., (1896) 44 Pac. 432.

Illinois.— North *v.* Kizer, 72 Ill. 172; American Express Co. *v.* Pinckney, 29 Ill. 392; Crittenden *v.* French, 21 Ill. 598; Fitzgerald *v.* Lorenz, 79 Ill. App. 651.

Indiana.— Madison County *v.* Miller, 87

operation, and applies not only to the statement of contracts in the action of assumpsit but also to the statement by either party of contracts and obligations of every description, whether verbal, written, or specialties, and in any form of action.[92] Where this mode of declaring on a written contract is adopted, it is sometimes customary to attach a copy of the contract as an exhibit;[93] and in some jurisdictions this is required.[94] But merely annexing to the declaration, complaint, or petition, as an exhibit, a copy of a contract in suit is not equivalent to positive allegations of the terms of such contract or a statement thereof *in hæc verba*.[95] A statement in a pleading inconsistent with the legal effect of a writing made a part of such pleading is no ground for demurrer.[96]

(v) *How Much of Contract Should Be Stated.* In order to avoid prolixity, so much of the contract as is essential to the cause of action should be set forth and no more, and this also may be stated according to its legal effect. The plaintiff is not bound to state that which is merely matter of evidence.[97] But

Ind. 257; Woodruff *v.* Noble Co., 10 Ind. App. 179, 37 N. E. 732.

Maryland.— Borden Min. Co. *v.* Barry, 17 Md. 419; Ridgely *v.* Riggs, 4 Harr. & J. 358; Walsh *v.* Gilmor, 3 Harr. & J. 383, 6 Am. Dec. 503.

Massachusetts.— Suffolk Bank *v.* Lowell Bank, 8 Allen 355; Higgins *v.* McDonnell, 16 Gray 386; Dexter *v.* Manley, 4 Cush. 14; Commercial Bank *v.* French, 21 Pick. 486, 32 Am. Dec. 280; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420; Hopkins *v.* Young, 11 Mass. 302; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

Mississippi.— Mullen *v.* Jelks, Walk. 205.

Missouri.— Jones *v.* Louderman, 39 Mo. 287; Moore *v.* Platte County, 8 Mo. 467.

New Hampshire.— Keyes *v.* Dearborn, 12 N. H. 52; Silver *v.* Kendrick, 2 N. H. 160.

New York.— New York News Pub. Co. *v.* National Steamship Co., 148 N. Y. 39, 42 N. E. 514; Barney *v.* Worthington, 37 N. Y. 112; Bennett *v.* Judson, 21 N. Y. 238; Farron *v.* Sherwood, 17 N. Y. 227; Brown *v.* Colie, 1 E. D. Smith 265; New York *v.* Doody, 4 Abb. Pr. 127; Thomas *v.* Van Ness, 4 Wend. 549; Scott *v.* Leiber, 2 Wend. 479; Grannis *v.* Clark, 8 Cow. 36; Close *v.* Miller, 10 Johns. 90.

Ohio.— Crawford *v.* Satterfield, 27 Ohio St. 421.

Vermont.— Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

See 11 Cent. Dig. tit. "Contracts," § 1652 *et seq.*

92. *Connecticut.*—Fish *v.* Brown, 17 Conn. 341; Andrews *v.* Williams, 11 Conn. 326.

Illinois.— White *v.* Thomas, 39 Ill. 227.

New York.— Candler *v.* Rossiter, 10 Wend. 487.

North Carolina.— Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 391.

Pennsylvania.— Davis *v.* Shoemaker, 1 Rawle 135.

South Carolina.— Morris *v.* Fort, 2 McCord 397; Allen *v.* Douglass, 2 Brev. 93.

Vermont.— Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

Virginia.— Woody *v.* Flournoy, 6 Munf. 506; Cooke *v.* Simms, 2 Call 39.

England.— Moore *v.* Plymouth, 3 B. & Ald. 66, 5 E. C. L. 48; Bushell *v.* Beavan, 1 Bing. N. Cas. 103, 3 L. J. C. P. 279, 4 Moore & S. 622, 27 E. C. L. 562; Price *v.* Birch, 1 Dowl. N. S. 720, 11 L. J. C. P. 193, 4 M. & G. 1, 43 E. C. L. 11; Blake *v.* Beaumont, 1 Dowl. N. S. 697, 11 L. J. C. P. 222, 4 M. & G. 7, 4 Scott N. R. 617, 43 E. C. L. 14; Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287; Wilson *v.* Bagshaw, 5 M. & R. 448; Stroud *v.* Gerrard, 1 Salk. 8; Baker *v.* Lade, 4 Mod. 149, 2 Vent. 145, 3 Lev. 291.

93. Howard Mfg. Co. *v.* Water Lot Co., 53 Ga. 689; Bray *v.* Elmore County Irr. Co., (Ida. 1896) 44 Pac. 432.

94 St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465, 33 N. E. 113; Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95. See also Moxley *v.* Moxley, 2 Metc. (Ky.) 309; Riggs *v.* Maltby, 2 Metc. (Ky.) 88.

Contract in foreign language.— The pleadings, however, should be in the English language. Hence it is not necessary to attach a copy of a contract in a foreign language. Christenson *v.* Gorsch, 5 Iowa 374.

95. Penrose *v.* Pacific Mut. L. Ins. Co., 66 Fed. 253; Oh Chow *v.* Hallett, 2 Sawy. (U. S.) 259, 18 Fed. Cas. No. 10,469.

96. McDonough *v.* Kane, 75 Ind. 181; Forst *v.* Elston, 13 Ind. 482; Johnson *v.* Tostevin, 60 Iowa 46, 14 N. W. 95.

97. *Alabama.*— Adams *v.* Davis, 16 Ala. 748; Brown *v.* Barnes, 6 Ala. 694; Blick *v.* Briggs, 6 Ala. 687.

Indiana.—Romel *v.* Alexander, 17 Ind. App. 257, 46 N. E. 595.

Maine.— Brown *v.* Attwood, 7 Me. 356.

Maryland.— Rich *v.* Boyce, 39 Md. 314; Hoke *v.* Wood, 26 Md. 453.

Massachusetts.—Couch *v.* Ingersoll, 2 Pick. 292.

Minnesota.— Estis *v.* Farnham, 11 Minn. 423.

Missouri.— Moore *v.* Mountcastle, 72 Mo. 605; Kercheval *v.* King, 44 Mo. 401; Warne *v.* Prentiss, 9 Mo. 544.

New York.— Smith *v.* Wiswall, 2 Hall 469; Logan *v.* Berkshire Apartment Assoc., 18 N. Y. Suppl. 164, 46 N. Y. St. 14; Williams *v.* Healey, 3 Den. 363; Sandford *v.* Halsey, 2 Den. 235; Henry *v.* Cleland, 14 Johns. 400.

while it is not necessary to set out more of an alleged contract than pertains to the obligation, the breach of which is complained of, yet if an alternative qualifies the obligation, the whole contract should be set out according to its legal effect or tenor;[98] or to say the least the omission of any part of the contract which materially qualifies and alters the legal nature of the promise alleged to have been broken will be fatal.[99] In other words if there is any part of an agreement which materially qualifies or varies the sense and legal effect of the parts set forth, care must be taken not to omit it in order to avoid a fatal variance.[1] It is not necessary for the plaintiff to set out the plans and specifications according to which he is to perform his contract or to attach them to his pleadings.[2] Nor is it necessary for him to set out another contract, the terms of which control his performance of the contract in suit.[3]

(VI) *ALLEGATION AS TO WRITING.* The general rule is that if a contract would have been good at common law before the passage of the statute of frauds, it is not necessary to aver that it is in writing. It is sufficient if the writing be produced in evidence at the trial.[4] But where the duty or liability is created by statute, and also required to be in writing, then it must be averred that the promise was in writing.[5] And there are cases which hold that all contracts within the statute of frauds are presumed to be oral, unless it is alleged that they are in writing.[6] When a contract consists of an oral agreement, a part of which only has been reduced to writing, it is proper to declare on it as a parol contract.[7]

North Carolina.— Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 291.

Vermont.— Allen *v.* Goff, 13 Vt. 148.

United States.— Wilcox *v.* Cohn, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640.

England.— Hill *v.* Saunders, 4 B. & C. 529, 10 E. C. L. 689, 2 Bing. 112, 9 E. C. L. 505, 1 C. & P. 80, 12 E. C. L. 56, 7 D. & R. 17, 4 L. J. K. B. O. S. 2, 9 Moore C. P. 238, 28 Rev. Rep. 375; Miles *v.* Sheward, 8 East 7; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

See 11 Cent. Dig. tit. "Contracts," § 1653.

Where defendant's undertaking was to do several separate and independent things, and the plaintiff complains only of a failure to do part of them, the stipulations as to the others need not be set out. Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

98. Hoke *v.* Wood, 26 Md. 453.

99. Moore *v.* Mountcastle, 72 Mo. 605.

1. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Butler *v.* Tucker, 24 Wend. (N. Y.) 447; Morgan *v.* Birnie, 9 Bing. 672, 3 Moore & S. 76, 23 E. C. L. 754; Howell *v.* Richards, 11 East 633, 11 Rev. Rep. 287; Miles *v.* Sheward, 8 East 7; Penny *v.* Porter, 2 East 2; Glenn *v.* Leith, 22 Eng. L. & Eq. 489; Grafton *v.* Eastern Counties R. Co., 8 Exch. 699, 22 Eng. L. & Eq. 557; Hotham *v.* East India Co., 1 T. R. 638, 1 Rev. Rep. 333. In Tempest *v.* Rawling, 13 East 18, 20, Lord Ellenborough said: "It is enough to state that part truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated."

2. Wysor Land Co. *v.* Jones, 24 Ind. App. 451, 56 N. E. 46.

3. O'Connor *v.* Adams, (Ariz. 1899) 59 Pac. 105; Sutliff *v.* Seidenberg, 132 Cal. 63, 64 Pac. 131.

4. *Alabama.*— Brown *v.* Adams, 1 Stew. 51, 18 Am. Dec. 36.

California.— McCann *v.* Pennie, 100 Cal. 547, 35 Pac. 158.

Massachusetts.— Higgins *v.* McDonnell, 16 Gray 386.

Nebraska.—Watson *v.* Roode, 43 Nebr. 348, 61 N. W. 625.

New York.— Steinberg *v.* Tyler, 3 Misc. 25, 22 N. Y. Suppl. 178, 51 N. Y. St. 125.

Oregon.— Russell *v.* Swift, 5 Oreg. 233; Taylor *v.* Patterson, 5 Oreg. 121.

South Dakota.— Jenkinson *v.* Vermillion, 3 S. D. 238, 52 N. W. 1066.

Texas.—Smith *v.* Patrick, (Civ. App. 1896) 36 S. W. 762.

See 11 Cent. Dig. tit. "Contracts," §§ 1641, 1642.

The court cannot assume that the party will rely on oral evidence to support his allegation of the contract. Francis *v.* Earle, 77 Fed. 712.

5. Brown *v.* Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36.

6. Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684; Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432, 8 N. E. 167; Dickson *v.* Lambert, 98 Ind. 487; Foreman *v.* Beckwith, 73 Ind. 515; Suman *v.* Springate, 67 Ind. 115; Goodrich *v.* Johnson, 66 Ind. 258; Logansport, etc., R. Co. *v.* Wray, 52 Ind. 578; King *v.* Enterprise Ins. Co., 45 Ind. 43; Woodward *v.* Gould, 27 Fed. 182 (Missouri). See further FRAUDS, STATUTE OF.

7. Louisville, etc., R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711; American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oreg. 549, 46 Pac. 138.

Writing modified by subsequent parol agreement.— In an action by a mortgagor to compel the mortgagee to pay over the balance

(VII) *CONTRACT MODIFIED BY SUBSEQUENT AGREEMENT.* Where an agreement has been modified by a subsequent agreement, the plaintiff may declare on it as modified, without reference to the terms of the original contract which have been dispensed with;[8] although if the original contract was not entirely superseded by the subsequent modification, it, together with such modification, constitutes the basis of the action.[9] The only safe course to pursue is to declare on the contract in its modified form, for if the modification is valid and material and the plaintiff declares on the original contract only, the variance between his pleading and proof will be fatal to a recovery.[10] No action lies upon a contract which has been superseded by the substitution of a different contract.[11] So in an action for the breach of a contract, where the plaintiff sets up two inconsistent contracts, one of which supersedes the other, and fails to show on which he relies, a demurrer should be sustained.[12] But it is not necessary for the plaintiff to plead an agreement between the defendant and himself, which amounts only to an extension of the time of performance and does not modify the terms of the original contract.[13] It has been held in Nebraska that the fact that the contract sued on has been modified or rescinded is an affirmative defense which should be set up by the defendant.[14]

(VIII) *DATE OF CONTRACT.* The day on which the contract was made must be stated, although the precise day may not be material.[15] The general principle is that in declaring on a parol or simple contract, the day when the contract is alleged to have been made is not material.[16] But where time is a vital element in the plaintiff's case it must be alleged with certainty.[17] An allegation of mistake in the date of an instrument under seal need not be proved before introducing the instrument in evidence, unless the date of the instrument marks the beginning of the performance of the contract or is put in issue by the defendant.[18]

of the loan, to secure which the mortgage was executed, which had been withheld by the mortgagee, the plaintiff alleged that the cause of action was based on a verbal agreement, while his proof showed that the application for the loan was in writing, but that subsequently it was modified by parol before the loan was made. It was held that there was no variance. Kansas L. & T. Co. *v.* Love, 4 Kan. App. 188, 45 Pac. 953.

8. *California.*— White *v.* Soto, 82 Cal. 654, 23 Pac. 210.

Indiana.— McDonough *v.* Kane, 75 Ind. 181.

Kentucky.— Wilkins *v.* Duncan, 2 Litt. 168.

Minnesota.— Swank *v.* Barnum, 63 Minn. 447, 65 N. W. 722; Estes *v.* Farnham, 11 Minn. 423.

Missouri.— Turner *v.* Butler, 126 Mo. 131, 28 S. W. 77; Lanitz *v.* King, 93 Mo. 513, 6 S. W. 263; Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 332.

New York.— Smith *v.* Brown, 17 Barb. 431.

England.— Boone *v.* Mitchell, 1 B. & C. 18, 1 L. J. K. B. O. S. 25, 8 E. C. L. 9; Robinson *v.* Tobin, 1 Stark. 336, 2 E. C. L. 132.

9. White *v.* Soto, 82 Cal. 654, 23 Pac. 210; O'Connor *v.* Dingley, 26 Cal. 11; Ladue *v.* Seymour, 24 Wend. (N. Y.) 60; Dermott *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

10. *Alabama.*—Nesbitt *v.* McGehee, 26 Ala. 748.

Kansas.— Pioneer Sav., etc., Co. *v.* Kasper, (App. 1898) 52 Pac. 623.

Maryland.— Kribs *v.* Jones, 44 Md. 396.

Missouri.— Harrison *v.* Kansas City, etc., R. Co., 50 Mo. App. 332.

North Carolina.— Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96.

Wisconsin.— Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035.

The agreement as modified should be set out in the declaration in order to entitle the plaintiff to recover special damages for its breach. Penwell *v.* Wilkinson, 97 Mich. 110, 56 N. W. 235.

It is proper to declare on both contracts, where a contract has been modified by a valid subsequent agreement. McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693.

11. King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

12. Gosline *v.* Albro-Clem Elevator Co., 174 Mass. 38, 54 N. E. 351.

13. Leeds *v.* Fassman, 17 La. Ann. 32; Maack *v.* Schneider, 51 Mo. App. 92. See also Sutter *v.* Raeder, 149 Mo. 297, 50 S. W. 813.

14. Denney *v.* Stout, 59 Nebr. 731, 82 N. W. 18.

15. Haven *v.* Shaw, 23 N. J. L. 309.

16. Little *v.* Blunt, 16 Pick. (Mass.) 359; Turner *v.* Butler, 126 Mo. 131, 28 S. W. 77. But see Drown *v.* Smith, 3 N. H. 299, holding that where the plaintiff declares on a written contract as bearing a particular date a mistake in the date is a fatal variance.

17. Little *v.* Blunt, 16 Pick. (Mass.) 359; Lockwood *v.* Bigelow, 11 Minn. 113.

18. Richards *v.* Vanner, 4 Stew. & P. (Ala.) 64.

(IX) *ACCEPTANCE BY PLAINTIFF.* If the contract is wholly unilateral, the plaintiff should allege his acceptance, or that he entered upon its performance and gave notice thereof to the defendant.[19] But in declaring upon a promise to pay upon the plaintiff's doing or omitting to do a certain act it is not necessary to allege an acceptance of the promise. It is sufficient to allege that the act was done or omitted.[20]

(X) *ALLEGATION OF A PROMISE.* In an action for the breach of a contract, the plaintiff must allege a promise on the part of the defendant;[21] but under the code system of pleading it is sufficient to allege the facts from which a promise may be implied.[22] And generally it is not essential that there shall have been an affirmatively expressed promise to pay. It is sufficient if words were used which are tantamount to a promise, express or implied.[23] The plaintiff has been allowed to recover upon proof of an implied promise, although he has declared on an express promise.[24]

c. **Averment of Consideration** — (I) *IN GENERAL.* If the contract in suit is under seal it imports a consideration and none need be alleged;[25] and the same is true if the instrument sued on is negotiable according to the law merchant.[26] And by statute in some jurisdictions every written contract is made to import a consideration, and where this is so, it is not necessary for the plaintiff to allege the consideration.[27] But the consideration is an essential part of a contract, and in the absence of statutory relief from the rule, a party declaring on a contract which at common law does not import a consideration must fully and truly state the consideration as well as the promise founded upon it, and must prove it as laid.[28] And if there be more than one consideration, the whole must be alleged and proved.[29] If no consideration is stated, it is a fatal defect which may

19. Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869; Sanborn *v.* Rodgers, 33 Fed. 851. See also Moxley *v.* Moxley, 2 Metc. (Ky.) 309.

20. Train *v.* Gold, 5 Pick. (Mass.) 380; Lonsdale *v.* Brown, 4 Wash. (U. S.) 148, 15 Fed. Cas. No. 8,494.

21. Hotchkiss *v.* Judd, 12 Allen (Mass.) 447; McNulty *v.* Collins, 7 Mo. 69; Brewer *v.* Swartz, 94 Mo. App. 392; Weber *v.* Squier, 51 Mo. App. 601; Gerrens *v.* Huhn, etc., Silver Min. Co., 10 Nev. 137.

22. Whitton *v.* Sullivan, 96 Cal. 480, 31 Pac. 1115; Higgins *v.* Germaine, 1 Mont. 230.

23. Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115; Rice *v.* Rice, 68 Ala. 216.

24. Palmer *v.* Miller, 19 Ind. App. 624, 49 N. E. 975.

25. Moore *v.* Waddle, 34 Cal. 145; Wills *v.* Kempt, 17 Cal. 98. And see BONDS, 5 Cyc. 823.

26. See COMMERCIAL PAPER, 8 Cyc. 109.

27. Click *v.* McAfee, 7 Port. (Ala.) 62; Chamberlain *v.* Darrington, 4 Port. (Ala.) 515; Phillips *v.* Scoggins, 1 Stew. & P. (Ala.) 28; Henke *v.* Eureka Endowment Assoc., 100 Cal. 429, 34 Pac. 1089; Williams *v.* Hall, 79 Cal. 606, 21 Pac. 965; Towsley *v.* Olds, 6 Iowa 526; Linder *v.* Lake, 6 Iowa 164.

28. *California.*—Acheson *v.* Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583; Shafer *v.* Bear River, etc., Water, etc., Co., 4 Cal. 294.

Connecticut.— Russell *v.* South Britain Soc., 9 Conn. 508.

Illinois.— Ives *v.* McHard, 103 Ill. 97; Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285.

Indiana.— Leach *v.* Rhodes, 49 Ind. 291; Doran *v.* Shaw, 26 Ind. 284; Robinson *v.* Barbour, 5 Blackf. 468; Poundstone *v.* Lewark, 4 Blackf. 173.

Massachusetts.— Harris *v.* Rayner, 8 Pick. 541.

Michigan.— Kean *v.* Mitchell, 13 Mich. 207.

New Hampshire.— Colburn *v.* Pomeroy, 44 N. H. 19; Smith *v.* Wheeler, 29 N. H. 334; Badger *v.* Burleigh, 13 N. H. 507; Mitchell *v.* Gile, 12 N. H. 390; Moore *v.* Ross, 7 N. H. 528; Favor *v.* Philbrick, 7 N. H. 326; Benden *v.* Manning, 2 N. H. 290.

New York.— Booz *v.* Cleveland School-Furniture Co., 45 N. Y. App. Div. 593, 61 N. Y. Suppl. 407; Burnet *v.* Bisco, 4 Johns. 235; Powell *v.* Brown, 3 Johns. 100.

Oregon.— Hayden *v.* Steadman, 3 Oreg. 550.

South Carolina.— Coggeshall *v.* Coggeshall, 2 Strobh. 51; Treadway *v.* Nicks, 3 McCord 195.

Tennessee.— Shelton *v.* Bruce, 9 Yerg. 24; Roper *v.* Stone, Cooke 497.

Texas.— Pitts *v.* Ennis, 1 Tex. 604.

Utah.— Felt *v.* Judd, 3 Utah 414, 4 Pac. 243.

Virginia.— Hale *v.* Crow, 9 Gratt. 263; Moseley *v.* Jones, 5 Munf. 23.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617; James *v.* Adams, 8 W. Va. 568.

United States.— Offutt *v.* Hall, 1 Cranch C. C. 572, 18 Fed. Cas. No. 10,450.

See 11 Cent. Dig. tit. "Contracts," § 1660.

Contra, Sloan *v.* Gibson, 4 Mo. 32.

29. Badger *v.* Burleigh, 13 N. H. 507; Lansing *v.* McKillip, 3 Cai. (N. Y.) 286. A declaration averring the existence of two

be taken advantage of by demurrer, motion in arrest of judgment, or writ of error.[30]

(II) *How Much of Contract Must Be Stated.* It is sufficient to state so much of the contract, when it consists of several distinct parts, as contains the entire consideration for the defendant's promise, and that part of the promise of which the plaintiff alleges a breach.[31]

(III) *When Contract Recites a Valuable Consideration and Is Set Out In Hæc Verba.* If the contract on its face purports to have been made for a valuable consideration, and the plaintiff sets it out *in hæc verba*, this is a sufficient averment of consideration.[32] An allegation that a note was executed and delivered to the payee for value received is sufficient averment of a valuable consideration.[33]

(IV) *When Contract Is Stated According to Its Legal Effect.* Where the contract is pleaded according to its legal effect, particular facts showing a consideration legally sufficient to support the promise must be stated. It is a conclusion of law to allege that there was a full and valuable consideration, without stating the particular facts; and it is for the court and not the pleader to decide whether or not the facts stated show a consideration.[34]

(V) *Past Consideration.* No action can be maintained upon a consideration which appears to be past, unless it is alleged to have been performed by the assent or request of the defendant.[35]

(VI) *Notes Payable in Specific Articles.* According to the weight of authority, in declaring on a note payable in property and not under seal, the

considerations for a simple contract is not sustained by proof of one; and the variance is not cured by verdict. Stone *v.* White, 8 Gray (Mass.) 589; Tillman *v.* Fuller, 13 Mich. 113. The whole consideration of a contract must be set forth in the declaration, and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, it is a variance on which the plaintiff must fail. Lowrie *v.* Brooks, 1 Nott & M. (S. C.) 342. See also Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Cunningham *v.* Shaw, 7 Pa. St. 401; Davisson *v.* Ford, 23 W. Va. 617; Leeds *v.* Burrows, 12 East 1.

The statement of a frivolous, together with a sufficient consideration for a contract, will not vitiate the declaration. The statement of the insufficient consideration may be stricken out. Lowry *v.* Brooks, 2 McCord (S. C.) 421. See also Ives *v.* McHard, 103 Ill. 97.

30. *Indiana.*— Robinson *v.* Barbour, 5 Blackf. 468.

Kentucky.— Bruner *v.* Stout, Hard. 225.

Maryland.— Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Missouri.— McNulty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276.

New Hampshire.— Bender *v.* Manning, 2 N. H. 289.

Tennessee.— Shelton *v.* Bruce, 9 Yerg. 24.

Virginia.— Moseley *v.* Jones, 5 Munf. 23; Winston *v.* Francisco, 2 Wash. 187.

England.— Dartnall *v.* Howard, 4 B. & C. 345, 6 D. & R. 438, 10 E. C. L. 608; Andrews *v.* Whitehead, 13 East 102; Jones *v.* Ashburnham, 4 East 455, 1 Smith K. B. 188; Mitchinson *v.* Hewson, 7 T. R. 348.

31. Badger *v.* Burleigh, 13 N. H. 507; Miles *v.* Sheward, 8 East 7; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622; Cotterill *v.* Cuff, 4 Taunt. 285.

32. Dickerson *v.* Derrickson, 39 Ill. 574; Prindle *v.* Caruthers, 15 N. Y. 425; Wood *v.* Knight, 35 N. Y. App. Div. 21, 54 N. Y. Suppl. 466; Walrad *v.* Petrie, 4 Wend. (N. Y.) 575; Jerome *v.* Whitney, 7 Johns. (N. Y.) 321; Van Norman *v.* Wheeler, 13 Tex. 316.

33. Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917. See COMMERCIAL PAPER, 8 Cyc. 111.

34. Leach *v.* Rhodes, 49 Ind. 291; Brush *v.* Raney, 34 Ind. 416.

35. Allen *v.* Woodward, 22 N. H. 544; Spear *v.* Downing, 34 Barb. (N. Y.) 522; Bassford *v.* Swift, 17 Misc. (N. Y.) 149, 39 N. Y. Suppl. 337; Winch *v.* Farmers' L. & T. Co., 11 Misc. (N. Y.) 390, 32 N. Y. Suppl. 244, 65 N. Y. St. 426; Parker *v.* Crane, 6 Wend. (N. Y.) 647; Oatfield *v.* Waring, 14 Johns. (N. Y.) 188; Comstock *v.* Smith, 7 Johns. (N. Y.) 87. See also *supra*, IV, D, 14. A writing which recites that in consideration of special services theretofore rendered to the defendant by the plaintiff's assignor in securing a contract for the sale of coal, defendant agrees to pay a commission of fifteen cents a ton on all coal sold and delivered under the contract of sale, implies that the services were performed at the instance and request of defendant, and therefore, in an action to recover the commission, the complaint need not allege such request where the contract is set out in full. Hurst *v.* Cresson, etc., Coal, etc., Co., 86 Hun (N. Y.) 189, 33 N. Y. Suppl. 313, 66 N. Y. St. 55.

plaintiff must aver a consideration.[36] Some courts, however, have held that a note payable in specific articles may be declared on in the same manner as a negotiable promissory note; that is, that a special consideration need not be averred or proved.[37]

d. Averment of Fulfilment of Condition Precedent. If the plaintiff's right of action depends upon a condition precedent, he must allege and prove the fulfilment of the condition or a legal excuse for its non-fulfilment. And if he omits such allegation, his declaration, complaint, or petition, as the case may be, will be bad on demurrer.[38] If a party agrees to pay money or do a particular thing on the happening of a contingency, its happening must be alleged by the plaintiff in an action on the contract.[39] And a general averment that the defendant failed to perform according to the terms of the agreement is insufficient.[40] But if the defendant's obligation to pay money was not to arise if a certain contingency did happen, it is not necessary for the plaintiff to allege that it did not happen. It is incumbent on the defendant to show that it did happen.[41]

e. Averment of Performance by Plaintiff — (i) *When Covenants Are Dependent or Concurrent.* As we have seen, there are three kinds of promises or covenants: First, such as are called mutual and independent, where either party may recover damages from the other for a breach of the promise or covenant, and where it is no excuse for the defendant to allege a breach on the part of the plaintiff;[42] second, such promises or covenants as are conditional and dependent, in which the performance of one depends on the prior performance of the

36. *Kentucky.*— Letcher *v.* Taylor, 2 Bibb 585.

Mississippi.— Minor *v.* Michie, Walk. 24.

New York.— Ford *v.* Adams, 2 Barb. 349.

South Carolina.— Wingo *v.* McDowell, 8 Rich. 446; Gains *v.* Kendrick, 2 Mill 339.

Tennessee.— Brown *v.* Parks, 8 Humphr. 294.

See 11 Cent. Dig. tit. "Contracts," § 1662.

37. Rogers *v.* Maxwell, 4 Ind. 243; Streeter *v.* Henley, Smith (Ind.) 187; Brooks *v.* Page, 1 D. Chipm. (Vt.) 340.

38. *Alabama.*— Flouss *v.* Eureka Co., 80 Ala. 30.

Arkansas.—McLaughlin *v.* Hutchins, 3 Ark. 207.

California.— Muller *v.* Ohm, 66 Cal. 475, 6 Pac. 102; Fisher *v.* Pearson, 48 Cal. 472.

Colorado.— Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236; McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014.

Illinois.— Meyers *v.* Phillips, 72 Ill. 460; Aledo *v.* Vincent, 59 Ill. App. 179.

Indiana.— Wheeler *v.* Hawkins, 101 Ind. 486.

Iowa.— Chicago, etc., R. Co. *v.* Burlington, etc., Elevator Co., 73 Iowa 629, 35 N. W. 654.

Kentucky.— Johnson *v.* Stokes, 9 Bush 279; Keys *v.* Powell, 2 A. K. Marsh. 253.

Massachusetts.— Newton Rubber Works *v.* Graham, 171 Mass. 352, 50 N. E. 547; Read *v.* Smith, 1 Allen 519; Couch *v.* Ingersoll, 2 Pick. 292.

Missouri.— Connelly *v.* Priest, 72 Mo. App. 673.

New Hampshire.— Batchelder *v.* Wendell, 36 N. H. 204.

New Jersey.— Turner *v.* Wells, 64 N. J. L. 269, 45 Atl. 641; Bruen *v.* Ogden, 18 N. J. L. 124; Wolf *v.* Liverpool, etc., Ins. Co., 10 N. J. L. J. 325.

New York.— Duschnes *v.* Heyman, 2 N. Y. App. Div. 304, 37 N. Y. Suppl. 841, 73 N. Y. St. 53 [*affirmed* on opinion below in 158 N. Y. 735, 53 N. E. 1125]; Fogg *v.* Suburban Rapid Transit Co., 90 Hun 274, 35 N. Y. Suppl. 954, 70 N. Y. St. 627; Hatch *v.* Peet, 23 Barb. 575; Hand *v.* Shaw, 20 Misc. 698, 46 N. Y. Suppl. 1093; Yorston *v.* Bouton, 4 N. Y. St. 36; Relyea *v.* Drew, 1 Den. 561; Dodge *v.* Coddington, 3 Johns. 146.

Tennessee.— Hyde *v.* Darden, 3 Heisk. 515.

Texas.—Thompson *v.* Houston, 31 Tex. 610.

Virginia.— Daniel *v.* Morton, 4 Munf. 120.

West Virginia.— Harris *v.* Lewis, 5 W. Va. 575.

Wisconsin.— Levis *v.* Black River Imp. Co., 105 Wis. 391, 81 N. W. 669; Blake *v.* Coleman, 22 Wis. 415, 99 Am. Dec. 53; Smith *v.* Chicago, etc., R. Co., 19 Wis. 326.

United States.— Garrow *v.* Davis, 15 How. 272, 14 L. ed. 692; McDonald *v.* Hobson, 7 How. 745, 12 L. ed. 897; Wilcox *v.* Cohn, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640; Hart *v.* Rose, Hempst. 238, 11 Fed. Cas. No. 6,154*a*; Gill *v.* Stebbins, 2 Paine 417, 10 Fed. Cas. No. 5,431.

Canada.—Dufresne *v.* Jacques Cartier Bldg. Soc., 5 R. L. 235; Wood *v.* Higginbotham, 2 Rev. Leg. 28.

See 11 Cent. Dig. tit. "Contracts," § 1636.

As to conditions precedent see *supra*, IX, C, 5; IX, F, 5; XII, E.

39. Root *v.* Childs, 68 Minn. 142, 70 N. W. 1087; Husenetter *v.* Gullikson, 55 Nebr. 32, 75 N. W. 41.

40. Wilson *v.* Clarke, 20 Minn. 367.

41. Root *v.* Childs, 68 Minn. 142, 70 N. W. 1087. See *infra*, XII, G, 1, h.

42. Houston *v.* Spruance, 4 Harr. (Del.) 117; Green *v.* Reynolds 2 Johns. (N. Y.) 207; Jones *v.* Barkley, Dougl. 659; Campbell *v.*

other, and until the prior condition is performed the other party is not liable to an action on his promise or covenant;[43] third, such as are mutual conditions to be performed at the same time, where the plaintiff must show that he was ready and offered to perform on his part, and the defendant neglected or refused to perform on his part, and may maintain his action, although it is not certain that either is obliged to do the first act.[44] In order to ascertain the intention of the parties, it is considered a good general rule that where the promises or covenants go to the whole consideration on both sides, they are mutual conditions, and also that where a day certain is appointed for the payment of the money, if such day is to occur after the time when the consideration ought to be performed for which the money is payable, the performance of the consideration is a condition precedent to the payment of the money.[45] When the promises or covenants in an agreement are mutual and dependent or concurrent the plaintiff must aver and prove performance, or at least an offer to perform, on his part.[46] And if the plaintiff avers a tender of performance, the defendant is bound to take issue on such averment. He is not at liberty to plead the non-performance of the promises or covenants on the part of the plaintiff in bar of the action.[47] But where

Jones, 6 T. R. 570, 3 Rev. Rep. 263. And see *supra*, IX, F, 5.

43. Houston *v.* Spruance, 4 Harr. (Del.) 117; Lock *v.* Wright, 1 Str. 569. Where stipulations are to be performed by both parties to a covenant, the conditions are either dependent or independent; where they are dependent the party in whose favor they are introduced need do no act until the condition is performed; if the condition is not performed, he has his remedy by action for the breach, and may also withhold the consideration and apply it to his own use. Elliot *v.* Carneal, 2 A. K. Marsh. (Ky.) 308. See also *supra*, IX, F, 5.

44. Houston *v.* Spruance, 4 Harr. (Del.) 117; Jones *v.* Barkley, Dougl. 659; Glazebrook *v.* Woodrow, 8 T. R. 366, 4 Rev. Rep. 700. See also *supra*, IX, F, 5.

45. Houston *v.* Spruance, 4 Harr. (Del.) 117. See *supra*, IX, F, 5.

46. *Arkansas.*— Speer *v.* McLaughlin, 11 Ark. 732; Childress *v.* Foster, 3 Ark. 252.

California.—Henry *v.* Sacramento, 116 Cal. 628, 48 Pac. 728.

Colorado.— Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728.

Illinois.— Hoy *v.* Hoy, 44 Ill. 469; Davis *v.* Wiley, 4 Ill. 234; Independent Order Mut. Aid *v.* Paine, 17 Ill. App. 572.

Indiana.— Ellsworth *v.* Buell, 4 Ind. 555; Vankirk *v.* Talbot, 4 Blackf. 367.

Kentucky.— Louisville *v.* Muldoon, 94 Ky. 46, 22 S. W. 847, 15 Ky. L. Rep. 233; Cleaveland *v.* Moore, 9 B. Mon. 378; Wilhite *v.* Roberts, 7 Dana 26; Dryden *v.* Lewis, 5 Dana 138; Baker *v.* Legrand, Litt. Sel. Cas. 253; Casey *v.* McAfee, Litt. Sel. Cas. 159; Pollard *v.* McClain, 3 A. K. Marsh. 24; Carter *v.* Woolright, 1 A. K. Marsh. 585; McCall *v.* Welsh, 3 Bibb 289; Kendal *v.* Talbot, 2 Bibb 614; Shephard *v.* Hubbard, 1 Bibb 494.

Louisiana.— Morgan *v.* Driggs, 3 La. Ann. 124.

Massachusetts.— Palmer *v.* Sawyer, 114 Mass. 1; Couch *v.* Ingersoll, 2 Pick. 292; Gardiner *v.* Corson, 15 Mass. 500; Hopkins *v.* Young, 11 Mass. 302.

Minnesota.— Becker *v.* Sweetzer, 15 Minn. 427.

Nebraska.— William Deering Co. *v.* Claypool, (1902) 89 N. W. 373; Burwell, etc., Irr., etc., Co. *v.* Wilson, 57 Nebr. 396, 77 N. W. 762.

New Jersey.—Ackley *v.* Richman, 10 N. J. L. 304; Harvey *v.* Trenchard, 6 N. J. L. 126.

New York.— Oakley *v.* Morton, 11 N. Y. 25, 26 Am. Dec. 49; Brown *v.* Colie, 1 E. D. Smith 265; Williams *v.* Healey, 3 Den. 363; Dakin *v.* Williams, 11 Wend. 67; Gould *v.* Banks, 8 Wend. 562, 24 Am. Dec. 90; Keep *v.* Goodrich, 12 Johns. 397; Tucker *v.* Woods, 12 Johns. 190, 7 Am. Dec. 305.

Oregon.— Ball *v.* Doud, 26 Oreg. 14, 37 Pac. 70.

Tennessee.— Bradford *v.* Gray, 3 Yerg. 463.

United States.— Columbia Bank *v.* Hagner, 1 Pet. 455, 7 L. ed. 219; Goldsborough *v.* Orr, 8 Wheat. 217, 5 L. ed. 600; Darland *v.* Greenwood, 1 McCrary 337, 2 Fed. 660; U. S. *v.* Beard, 5 McLean 441, 24 Fed. Cas. No. 14,551; Goodwin *v.* Lynn, 4 Wash. 714, 10 Fed. Cas. No. 5,553; Webster *v.* Warren, 2 Wash. 456, 29 Fed. Cas. No. 17,339.

England.— Hall *v.* Cazenove, 4 East 477, 1 Smith K. B. 272, 7 Rev. Rep. 611; St. Albans *v.* Shore, 1 H. Bl. 270; Pordage *v.* Cole, 1 Saund. 319*h*; Glazebrook *v.* Woodrow, 8 T. R. 366, 4 Rev. Rep. 700; Campbell *v.* Jones, 6 T. R. 570, 3 Rev. Rep. 263; Goodisson *v.* Nunn, 4 T. R. 761.

See 11 Cent. Dig. tit. "Contracts," § 1664 *et seq.*

47. Traver *v.* Halsted, 23 Wend. (N. Y.) 66.

Tender.— Where an action was brought upon a contract by which the defendant agreed to pay the plaintiff two thousand five hundred dollars, at a certain time upon condition that the plaintiff should first furnish to the defendant a general release specified, and the complaint alleged that at the proper time he tendered such release and demanded payment, which was refused, it was held that the allegation of tender showed sufficient performance on the part of the plaintiff. Kelly

the promises or covenants are independent the plaintiff need not aver or prove the performance of his own promise or covenant.[48] And where the plaintiff's promise or covenant, which forms the consideration, is dependent, yet if part of the consideration has been accepted and enjoyed by the defendant who refuses to proceed with the performance of the contract, the plaintiff may recover without alleging performance of the residue.[49]

(II) *When First Act Is to Be Done by Plaintiff.* It is quite well established that where a specific act is to be done by the plaintiff, or any number of acts, by way of condition precedent, he must show in pleading precisely what he has done in performing them, in order to enable the court to see whether the defendant be in default.[50] Where anything is to be done by the plaintiff, precedent to performance by the defendant, the plaintiff must as a general rule allege performance by himself in declaring for a breach of the defendant's promise. An averment of readiness to perform is not sufficient,[51] unless it be alleged that performance by the plaintiff was prevented by the act of the defendant, which dispenses with the necessity of an averment of performance or readiness to perform.[52] He shows no right of action unless he shows that he has performed the condition precedent, or that he was prevented from doing so by the act of the defendant,[53]

v. Baker, 26 N. Y. App. Div. 217, 49 N. Y. Suppl. 973.

48. Water Lot Co. *v.* Leonard, 30 Ga. 560; Pordage *v.* Cole, 1 Saund. 319*h*. Thus, if under an independent covenant in a contract, the first act is to be done by the defendant, it is not necessary for the plaintiff to show or aver performance of the covenants on his part. Couch *v.* Ingersoll, 2 Pick. (Mass.) 292.

49. Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341; Woodward *v.* Gould, 27 Fed. 338; Coe *v.* Bradley, 5 Fed. Cas. No. 2,941.

50. Niebuhr *v.* Sonn, 29 N. Y. App. Div. 360, 51 N. Y. Suppl. 592; Glover *v.* Tuck, 24 Wend. (N. Y.) 153.

51. *Arkansas.*— Childress *v.* Foster, 3 Ark. 252.

Georgia.— Griswold *v.* Scott, 13 Ga. 210.

Indiana.— Justice *v.* Vermillion County, 2 Blackf. 149; Case *v.* Cleveland, etc., R. Co., 11 Ind. App. 517, 39 N. E. 426.

Iowa.— Edgerly *v.* Farmers' Ins. Co., 43 Iowa 587.

Kentucky.— Jewell *v.* Thompson, 2 Litt. 52; Stuteville *v.* Miles, 2 A. K. Marsh. 425.

Massachusetts.— Couch *v.* Ingersoll, 2 Pick. 292. If a memorandum in writing is declared on as a written contract of sale, the vendee cannot maintain an action for its breach if he has not himself complied with its terms. King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

Missouri.— Bayse *v.* Ambrose, 32 Mo. 484.

New York.— Smith *v.* Brown, 17 Barb. 431; Winch *v.* Farmers' L. & T. Co., 11 Misc. 390, 32 N. Y. Suppl. 244, 65 N. Y. St. 426; Muller *v.* Schumann, 19 N. Y. Suppl. 213, 46 N. Y. St. 391; Glover *v.* Tuck, 24 Wend. 153; McIntire *v.* Clark, 7 Wend. 330.

Pennsylvania.— Zerger *v.* Sailer, 6 Binn. 24.

South Carolina.— Salmon *v.* Jenkins, 4 McCord 288.

Texas.— Shuttock *v.* Griffin, 44 Tex. 566; Burns *v.* Batey, 1 Tex. App. Civ. Cas. § 419.

West Virginia.—James *v.* Adams, 16 W. Va. 245.

England.— Campbell *v.* Jones, 6 T. R. 570, 3 Rev. Rep. 263.

See 11 Cent. Dig. tit. "Contracts," § 1664 *et seq.*

Substantial performance of conditions precedent is necessary to authorize recovery, as for performance of a contract, and an allegation that the opposite party refuses to permit it is not equivalent to an allegation of performance, especially where the complaining party does not allege his willingness and ability to perform at the time of such refusal or at any time prior to the expiration of the period fixed for performance. Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193.

52. Newby *v.* Rogers, 54 Ind. 193; Riley *v.* Walker, 6 Ind. App. 622, 34 N. E. 100; Chamberlin *v.* McCallister, 6 Dana (Ky.) 352; Clarke *v.* Crandall, 27 Barb. (N. Y.) 73; Woodworth *v.* Curtiss, 7 Wend. (N. Y.) 112; Huntingdon, etc., R. Co. *v.* McGovern, 29 Pa. St. 78.

53. Hansell *v.* Erickson, 28 Ill. 257; Fish *v.* Roseberry, 22 Ill. 288; Baird *v.* Evans, 20 Ill. 29; Bassett *v.* Child, 11 Ill. 569; Badgley *v.* Heald, 9 Ill. 64; Eldridge *v.* Rowe, 7 Ill. 91, 43 Am. Dec. 41; Escott *v.* White, 10 Bush (Ky.) 169; Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45.

Contract for services.— Upon this principle a party who engages to labor for another for a specified time cannot recover for his services unless he has performed his contract, has been excused by his employer, or is justified in leaving the service. Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161. See MASTER AND SERVANT; WORK AND LABOR.

Statute requiring statement.— Under Mich. Pub. Stat. (1891), p. 230, § 4, providing that a contractor shall furnish the owner of land with a statement under oath of the amounts due for labor and material, and suspending the right to collect by action until such statement is made, a builder cannot sue on

unless it appears that the performance of the condition would be a useless act, for the law does not require that.[54] In all cases of this kind, the plaintiff must either allege performance on his part or a sufficient excuse for non-performance.[55] And no excuse for non-performance can be shown where the plaintiff does not allege the facts constituting the excuse.[56] Where the right of action depends upon the performance of a condition precedent by the plaintiff, if he omits to allege performance the omission is not curable by verdict.[57] Generally, if a condition precedent has not been complied with, no recovery can be had on a *quantum meruit*.[58] But it is otherwise where the defendant himself completes the contract and thus puts it out of the power of the plaintiff to do so.[59]

(III) *Whether Averment Should Be General or Special*—(A) *In General.* At common law it was ordinarily required of the pleader not only to make an allegation of the performance of a condition precedent, but also a statement of the time and manner of its performance or an excuse for non-performance, in order that the court might determine as a matter of law whether or not the intention of the parties had been fulfilled, and in order that a traversable issue might be presented.[60] But according to the general rule as it now exists, and is established in some jurisdictions by statute, in pleading the performance of conditions precedent it is not necessary for the plaintiff to state the facts showing such performance, but he may aver generally that he has duly performed all the stipulations and conditions on his part.[61] And in such case the defendant cannot

a contract for the erection of a house, although he has not effected a lien thereon, until such statement is filed. Barnard *v.* McLeod, 114 Mich. 73, 72 N. E. 24.

Excuse for non-performance.— A petition in a suit upon a contract need not allege that the plaintiff has performed his part of the contract if it states a good and sufficient excuse for non-performance. Buchanan *v.* Layne, 95 Mo. App. 148, 68 S. W. 952.

54. Thus where the plaintiff, upon the sale of land to a railroad company, received from the defendants their guaranty that certain stock of the railroad company which the plaintiff received for the land should be worth par in three years, or the defendants should make it up to par or pay whatever sum such stock should be worth less than par, it was held that this was an independent contract and valid, and the stock at that time being worthless and the railroad company wholly insolvent, it was further held that the bringing of an action against the railroad company was not a condition precedent to the bringing of an action against the guarantors. Hill *v.* Smith, 21 How. (U. S.) 283, 16 L. ed. 113.

55. *Indiana.*—Armstrong *v.* Rockwood, 53 Ind. 506; Ruble *v.* Massey, 2 Ind. 636; Current *v.* Fulton, 10 Ind. App. 617, 38 N. E. 419.

New York.— Clarke *v.* Crandall, 27 Barb. 73.

Texas.— Brown *v.* Binz, (Civ. App. 1899) 50 S. W. 483.

West Virginia.— Jones *v.* Singer Mfg. Co., 38 W. Va. 147, 18 S. E. 478.

Wisconsin.— Warren *v.* Bean, 6 Wis. 120.

See 11 Cent. Dig. tit. "Contracts," § 1674.

In an action on a quantum meruit for personal services, it is unnecessary to aver the sickness and death of the contractor as an excuse for the non-performance of a special contract, that being a matter of reply to a defense interposing the contract. Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388.

56. Stern *v.* McKee, 70 N. Y. App. Div. 142, 75 N. Y. Suppl. 157.

57. Childress *v.* Foster, 3 Ark. 252.

58. Escott *v.* White, 10 Bush (Ky.) 169.

59. Escott *v.* White, 10 Bush (Ky.) 169.

60. Averbeck *v.* Hall, 14 Bush (Ky.) 505; Alexander *v.* Wales, 6 T. B. Mon. (Ky.) 323; Perrin *v.* Thurman, 4 T. B. Mon. (Ky.) 176; Read *v.* Cisney, 4 Litt. (Ky.) 137; Stuteville *v.* Miles, 2 A. K. Marsh. (Ky.) 425.

61. *California.*— Griffiths *v.* Henderson, 49 Cal. 566; California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511.

Connecticut.— Wright *v.* Tuttle, 4 Day 313.

Indiana.— Fairbanks *v.* Meyers, 98 Ind. 92; Bertelson *v.* Bower, 81 Ind. 512; American Ins. Co. *v.* Leonard, 80 Ind. 272; Lowry *v.* Megee, 52 Ind. 107; Home Ins. Co. *v.* Duke, 43 Ind. 418; Cromwell *v.* Wilkinson, 18 Ind. 365; Purdue *v.* Noffsinger, 15 Ind. 386; Vice *v.* Brown, 22 Ind. App. 345, 53 N. E. 776; Darnell *v.* Keller, 18 Ind. App. 103, 45 N. E. 676; Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769; Watson *v.* Deeds, 3 Ind. App. 75, 29 N. E. 151.

Iowa.— Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90.

Kentucky.—Averbeck *v.* Hall, 14 Bush 505.

Minnesota.—Andreas *v.* Holcombe, 22 Minn. 339.

Missouri.— Roy *v.* Boteler, 40 Mo. App. 213.

New York.— Fox *v.* Cowperthwait, 60 N. Y. App. Div. 528, 69 N. Y. Suppl. 912; Case *v.* Phœnix Bridge Co., 55 N. Y. Super. Ct. 25, 10 N. Y. St. 474; Rowland *v.* Phalen, 1 Bosw. 43; Enos *v.* Thomas, 4 How. Pr. 48.

Ohio.— Humphreys *v.* Staley, 2 Ohio Dec. (Reprint) 550, 3 West. L. Month. 628.

set up in defense the non-performance of any condition which he has not specified in his plea.[62] In pleading the performance of a condition precedent under the code system, it is not necessary, as it was at common law, to state the facts showing such performance; but it is sufficient to state generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing the performance.[63]

(B) *Condition Not Definitely Settled.* Where the condition precedent is not definitely settled and limited by the terms of the contract, this rule, in the nature of things, cannot apply. In such case the plaintiff must state the facts upon which he relies for a recovery.[64] Thus where the covenant is indefinite or in the alternative the general averment is not sufficient, but the *quo modo* must be stated.[65]

(C) *Excuse For Non-Performance.* Where the plaintiff intends to rely on an excuse for not performing, whatever it may be, the particular facts and circumstances constituting such excuse should be averred.[66]

(D) *When Act Involves a Question of Law.* Another distinction is that where the act involves in it a question of law, that is, whether it was done as the law directs, the *quo modo* must be pointed out; but where it is a mere matter of fact a general averment is proper.[67]

(E) *Condition Altered by Subsequent Agreement.* Again, if the conditions precedent of a contract have been altered by the consent of the parties, the alteration should be stated, and performance of the contract as modified should be alleged.[68]

(F) *When Character of Performance Cannot Be Understood From General Averment.* And in any case, where the character of the performance cannot be understood from a general averment, the plaintiff should specifically aver the facts constituting the alleged performance;[69] and if he does this in any case it is sufficient.[70]

(IV) *AVERMENT OF READINESS TO PERFORM AND TENDER.* In an action on a contract containing mutual and dependent or concurrent promises or covenants, the plaintiff must allege his readiness and willingness to perform his part of the agreement at the time and place stipulated.[71] And an averment that the plaintiff

Texas.— Long *v.* McCauley, (Sup. 1887) 3 S. W. 689.

United States.— Toy William *v.* Hallett, 2 Sawy. 261, 24 Fed. Cas. No. 14,123.

See 11 Cent. Dig. tit. "Contracts," § 1665.

62. Ottawa Tribe No. 15, I. O. R. M. *v.* Munter, 60 N. J. L. 459, 38 Atl. 696.

63. Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 23 C. C. A. 89; Kahnweiler *v.* Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485, and other cases above cited.

64. Armstrong *v.* Bartram, 44 Ill. 422; McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 576; Barbee *v.* Willard, 4 McLean (U. S.) 356, 2 Fed. Cas. No. 969; Toy William *v.* Hallett, 2 Sawy. (U. S.) 261, 24 Fed. Cas. No. 14,123.

65. Byrne *v.* McNulty, 7 Ill. 424.

66. Purdue *v.* Noffsinger, 15 Ind. 386.

67. Wright *v.* Tuttle, 4 Day (Conn.) 313; Byrne *v.* McNulty, 7 Ill. 424; Winkle Terra Cotta Co. *v.* Galena Safety Vault, etc., Co., 64 Ill. App. 184; Read *v.* Cisney, 4 Litt. (Ky.) 137; Dalzell *v.* Fahys Watch Case Co., 60 N. Y. Super. Ct. 293, 17 N. Y. Suppl. 365.

68. Cromwell *v.* Wilkinson, 18 Ind. 365. See also *supra*, XII, G, 1, b, (VII).

69. *Alabama.*— Mobile, etc., R. Co. *v.* Talman, 15 Ala. 472.

California.— Henry *v.* Sacramento, 116 Cal. 628, 48 Pac. 728.

Colorado.— Calhoun *v.* Girardine, 13 Colo. 103, 21 Pac. 1017.

Connecticut.— Nichols *v.* Blakeslee, 2 Day 218, 2 Am. Dec. 95.

Illinois.— Davis *v.* Wiley, 4 Ill. 234.

Indiana.— Hays *v.* Branham, 36 Ind. 219.

Kentucky.— Smith *v.* Robinson, 3 T. B. Mon. 174; Mitchell *v.* Bean, 11 Ky. L. Rep. 720.

Minnesota.— Johnson *v.* Howard, 20 Minn. 370; Wilson *v.* Clarke, 20 Minn. 367.

New York.— Dalzell *v.* Fahys Watch Case Co., 138 N. Y. 285, 33 N. E. 1071, 52 N. Y. St. 354.

Virginia.— Ragland *v.* Butler, 18 Gratt. 323.

Washington.—Rathbun *v.* Thurston County, 8 Wash. 238, 35 Pac. 1102.

United States.— Toy William *v.* Hallett, 2 Sawy. 261, 24 Fed. Cas. No. 14,123.

See 11 Cent. Dig. tit. "Contracts," § 1669.

70. Patmor *v.* Rombauer, 46 Kan. 409, 26 Pac. 691; Butterworth *v.* Kinsey, 14 Tex. 495.

71. *Alabama.*— Jones *v.* Powell, 15 Ala. 824; McGehee *v.* Hill, 4 Port. 170, 29 Am. Dec. 277.

was at all times willing to perform is not equivalent to an averment that he was ready and willing to perform.[72] As a rule it is sufficient for the plaintiff to allege that he was ready and willing to perform on his part. He need not allege also an offer to perform.[73] And where the non-performance of a condition precedent was caused by the act of the defendant, the plaintiff is not bound to aver performance or readiness to perform on his part; he may simply allege the facts constituting his excuse.[74] When either party to a contract gives notice to the other that he will not comply with its terms, the other need not in an action for damages aver or prove a tender of performance on his part.[75] But if by the terms of the agreement the plaintiff is to do the first act he must allege a tender of performance.[76] And if a deed is to be given, money is to be paid, or services are to be performed, as a concurrent or precedent condition, the plaintiff must allege performance in so many words, or that performance was duly tendered and refused, together with such circumstances as are material in point of law to raise the corresponding obligation on the part of the defendant.[77] Where it is necessary for the plaintiff to allege and prove a tender of performance, the day on which the alleged tender was made must be averred.[78] In an action against

Connecticut.— Smith *v.* Lewis, 26 Conn. 110.

Indiana.— Magic Packing Co. *v.* Stone-Ordean-Wells Co., 158 Ind. 538, 64 N. E. 11; Adams *v.* Dale, 29 Ind. 273.

Kentucky.— Sousely *v.* Burns, 10 Bush 87; Casey *v.* McAfee, Litt. Sel. Cas. 159; Orndorff *v.* Webster, 4 Ky. L. Rep. 452.

New York.— Marie *v.* Garrison, 45 N. Y. Super. Ct. 157; Slocum *v.* Despard, 8 Wend. 615; Topping *v.* Root, 5 Cow. 404; Gazley *v.* Price, 16 Johns. 267; Porter *v.* Rose, 12 Johns. 209, 7 Am. Dec. 306; West *v.* Emmons, 5 Johns. 179.

Pennsylvania.— Wagenblast *v.* McKean, 2 Grant 393.

Tennessee.— Bradford *v.* Gray, 3 Yerg. 463.

Texas.— Van Norman *v.* Wheeler, 13 Tex. 316.

United States.—McCabe *v.* Cruikshank, 106 Fed. 648.

See 11 Cent. Dig. tit. "Contracts," § 1667.

Sufficiency of averment.— If the defendant pleads that he was ready to perform on the day and at the place appointed by the contract, he must also allege that he was at the place to the last convenient moment of time on the day appointed. Tiernan *v.* Napier, 5 Yerg. (Tenn.) 410.

72. Chicago, etc., R. Co. *v.* Hoyt, 37 Ill. App. 64. An allegation in a complaint for a breach of a contract to convey land that the plaintiff was ready and willing to make payment therefor according to the contract is not equivalent to an averment of payment or of an offer to pay. Bailey *v.* Lay, 18 Colo. 405, 33 Pac. 407.

73. *Indiana.*— Schreiber *v.* Butler, 84 Ind. 576.

Iowa.— Lucas *v.* Snyder, 2 Greene 490.

Kentucky.— Estill *v.* Jenkins, 4 Dana 75.

Massachusetts.— Tinney *v.* Ashley, 15 Pick. 546, 26 Am. Dec. 620.

Mississippi.— Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

New York.— Maguire *v.* Halsted, 18 N. Y. App. Div. 228, 45 N. Y. Suppl. 783.

Ohio.— Gould *v.* Brown, 6 Ohio St. 538.

South Carolina.— Rice *v.* Sims, 2 Bailey 82.

See 11 Cent. Dig. tit. "Contracts," §§ 1667, 1668.

74. Clarke *v.* Crandall, 27 Barb. (N. Y.) 73. In an action on a contract to dig a well, where the plaintiff alleged that he was prevented from finishing the well because of the defendant's furnishing unsuitable casing, which collapsed and stopped up the well, an allegation that the plaintiff offered to dig another well, without profit, at its actual cost, is unnecessary to the cause of action, and ineffectual as an offer to perform. McPherson *v.* San Joaquin County, (Cal. 1899) 56 Pac. 802.

75. Gray *v.* Smith, 83 Fed. 824, 28 C. C. A. 168.

76. Ackley *v.* Richman, 10 N. J. L. 304; Smith *v.* Wright, 4 Abb. Dec. (N. Y.) 274, 1 Abb. Pr. (N. Y.) 243; Lester *v.* Jewett, 12 Barb. (N. Y.) 502; Chatterton *v.* Fisk, 1 Abb. N. Cas. (N. Y.) 88; Johnson *v.* Wygant, 11 Wend. (N. Y.) 48; Sage *v.* Ranney, 2 Wend. (N. Y.) 532; Miller *v.* Drake, 1 Cai. (N. Y.) 45; Strauch *v.* Royal Land Co., 12 Phila. (Pa.) 239, 35 Leg. Int. (Pa.) 78.

Sufficiency of averment.— In an action for a breach of a contract to accept certain sawlogs on delivery, allegations in the petition that a tender of such logs was made in accordance with the terms of such contract, which was copied into and made a part of the petition, were held sufficient on exception thereto to admit proof that such contract had been complied with by the plaintiff. Sabine Tram Co. *v.* Jones, (Tex. Civ. App. 1898) 43 S. W. 905.

77. Pomroy *v.* Gold, 2 Metc. (Mass.) 500; Ackley *v.* Richman, 10 N. J. L. 304; Harvey *v.* Trenchard, 6 N. J. L. 126; Glover *v.* Tuck, 24 Wend. (N. Y.) 153.

78. Vance *v.* Blair, 18 Ohio 532, 51 Am. Dec. 467.

the buyer for not accepting and paying for goods on the seller's offer of performance, the plaintiff must allege to whom the offer was made;[79] and if the contract alleged makes the place material, the place of the offer must also be stated.[80]

(v) *Time When Defendant Should Have Performed.* A declaration in an action on a contract which does not state the time at which the defendant should have performed it is bad on demurrer.[81] Where no time for performance is specified in a contract, it should be averred that it was to be performed on request or within a reasonable time, and that such request has been made or that a reasonable time has elapsed.[82]

f. Averment of Demand or Request —(i) *When a Condition Precedent.* Where a special request is a condition precedent, that is, where it is expressly or by necessary implication made a part of the contract, it must be alleged and proved. The omission to aver a special request or notice, where by law it is necessary in order to put the defendant in default, is a matter of substance and may be taken advantage of on general demurrer.[83] Upon a contract for the payment of a certain sum in goods, the goods being deliverable upon demand, an action for a recovery in money cannot be maintained without an allegation and proof of demand or refusal to deliver the goods.[84] And whenever it is necessary to allege a special request it should be stated with time and place;[85] and it should also be alleged by whom the request was made.[86] But in a case where a special request is not necessary, a general allegation of demand is sufficient without alleging the time and place.[87]

79. Mills *v.* Gould, 1 Abb. N. Cas. (N. Y.) 93.

80. Mills *v.* Gould, 1 Abb. N. Cas. (N. Y.) 93.

81. Bradley Beach *v.* Atlantic Coast Electric R. Co., (N. J. 1902) 52 Atl. 231.

82. Osborne *v.* Lawrence, 9 Wend. (N. Y.) 135; Roberts *v.* Beatty, 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 410. See also Nichols *v.* Blakeslee, 2 Day (Conn.) 218, 2 Am. Dec. 95; Schreiber *v.* Butler, 84 Ind. 576; Ryberg *v.* Goodnow, 59 Minn. 413, 61 N. W. 455; Pope *v.* Terre Haute Car, etc., Co., 107 N. Y. 61, 13 N. E. 592; Fickett *v.* Brice, 22 How. Pr. (N. Y.) 194.

83. *Alabama.*— Ingram *v.* Bussey, 133 Ala. 539, 31 So. 967.

Arkansas.—Childress *v.* Foster, 3 Ark. 252; Taylor *v.* Patterson, 3 Ark. 238.

Indiana.— Richards *v.* Carl, 1 Blackf. 313; Ewing *v.* French, 1 Blackf. 170.

Iowa.— *In re* Allen, 116 Iowa 697, 88 N. W. 1091.

Massachusetts.— Carley *v.* Vance, 17 Mass. 389; Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

Minnesota.— Snow *v.* Johnson, 1 Minn. 48.

Missouri.— Martin *v.* Chauvin, 7 Mo. 277.

New York.— Kraft *v.* Rice, 45 N. Y. App. Div. 569, 61 N. Y. Suppl. 368; Lutweller *v.* Linnell, 12 Barb. 512.

South Carolina.— Pickett *v.* Cloud, 1 Bailey 362.

West Virginia.— White *v.* Romans, 29 W. Va. 571, 3 S. E. 14.

England.— Bach *v.* Owen, 5 T. R. 409.

See 11 Cent. Dig. tit. "Contracts," § 1677 *et seq.*

When a covenant is to pay on request, a special request must be alleged; the general allegation of *licet sæpius requisitus* is not enough. Bush *v.* Stevens, 24 Wend. (N. Y.) 256.

A demand on the debtor requires no particular form in order to put him in default. It is sufficient that the rule be substantially complied with. Wilbor *v.* McGillicuddy, 3 La. 382; *In re* Swift, 114 Fed. 947.

84. Parr *v.* Johnson, 37 Minn. 457, 35 N. W. 176.

Waiver of objection by setting up fraud.— In such an action, in which no demand is alleged, the defendant, by setting up fraud in the making of the contract as a defense, and demanding a rescission, does not lose the right to avail himself of the fact that upon the plaintiff's own showing there is no right of recovery. Parr *v.* Johnson, 37 Minn. 457, 35 N. W. 176.

A demand for property due on a contract is sufficiently shown by an allegation that the defendant refused to let the plaintiff have it "when demand was made by plaintiff of defendant." Gilmore *v.* Ward, 22 Ind. App. 106, 52 N. E. 810.

85. *Kentucky.*— Wilmouth *v.* Patton, 2 Bibb 280.

Massachusetts.— Carley *v.* Vance, 17 Mass. 389.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— Rutty *v.* Consolidated Fruit-Jar Co., 52 Hun 492, 6 N. Y. Suppl. 23, 24 N. Y. St. 640.

Pennsylvania.— Wallace *v.* Baker, 1 Binn. 610.

Vermont.— Brooks *v.* Page, 1 D. Chipm. 340.

See 11 Cent. Dig. tit. "Contracts," § 1679.

86. Marie *v.* Garrison, 45 N. Y. Super. Ct. 157.

87. Frank *v.* Murray, 7 Mont. 4, 14 Pac. 654.

(II) *When Not a Condition Precedent.* In all cases where a party has laid himself under an absolute duty to perform an act, no previous request is necessary and of course none need be alleged or proved, although in such cases it is customary to add the general averment of *licet sæpius requisitus.*[88] Thus where the promise was to do a certain act or to pay a sum of money, and the defendant has not done the act, a special request to pay the money need not be alleged. When the particular act is not done at the time stipulated the payment of the money becomes a present duty.[89] So also in case of a contract to pay a sum of money at a fixed date no notice or demand is necessary before suit.[90] Indeed in such cases it is unnecessary to lay a general request, for the bringing of the action is itself a sufficient request, where the duty is one which the defendant is bound to discharge without a demand.[91] The only use of a special request is to avoid vexatious suits by giving the defendant an opportunity to pay an undisputed demand without action, and no such request need be made when it is apparent that it would be a fruitless ceremony.[92]

g. Averment of Notice. When the happening of a contingency or other matter alleged lies peculiarly within the knowledge of the plaintiff, he must aver that the defendant had notice;[93] but when it lies equally within the knowledge of the defendant such an averment is unnecessary. He is bound to take notice at his peril.[94] And the same is true where the defendant had ample means of ascertaining the happening of the contingency.[95]

Under the Ohio code a general allegation is sufficient, although a demand is required by law. Humphreys *v.* Staley, 2 Ohio Dec. (Reprint) 550, 3 West. L. Month. 628.

88. *Alabama.*— Calvert *v.* Marlow, 18 Ala. 67.

Connecticut.— Pettibone *v.* Pettibone, 5 Day 324.

Indiana.— Schreiber *v.* Butler, 84 Ind. 576; Princeton School Town *v.* Gebhart, 61 Ind. 187; Van Horn *v.* Mercer, 29 Ind. App. 277, 64 N. E. 531.

Massachusetts.— Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— Doty *v.* Wilson, 14 Johns. 378.

Tennessee.— Shelby *v.* Wynne, Mart. & Y. 93; Davis, etc., Bldg., etc., Co. *v.* Caigle, (Ch. 1899) 53 S. W. 240.

England.— Capp *v.* Lancaster, Cro. Eliz. 548; Wallis *v.* Scott, 1 Str. 88.

See 11 Cent. Dig. tit. "Contracts," § 1677.

In an action on an obligation to deliver a certain quantity of cotton where the plaintiff, in an amended petition, alleged a promise made after the obligation had fallen due to pay the amount in money, it was held that proof of putting the defendant *in mora* was unnecessary, and that the plaintiff was entitled to recover on proof of the subsequent promise as alleged. Row *v.* Richardson, 6 La. 78.

89. Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

90. Gray *v.* Robertson, 174 Ill. 242, 51 N. E. 248.

91. Ernst *v.* Bartle, 1 Johns. Cas. (N. Y.) 319; Leffingwell *v.* White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97.

Contract to furnish materials.— The complaint on a contract for a breach consisting of a failure to furnish certain materials which the defendant had agreed to furnish need not aver demand and refusal to pay the damages. Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637.

92. Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Thompson *v.* Whitney, 20 Utah 1, 57 Pac. 429.

Excuse for not making demand.— An allegation that the defendant refused to pay the plaintiff, although often requested, shows a sufficient excuse for not making a formal demand for payment. Indiana Mfg. Co. *v.* Porter, 75 Ind. 428. But in a case which requires a special demand for performance, an excuse for not making it must be specially pleaded. Newcomb *v.* Brackett, 16 Mass. 161.

93. Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Howard *v.* Hunt, 57 N. H. 467; James *v.* Adams, 16 W. Va. 245; Vyse *v.* Wakefield, 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 442.

94. *Connecticut.*— Townsend *v.* Wells, 3 Day 327.

Kentucky.— Peck *v.* McMurtry, 2 A. K. Marsh. 358.

Massachusetts.— Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119.

New Hampshire.— Howard *v.* Hunt, 57 N. H. 467; Dix *v.* Flanders, 1 N. H. 246.

New York.— Kemble *v.* Wallis, 10 Wend. 374; Humphreys *v.* Gardner, 11 Johns. 61.

Ohio.— Bush *v.* Critchfield, 4 Ohio 103.

Texas.— Dumas *v.* Hardwick, 19 Tex. 238.

Vermont.— Grew *v.* Goodhue, (1902) 52 Atl. 971.

Virginia.— Austin *v.* Richardson, 3 Call 201, 2 Am. Dec. 543.

England.— Hodsden *v.* Harridge, 2 Saund. 61*k*.

See 11 Cent. Dig. tit. "Contracts," § 1677.

95. Peck *v.* McMurtry, 2 A. K. Marsh. (Ky.) 358.

h. Not Necessary to Anticipate and Negative Matters of Defense. As a general rule it is not necessary for the plaintiff to anticipate and negative matters of defense.[96] Matters which should come more properly from the other side need not be stated; it is enough for each party to make out his own case.[97] Thus in an action on a contract which on its face refers to a contingency, on the happening of which the defendant should be discharged from liability, the plaintiff need not aver that the contingency has not happened, but if the defendant relies on it as a defense he must allege and prove that it did happen.[98] So in declaring on a contract, it is not necessary to allege the defendant's authority or legal capacity to make it. If he labors under any disability the fact must be set up as an affirmative defense.[99] And if the contract in suit was made by the defendant through the medium of an agent, it is not necessary to aver the authority of the agent.[1] But the defendant's connection with the contract must be distinctly averred. It is not sufficient to allude to the supposed agent in words which are merely *descriptio personæ*.[2]

i. Waiver of Performance. The plaintiff cannot show a waiver of performance or a modification of any part of a contract without alleging it.[3] So also where the defendant relies on a waiver of a stipulation in a contract sued on he must plead it.[4] And the facts showing a waiver of performance of a provision in a contract must be specially pleaded.[5] It is essential to the validity of a waiver of performance of a contract that the party making it should know that the contract has not been performed, and a pleading by the plaintiff which sets up such waiver must aver such knowledge on the part of the defendant making it.[6] A

96. *Arkansas.*—Patterson *v.* Jones, 13 Ark. 69, 56 Am. Dec. 296.

Connecticut.—Newton *v.* Paddock, 2 Root 89.

Georgia.—Griswold *v.* Scott, 13 Ga. 210.

Iowa.—Wallace *v.* Ryan, 93 Iowa 115, 61 N. W. 395.

New York.—Gurney *v.* Union Transfer, etc., Co., 8 N. Y. Suppl. 549, 29 N. Y. St. 274, 278.

South Dakota.—Hudson *v.* Archer, 4 S. D. 128, 55 N. W. 1099.

Tennessee.—Shelby *v.* Wynne, Mart. & Y. 93.

Texas.—Wooters *v.* International, etc., R. Co., 54 Tex. 294; Hardy *v.* Kansas Mfg. Co., (Sup. 1891) 18 S. W. 157.

Wisconsin.—McDowell *v.* Leav, 35 Wis. 171.

United States.—Wilcox *v.* Cohn, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640.

England.—Murray *v.* Stair, 2 B. & C. 82, 3 D. & R. 278, 26 Rev. Rep. 282, 9 E. C. L. 45; Mitchell *v.* Broughton, 1 Ld. Raym. 673; Freeman *v.* Bernard, 1 Ld. Raym. 247; Marks *v.* Marriot, 1 Ld. Raym. 114; Powell *v.* Graham, 1 Moore C. P. 305, 7 Taunt. 580, 18 Rev. Rep. 593, 2 E. C. L. 501; Irish Soc. *v.* Needham, 1 T. R. 482.

See 11 Cent. Dig. tit. "Contracts," § 1634; and, generally, PLEADING.

97. *Connecticut.*—Goshen, etc., Turnpike Co. *v.* Sears, 7 Conn. 86.

Maryland.—Karthaus *v.* Owings, 2 Gill & J. 430.

Massachusetts.—King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

New York.—Griswoll *v.* National Ins. Co., 3 Cow. 96; Hughes *v.* Smith, 5 Johns. 163; U. S. Postmaster-Gen. *v.* Cochran, 2 Johns. 413.

England.—Stowel *v.* Zouch, Plowd. 353*a*; Casseres *v.* Bell, 8 T. R. 166; Hotham *v.* East India Co., 1 T. R. 638, 1 Rev. Rep. 333; 1 Chitty Pl. (16th Am. ed.) 245; Comyns Dig. Pl. c. 81.

See PLEADING.

98. Root *v.* Childs, 68 Minn. 142, 70 N. W. 1087; Wooters *v.* International, etc., R. Co., 54 Tex. 294.

99. Shelbyville *v.* Shelbyville, etc., Turnpike Co. 1 Metc. (Ky.) 54; Walsingham's Case, Plowd. 547; Bovy's Case, 1 Vent. 217.

1. Call *v.* Hamilton County, 62 Iowa 448, 17 N. W. 667; State University *v.* Detroit Young Men's Soc., 12 Mich. 138; Weide *v.* Porter, 22 Minn. 429; Fagg *v.* Southern Bldg., etc., Assoc., 113 N. C. 364, 18 S. E. 655. See PRINCIPAL AND AGENT.

2. Phillips *v.* Knight, 20 R. I. 624, 40 Atl. 762.

3. McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153.

4. Kansas City *v.* Walsh, 88 Mo. App. 271.

5. Kentucky Chair Co. *v.* Com., 105 Ky. 455, 49 S. W. 197, 20 Ky. L. Rep. 1279; Bailey *v.* Bond, 77 Fed. 406, 23 C. C. A. 206.

6. Mohney *v.* Reed, 40 Mo. App. 99.

Where a building contract makes an architect's certificate a prerequisite to payment, it is indispensable, unless withheld in bad faith or else waived by the employer. See *supra*, IX, C, 5, g; XII, G, 1, b, (I). A mere allegation that the employer duly accepted the work performed by the plaintiff under and by virtue of said agreement does not show that the work was accepted as a full compliance with the contract, and is insufficient

waiver of performance of a contract and a waiver of damages for its non-performance set up in a pleading amount to one and the same thing.[7]

j. Assignment of Breach — (i) *In General.* There can be no recovery unless the plaintiff sets forth a breach by the defendant of the contract in suit; and if he fails to do so a demurrer is proper.[8] It is not enough to show a right of action against the defendant that the promises or covenants of the respective parties be fully set out, with the averment of performance on the part of the plaintiff. The plaintiff is bound to go further, and in due form to assign such breaches of the defendant's promises or covenants as are relied upon as grounds for a recovery of damages.[9] And it follows that there can be no recovery upon a breach not assigned by the plaintiff.[10]

(ii) *Sufficiency of Allegation.* The essential facts constituting the breach should be set forth in unequivocal terms;[11] and the breach should be assigned with such certainty and particularity as will apprise the defendant in what particular he has failed to perform.[12] But where an enumeration of particulars would lead to great prolixity in pleading a breach, a general assignment will suffice.[13] The same certainty is not required in assigning the breach of a contract as in setting forth its terms. All that can be required is that the breach complained of be substantially set forth and substantially proved.[14] It is not necessary that the breach assigned should negative the performance of the defendant's contract in every particular; if it has been performed in part it is enough to aver non-performance of the residue.[15] An allegation of the spoiling or destruction by the covenantor or promisor of the thing to be conveyed or delivered, whereby he has put it out of his power to perform, is a sufficient assignment of breach.[16] But the naked averment that the defendant has disabled him-

as an allegation of waiver. Schenke *v.* Rowell, 7 Daly (N. Y.) 286. See also Essex *v.* Murray, (Tex. Civ. App. 1902) 68 S. W. 736.

Cure or waiver of defect in pleading.— The plaintiff erected a building for the defendant under an entire contract. After erection, but before entire completion, the defendant drove the plaintiff away and would not permit him to finish the building. The plaintiff sued for the balance due on the contract and obtained a verdict therefor on the ground that the defendant's action rendered the complete performance impossible. And it was held that although the plaintiff's *narr.* was defective in not setting out a waiver of performance, yet that defect was amendable at any time on motion, either in the common pleas or the court above; and as the defendant admitted driving the plaintiff away and thus rendering complete performance impossible, the absence of such averment was not a sufficient reason for reversing the judgment. Wilman *v.* Wagner, 4 Luz. Leg. Reg. (Pa.) 252, 23 Pittsb. Leg. J. (Pa.) 40.

7. Mohney *v.* Reed, 40 Mo. App. 99.

8. *Alabama.*— Jones *v.* Powell, 15 Ala. 824.
Arkansas.— Green *v.* Thornton, 7 Ark. 383.
California.— Tozer *v.* George, 123 Cal. 650, 56 Pac. 465; Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249; Du Brutz *v.* Jessup, 70 Cal. 75, 11 Pac. 498; Roberts *v.* Treadwell, 50 Cal. 520; Fisher *v.* Pearson, 48 Cal. 472.
Connecticut.— Newell *v.* Roberts, 13 Conn. 417.
Indiana.— Thornton *v.* Burr, 90 Ind. 488; Green *v.* Chipman, 32 Ind. 195.
Mississippi.— Rich *v.* Calhoun, (1893) 12 So. 707.
Nebraska.— Simmons *v.* Yurann, 11 Nebr. 516, 9 N. W. 690.
New Jersey.— Gibbs *v.* Dempsey, 3 N. J. L. 201.
New York.— Lutweller *v.* Linnell, 12 Barb. 512; Schenck *v.* Naylor, 2 Duer 675; Mills *v.* Gould, 1 Abb. N. Cas. 93.
Ohio.— Phipps *v.* Hope, 16 Ohio St. 586.
Oregon.— Bowen *v.* Emmerson, 3 Oreg. 452.
England.— Newton *v.* Wilmot, 8 M. & W. 711.
See 11 Cent Dig. tit. "Contracts," § 1682 *et seq.*

9. Relyea *v.* Drew, 1 Den. (N. Y.) 561.

10. Bucki *v.* Seitz, 39 Fla. 55, 21 So. 576.

11. People *v.* Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90; Moore *v.* Beese, 30 Cal. 570; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Pollard *v.* Taylor, 1 Bibb (Ky.) 465; Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

12. Hart *v.* Bludworth, 49 Ala. 218; People *v.* Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90.

13. Smith *v.* Boston, etc., R. Co., 36 N. H. 458. See *infra*, XII, G, 1, i, (III), (A).

14. East Tennessee, etc., R. Co. *v.* Staub, 7 Lea (Tenn.) 397; Michie *v.* Governor, 4 Humphr. (Tenn.) 486. It is sufficient if the words used, either in their expressed intent or by necessary implication, show that a breach has been committed. Stone *v.* Wendover, 2 Mo. App. 247.

15. Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307.

16. Hopkins *v.* Young, 11 Mass. 302; Teat's Case, Cro. Eliz. 7; Griffith *v.* Goodhand, T. Raym. 464.

self from performing his contract is not a sufficient assignment of breach. From this it might be inferred that the defendant did not perform; but allegations in pleading must be direct, and are bad if they depend on mere inference.[17] In an action on a joint and several contract, the assignment of a breach by only one of the defendants is insufficient.[18] In assigning a breach of contract, it is not necessary to allege a promise which the law implies; it is sufficient to aver that the duty imposed by such implied promise was not performed.[19]

(III) *Manner of Assigning Breach*—(A) *In General Terms.* At common law it is as a rule sufficient to assign a breach in the words of the contract either negatively or affirmatively as the case may require, or in words which are coextensive with the import and effect of the contract. Inasmuch as the defendant must generally know in what respects he has or has not performed his contract, no great particularity ought to be required.[20] In assigning the breach, it is not necessary to use the precise terms of the agreement sued on, but it is sufficient to state the intention of the parties, as it may be collected from the instrument itself.[21] In other words it is sufficient upon general demurrer that the breach assigned be in words which contain the sense and substance or legal import, although they be not in the language of the contract.[22]

(B) *Cases Requiring Greater Particularity.* Although it is well settled that in many cases the breach may be assigned in general terms, there is another class of cases to which a different rule applies. Where the terms of the contract leave its meaning ambiguous, the rule does not apply, for if the breach were assigned generally, without proper introductory matter and corresponding averments, the court might not know what judgment to render.[23] The law requires that both in setting out the agreement and assigning the breach enough must be placed on the record to show that the contract has been broken, and that the plaintiff has a cause of action.[24] It should also be observed that more particularity is required in assigning the breach where the matter rests peculiarly in the knowledge of the party pleading.[25]

(C) *In Covenant.*[26] In covenant the breach may be assigned in the words of the covenant whenever a general negation or affirmance of the words necessarily

17. Murdock *v.* Caldwell, 10 Allen (Mass.) 299.

18. Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641.

19. White *v.* Snell, 9 Pick. (Mass.) 16.

20. *Arkansas.*— Green *v.* Thornton, 7 Ark. 383.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 151.

Iowa.— Jones County *v.* Sales, 25 Iowa 25.

Kentucky.— Moxley *v.* Moxley, 2 Metc. 309.

Massachusetts.— McGregory *v.* Prescott, 5 Cush. 67, holding that in declaring on a contract, a breach is sufficiently averred by alleging a request of performance in the terms of the contract.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— Glover *v.* Tuck, 1 Hill 66. See Ward *v.* Hogan, 11 Daly 227, 11 Abb. N. Cas. 478, holding that in an action for breach of an agreement to do a certain act it is sufficient to allege that the defendant has failed, neglected, and refused to do the act specified.

England.— Earl of Falmouth *v.* Thomas, 3 Tyrw. 26.

See 11 Cent. Dig. tit. "Contracts," § 1682 *et seq.*

Where no question of law is involved, an assignment of a breach in the words of the contract is good pleading. Seebass *v.* Mut. Reserve Fund L. Assoc., 82 Fed. 792.

21. Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473; Day *v.* Chism, 10 Wheat. (U. S.) 449, 6 L. ed. 363; Thornicroft *v.* Barns, 10 Mod. 149; Smith *v.* Sharp, 5 Mod. 133.

22. Calvert *v.* Marlow, 18 Ala. 67; Moxley *v.* Moxley, 2 Metc. (Ky.) 309; Hord *v.* Trimble, 3 A. K. Marsh. (Ky.) 532; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Wilcox *v.* Cohn, 5 Blatchf. (U. S.) 346, 29 Fed. Cas. No. 17,640.

23. Worthington *v.* McDonald, 4 Ind. 483.

24. *Alabama.*— Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473; Watts *v.* Sheppard, 2 Ala. 425.

Arkansas.— Green *v.* Thornton, 7 Ark. 383.

Delaware.— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 151.

Kentucky.— Hord *v.* Trimble, 3 A. K. Marsh. 532; Breckenridge *v.* Lee, 3 Bibb 329.

New York.— Lynch *v.* Murray, 21 How. Pr. 154.

See 11 Cent. Dig. tit. "Contracts," § 1682 *et seq.*

25. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151. See Pleading.

26. See, generally, Covenants.

shows a breach.[27] But if the words of a covenant taken in connection with the residue of the instrument do not mean the same as when they are separated from their context, a breach assigned in the words of the covenant is not well assigned.[28] And there are some other exceptions to the rule, as where the law implies a covenant, although there is none expressed, or where, by construction of law, the operation of the covenant is more restricted than the words of the covenant in their usual import would indicate.[29] Although it may not be necessary that the exact words of a covenant should be followed in assigning a breach, it must distinctly appear by express words, or by necessary implication, that, admitting the truth of the facts stated, the defendant has broken the covenant in its true sense and meaning.[30] And if the breach assigned vary from the sense and substance of the contract, and be either more limited or more extensive than the covenant, it will be insufficient.[31] The averment of a breach should negative every mode of performance which the previous averments would authorize.[32]

(IV) *Assignment of Several Breaches.* In assumpsit as well as in covenant the plaintiff may assign as many breaches as he thinks proper; at least where he does not declare on a promise to pay a penal sum.[33] Distinct breaches of separate covenants or promises may be assigned in the same count, and the count will be good if any one of them is well assigned.[34] And if, in a count setting forth several covenants or promises of the defendant, the breach of one be properly assigned, that is sufficient to support the count as against a demurrer.[35] The pleader, however, must not assign two or more breaches of the same covenant or promise in a single count, because that would be objectionable for duplicity.[36] And at common law, if several breaches be assigned, some of which are defective, and a general verdict be given, the judgment should be arrested on motion or reversed on writ of error, for the jury may have assessed damages upon the ill-assigned breaches.[37] Where a contract contains various substantive and independent stipulations and there is a breach of more than one of such stipulations, distinct causes of action arise which should be pleaded separately.[38]

(V) *Allegation of Non-Payment* — (A) *In Actions For Recovery of Money.* In an action on a contract to pay money, it should appear from the declaration, complaint, or petition that the sum demanded remains unpaid.[39] The

27. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151.

28. Chicago, etc., R. Co. *v.* Hoyt, 44 Ill. App. 48; Sicklemore *v.* Thistleton, 6 M. & S. 9, 18 Rev. Rep. 280.

29. Rees *v.* Buckner, 5 Litt. (Ky.) 328.

30. Schenck *v.* Naylor, 2 Duer (N. Y.) 675.

31. Moxley *v.* Moxley, 2 Metc. (Ky.) 309; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252; Glover *v.* Tuck, 1 Hill (N. Y.) 66. Under a covenant not to cut wood except from lands then cleared or which should thereafter be cleared, a breach assigning the cutting of wood on lands which the defendant had not cleared was held bad, inasmuch as the lands might have been cleared by others. Tredwell *v.* Steele, 3 Cai. (N. Y.) 169.

32. Dorsey *v.* Lawrence, Hard. (Ky.) 508.

33. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

34. *Alabama.*— Nave *v.* Berry, 22 Ala. 382.

Connecticut.— Chambers *v.* Robbins, 28 Conn. 544.

Indiana.— Smiley *v.* Deweese, 1 Ind. App. 211, 27 N. E. 505.

Missouri.— Pryor *v.* Kansas City, 153 Mo. 135, 54 S. W. 499.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

Ohio.— Bowman *v.* Fuher, 11 Ohio Cir. Ct. 231, 5 Ohio Cir. Dec. 218.

Wisconsin.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

United States.— Wilcox *v.* Cohn, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640.

See 11 Cent. Dig. tit. "Contracts," § 1690.

35. Jurnick *v.* Manhattan Optical Co., 66 N. J. L. 380, 49 Atl. 681.

36. Nave *v.* Berry, 22 Ala. 382.

37. Wilson *v.* Bowens, 2 T. B. Mon. (Ky.) 86.

38. Oh Chow *v.* Hallett, 2 Sawy. (U. S.) 259, 18 Fed. Cas. No. 10,469.

39. Schreiber *v.* Butler, 84 Ind. 576; Wheeler, etc., Mfg. Co. *v.* Worrall, 80 Ind. 297; Higert *v.* Indiana Asbury University, 53 Ind. 326; Stafford *v.* Davidson, 47 Ind. 319; Kent *v.* Cantrall, 44 Ind. 452; Howorth *v.* Scarce, 29 Ind. 278; Michael *v.* Thomas, 27 Ind. 501; Pace *v.* Grove, 26 Ind. 26; Lawson *v.* Sherra, 21 Ind. 363; Love *v.* Kidwell, 4 Blackf. (Ind.) 553.

Under the Connecticut statute (Pr. Act, §§ 1, 9), requiring a complaint merely to state a plain and concise statement of the material facts requisite to show the plaintiff

mere statement that the defendant is indebted to the plaintiff is substantially the conclusion to be found by the jury at the end of the investigation.[40] In such an action it is not sufficient to allege merely that the whole amount is now due; but the plaintiff must allege that the defendant has not paid it.[41] Whether the action be assumpsit or debt, the plaintiff must not only allege the non-payment of the debt, but must make this allegation general, and not confine it to the time when the debt became due.[42] And the allegation must be extended to every person who had a right to receive payment, either at the time the debt fell due or at any subsequent time prior to the commencement of the action.[43] If there be two obligees the averment must be of non-payment to either of them.[44] But it is generally sufficient to allege that the defendant, although often requested by the plaintiff to pay, has failed, neglected, and refused to pay the money alleged to be due or any part thereof.[45] An assignment that a sum less than the amount sued for is due and unpaid is not objectionable on that account. It merely limits the damages recoverable to the amount assigned in the breach.[46]

(B) *In Actions For Damages.* In an action for breach of a contract to do something other than to pay money, it is not necessary to allege that the damages claimed are due and unpaid, for the damages in such case are not the primary object of the contract, but merely an incident of its breach, and the object of the action is to recover these very damages when they shall have been ascertained by the jury. In such cases the breach alleged is not a failure to pay, but a failure to do something else for which the damages are not liquidated.[47] Where the contract is to do, or refrain from doing, a certain act, or in case of breach to pay a certain sum as damages, it is not necessary to aver that the stipulated damages remain unpaid.[48] If a note is payable in merchandise it is not necessary to allege failure to deliver the merchandise; the usual allegation of non-payment is sufficient.[49]

2. PLEAS AND ANSWERS — a. **Argumentative Denials.** An argumentative denial is bad.[50] A plea setting up a different contract from the one declared on is bad

entitled to the relief demanded, in an action on an implied contract to pay for services, judgment will not be arrested because the complaint fails to allege that the debt remained unpaid at the commencement of the action. Morehouse *v.* Throckmorton, 72 Conn. 449, 44 Atl. 747.

40. Seeley *v.* Engell, 17 Barb. (N. Y.) 530; Lienan *v.* Lincoln, 2 Duer (N. Y.) 670; Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34; Levy *v.* Bend, 1 E. D. Smith (N. Y.) 169; Bowen *v.* Emmerson, 3 Oreg. 452.

41. Scroufe *v.* Clay, 71 Cal. 123, 11 Pac. 882; Roberts *v.* Treadwell, 50 Cal. 520.

An allegation that "there is now due and owing from defendant," etc., on a contract for the payment of money is not sufficient as an allegation of non-payment constituting the breach of the contract. Richards *v.* Lake View Land Co., 115 Cal. 642, 47 Pac. 683.

42. Hurley *v.* Ryan, 119 Cal. 71, 51 Pac. 20; Douglass *v.* Central Land Co., 12 W. Va. 502.

43. Douglass *v.* Central Land Co., 12 W. Va. 502.

Thus in an action on a bond which has been assigned it must be alleged that the debt has not been paid either to the obligee or his assignee. Braxton *v.* Lipscomb, 2 Munf. (Va.) 282.

If two obligors executed the bond and only one is sued the declaration must negative payment by either. Hill *v.* Harvey, 2 Munf. (Va.) 525.

In an action by a surviving executor for a debt due the testator, the declaration must aver non-payment to the testator, to his deceased executor, or to the surviving executor. Buckner *v.* Blair, 2 Munf. (Va.) 336.

44. Strange *v.* Floyd, 9 Gratt. (Va.) 474.

In an action by a surviving partner, the plaintiff must allege non-payment to the two partners during the life of the deceased partner as well as non-payment to the survivor. Nicholson *v.* Dixon, 5 Munf. (Va.) 198.

45. Poirier *v.* Gravel, 88 Cal. 79, 25 Pac. 962; O'Hanlon *v.* Denvir, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19; Higert *v.* Indiana Asbury University, 53 Ind. 326; State University *v.* Detroit Young Men's Soc., 12 Mich. 138.

46. Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307.

47. Schreiber *v.* Butler, 84 Ind. 576; Kent *v.* Cantrall, 44 Ind. 452; Riley *v.* Walker, 6 Ind. App. 622, 34 N. E. 100.

48. Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

49. Henry *v.* Gamble, Minor (Ala.) 15. In declaring on a note for a given sum payable in specific articles at a certain time and place, it is sufficient for the plaintiff to aver that by reason of making the note the defendant became liable to pay, but had not paid, etc., without alleging in terms a non-delivery of the articles. Rockwell *v.* Rockwell, 4 Hill (N. Y.) 164.

50. See PLEADING.

as amounting to the general issue. It is an argumentative denial of the contract instead of being a direct denial.[51] Any plea or answer setting up new matter which amounts only to the general issue is bad as an argumentative denial.[52] But where the defendant first denies the contract alleged by the plaintiff and then sets up a contract materially different a substantial issue is raised.[53] A plea which merely denies that any such contract as that alleged in the declaration was seriously entered into by the parties, and alleges that if it was made in fact it was not intended to be operative is not open to the objection of being argumentative.[54]

b. Partial Defense Pleaded as Complete Defense. Where a partial defense to an action on a contract is pleaded as a complete defense it is bad on demurrer.[55]

c. New Contract Set Up as a Defense. At any time before a breach, the parties to a written contract may dissolve, waive, discharge, or qualify the contract or any part of the same by a new contract;[56] but a plea or answer setting up such new contract as a defense must aver that it was made before breach of the contract in suit.[57] And it must be shown that such new contract was binding on both parties.[58] If the time of payment mentioned in any written contract not under seal is enlarged by agreement of the parties, the plaintiff may declare on the original contract without noticing the agreement to enlarge the time of payment; and if he does this the defendant must plead and prove the subsequent agreement if he would rely on it as a defense.[59]

d. Breach by Plaintiff. In pleading the non-performance of a contract by the plaintiff the facts which constitute the breach must be alleged.[60] Where a party defends on the ground that work, for the price of which he is sued, was negligently and unskilfully done, the nature and character of the imperfections must be set out specifically. General allegations are insufficient.[61] Where the plaintiff alleges compliance with all the conditions of a contract and the defendant relies upon a breach of one condition, he must either deny such compliance or specially plead the breach relied on as a defense.[62] Where by statute the plaintiff is authorized to plead a general performance of all conditions precedent, the defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.[63]

51. Kimball *v.* Boston, etc., R. Co., 55 Vt. 95; Lyall *v.* Higgins, 4 Q. B. 528, 3 G. & D. 585, 7 Jur. 644, 12 L. J. Q. B. 241, 45 E. C. L. 528; Hayselden *v.* Staff, 5 A. & E. 153, 2 H. & N. 204, 6 N. & M. 659, 31 E. C. L. 562; Morgan *v.* Pebrer, 3 Bing. N. Cas. 457, 3 Hodges 3, 6 L. J. C. P. 75, 4 Scott 230, 32 E. C. L. 215.

52. American Button Hole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319; Sutherland *v.* Pratt, 2 Dowl. N. S. 813, 7 Jur. 261, 12 L. J. Exch. 235, 11 M. & W. 296.

53. Havens *v.* American F. Ins. Co., 11 Ind. App. 315, 39 N. E. 40; Becker *v.* Sweetzer, 15 Minn. 427.

54. Rake *v.* Pope, 7 Ala. 161.

55. Everroad *v.* Schwartzkopf, 123 Ind. 35, 23 N. E. 969; Smith *v.* Little, 67 Ind. 549; Alvord *v.* Essner, 45 Ind. 156; Conger *v.* Parker, 29 Ind. 380; Tittle *v.* Bonner, 53 Miss. 578; Holcomb *v.* Mason, 35 Miss. 698; Thompson *v.* Halbert, 109 N. Y. 329, 16 N. E. 675, 15 N. Y. St. 513; Ivy Courts Realty Co. *v.* Morton, 73 N. Y. App. Div. 335, 76 N. Y. Suppl. 687; Krog *v.* Rice, 1 Speers (S. C.) 333.

Where more than one breach of a contract is assigned, a plea answering but a single breach is insufficient as a plea to the whole action, although it may be sufficient as to the breach to which it refers. Muldrow *v.* McCleland, 1 Litt. (Ky.) 1.

56. See *supra*, IX, B, 1.

57. Billingsley *v.* Stratton, 11 Ind. 396.

58. Law *v.* Plume, 17 N. J. L. 466.

59. Pike *v.* Mott, 5 Vt. 108.

60. Branham *v.* Johnson, 62 Ind. 259; Scott *v.* Whipple, 6 Me. 425; Krause *v.* Thomas, 53 Minn. 209, 54 N. W. 1114; Maverick *v.* Gibbs, 3 McCord (S. C.) 315.

61. Parks *v.* Holmes, 22 Ill. 522. But an allegation that a window was built in such an unskilful and negligent manner as to let rain come through it into the house is sufficient to inform the plaintiff wherein the work is defective. Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188.

62. Glencross *v.* Evans, (Ariz. 1894) 36 Pac. 212.

63. *Kansas.*— McGrath *v.* Crouse, 6 Kan. App. 507, 50 Pac. 969.

Kentucky.— Preston *v.* Roberts, 12 Bush 570; Gridler *v.* Farmers', etc., Bank, 12 Bush 333; Muldrow *v.* McCleland, 1 Litt. 1.

e. Setting Up Parol Contemporaneous Agreement. A plea or answer setting up a parol contemporaneous agreement inconsistent with the written contract in suit is bad on demurrer.[64] But a contemporaneous parol agreement may be the consideration for a written promise, and a failure to perform it would constitute a failure of consideration, and this is open to inquiry by extrinsic evidence.[65]

f. General Issue and General Denial — (i) *General Issue.* If the plaintiff declares in assumpsit, the defendant may, under the general issue of *non assumpsit*, show that no such contract as that declared on was ever made,[66] for if the plaintiff misdescribes the terms or mistakes the meaning of the contract on which he sues, *non assumpsit* or a plea traversing the contract is the proper plea to let in the objection.[67] And it seems that the defendant may show that another and different agreement was actually made,[68] although this has been disputed.[69] The plea of *non assumpsit*, verified, puts in issue the execution of the instrument sued on to the same extent that the plea of *non est factum* does in actions of covenant;[70] but by statute or rule of court in some states, if the defendant pleads the general issue without denying the execution of the contract under oath, he must be considered to have admitted its execution in manner and form as alleged.[71] Under the general issue the defendant may show that the instrument was delivered conditionally;[72] but he is not at liberty to show an excuse for non-performance,[73] although it has been held that he may show that he offered to perform his part of the contract, but was prevented by the act of the plaintiff.[74] He may show under the general issue, by way of reduction of damages, that work was unskilfully done or that goods were not of the quality warranted.[75] But it seems that he cannot show, for the purpose of reducing damages, a breach by the plaintiff of stipulations independent of those on which the plaintiff seeks to recover, even though they be included in the same contract on which the action is brought.[76] And fraud which invalidates a contract cannot be proved under the general issue,

Massachusetts.— See Weed *v.* Draper, 104 Mass. 28.

New Jersey.— Vreeland *v.* Beekman, 36 N. J. L. 13.

New York.— See Reiher *v.* Moellner, 10 Misc. 43, 30 N. Y. Suppl. 831, 63 N. Y. St. 179.

United States.— Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 23 C. C. A. 89; Kahnweiler *v.* Phœnix Ins. Co., 67 Fed. 483, 14 C. C. A. 485.

England.— Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228, 25 Eng. L. & Eq. 552; Glenn *v.* Leith, 22 Eng. L. & Eq. 489.

64. *Arkansas.*—Hastings *v.* White, 24 Ark. 269.

Colorado.— Fitzgerald *v.* Burke, 14 Colo. 559, 23 Pac. 993.

Indiana.— Dickinson *v.* Colter, 45 Ind. 445; Coy *v.* Stucker, 31 Ind. 161.

Kansas.— Ft. Scott Coal, etc., Co. *v.* Sweeney, 15 Kan. 244.

Kentucky.— Trask *v.* Roberts, 1 B. Mon. 201; Trabue *v.* Kay, 4 Bibb 226.

Texas.— Wright *v.* Hays, 34 Tex. 253. *Compare* History Co. *v.* Flint, (App. 1891) 15 S. W. 912.

See 11 Cent. Dig. tit. "Contracts," § 1700.

65. Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145; Simpson Centenary College *v.* Bryan, 50 Iowa 293; Trayer *v.* Reeder, 45 Iowa 272; Puttman *v.* Haltey, 24 Iowa 425.

66. Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. (U. S.) 419, 13 L. ed. 479.

67. Nash *v.* Breese, 2 Dowl. N. S. 1015, 12 L. J. Exch. 305, 11 M. & W. 352; Kemble *v.* Mills, 9 Dowl. P. C. 446, 1 Drinkw. 22, 1 M. & G. 757, 2 Scott N. R. 121, 39 E. C. L. 1011.

68. Loughridge *v.* Thompson, 20 Ala. 828; Brundred *v.* Smithman, 188 Pa. St. 416, 41 Atl. 648; Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. (U. S.) 419, 13 L. ed. 479.

69. Center *v.* Torry, 8 Mart. (La.) 206.

Where an action is brought on an implied contract, and the defendant wishes to avail himself of a special contract either to defeat the action or to fix the measure of damages, he must plead it and produce it in evidence. Kerstetter *v.* Raymond, 10 Ind. 199.

70. Strong *v.* Linington, 8 Ill. App. 436.

71. Inglish *v.* Ayer, 92 Mich. 370, 52 N. W. 639; Jenkinson *v.* Monroe, 71 Mich. 630, 39 N. W. 854; Jacobson *v.* Miller, 41 Mich. 90, 1 N. W. 1013; Lobdell *v.* Merchants', etc., Bank, 33 Mich. 408; Peoria Mar., etc., Ins. Co. *v.* Perkins, 16 Mich. 380; Pegg *v.* Bidleman, 5 Mich. 26.

72. Curtis *v.* Harrison, 36 Ill. App. 287.

73. Bement *v.* Peck, 2 Root (Conn.) 494.

74. Wilt *v.* Ogden, 13 Johns. (N. Y.) 56.

75. Keyes *v.* Western Vermont Slate Co., 34 Vt. 81.

76. Keyes *v.* Western Vermont Slate Co., 34 Vt. 81.

unless the statutory notice is given.[77] The plea of "never was indebted" is applicable only to the common counts of a declaration. It is not applicable to a count upon a special contract.[78] A denial of indebtedness is not a sufficient answer where the plaintiff charges that the indebtedness arose out of breaches of a specific contract. The breaches must also be denied.[79]

(II) *General Denial* — (A) *Affirmative Defenses Cannot Be Shown.* The rule is that a general denial in an answer simply puts the plaintiff upon proof of all matters necessary to make out his cause of action, but does not authorize the defendant to prove any new matter constituting an affirmative defense.[80] Such new matter, or matter in confession and avoidance, as it is known at common law, must be specially pleaded, and cannot be introduced in evidence under a mere denial.[81]

(B) *Facts Inconsistent With Plaintiff's Allegations.* Although under the requirements of the code practice new matter must be pleaded, and consequently the defenses of payment, release, accord and satisfaction, arbitration, and many other entire and partial defenses which, while they do not deny the cause of action stated in the complaint or petition, yet seek to avoid or bar it, and which were formerly available under the general issue, must now be set up in the answer before evidence in their support can be received, yet under a general or special denial of any part of the complaint or petition which the plaintiff is required to prove in order to maintain his action, the defendant, upon principle and authority, is at all times at liberty to prove anything tending to show that the plaintiff's allegations are untrue.[82] And he may introduce evidence to disprove, wholly or in part, any fact which the plaintiff must establish to show a cause of action.[83] He may prove facts which are apparently new matter, when, instead of confessing and avoiding, they tend to disprove the facts alleged by the plaintiff. Such facts support the denial, because they tend to show that the plaintiff's allegations can-

77. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

78. Bucki *v.* Seitz, 39 Fla. 55, 21 So. 576; Bucki *v.* McKinnon, 37 Fla. 391, 20 So. 540.

79. Engler *v.* Bate, 19 Mo. 543.

80. *Alabama.*— Brush Electric Light, etc., Co. *v.* Montgomery, 114 Ala. 433, 21 So. 960.

Kansas.— Barber Asphalt Paving Co. *v.* Botsford, 56 Kan. 532, 44 Pac. 3; St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731, 18 Pac. 958; Clark *v.* Spencer, 14 Kan. 398, 19 Am. Rep. 96; Stevens *v.* Thompson, 5 Kan. 305; Perkins *v.* Ermel, 2 Kan. 325.

Minnesota.— Brown *v.* Eaton, 21 Minn. 409.

Missouri.— Reynolds *v.* Reynolds, 45 Mo. App. 622.

New York.— Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31, 38 N. Y. St. 910, 24 Am. St. Rep. 454; Weaver *v.* Barden, 49 N. Y. 286; Wilking *v.* Richter, 25 Misc. 735, 55 N. Y. Suppl. 582.

Texas.— Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

81. *Massachusetts.*— Bradford *v.* Tinkham, 6 Gray 494; Mulry *v.* Mohawk Valley Ins. Co., 5 Gray 541, 66 Am. Dec. 380.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

Missouri.— Wilkerson *v.* Farnham, 82 Mo. 672.

New York.— McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696; Catlin *v.* Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Gould *v.* Horner, 12 Barb. 601; Fay *v.* Grimsteed, 10 Barb. 321; Watson *v.* Bailey, 2 Duer 509; Schaus *v.* Manhattan Gas Light Co., 14 Abb. Pr. N. S. 371; Stuart *v.* Merchants', etc., Bank, 19 Johns. 496; Gouverneur *v.* Elmendorf, 5 Johns. Ch. 79.

Texas.— Eborn *v.* Chote, 22 Tex. 32.

Wisconsin.— Richards *v.* Worthley, 5 Wis. 73.

An act of God relied on as an excuse for the non-performance of a contract must be pleaded as an affirmative defense. New Haven, etc., Co. *v.* Quintard, 6 Abb. Pr. N. S. (N. Y.) 128, 37 How. Pr. (N. Y.) 29; Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726.

An allegation of non-payment is not put in issue by a general denial. Lent *v.* New York, etc., R. Co., 130 N. Y. 504, 29 N. E. 988, 42 N. Y. St. 592; Crawford *v.* Tyng, 10 Misc. (N. Y.) 143, 30 N. Y. Suppl. 907, 62 N. Y. St. 475.

82. Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Wheeler *v.* Billings, 38 N. Y. 263; Schaus *v.* Manhattan Gas Light Co., 14 Abb. Pr. N. S. (N. Y.) 371.

83. Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Knapp *v.* Roche, 94 N. Y. 329; O'Brien *v.* McCann, 58 N. Y. 373; Weaver *v.* Barden, 49 N. Y. 286; New York, etc., Sprinkler Co. *v.* Andrews, 38 N. Y. App. Div. 56, 55 N. Y. Suppl. 1020; Sawyer *v.* Warner, 15 Barb. (N. Y.) 282; Eisert *v.* Brandt, 10 Misc. (N. Y.) 393, 31 N. Y. Suppl. 121, 63 N. Y. St. 405.

not be true by reason of certain other facts which are inconsistent with them.[84] Thus he may show that at the time of making the alleged contract he was, by reason of excessive indulgence in the use of intoxicating liquors, in such unsound mental condition that he was wholly devoid of judgment and discretion.[85] And he may prove that the contract sued on was conditional and that the condition was not fulfilled,[86] or that the contract by force of the condition has terminated.[87] So also he may show that the plaintiff has failed to perform the contract upon which he has sued.[88] And in an action for goods sold and delivered, which are claimed to have been purchased by the defendant's agent, a revocation of the agent's authority and notification thereof to the plaintiff before the sale may be shown under a general denial.[89] In such action the defendant may show under a general denial that the goods were sold and delivered to his wife under such circumstances as not to bind him.[90]

(c) *Proof Of the Real Contract.* Under a general denial the defending party is always at liberty to disprove and overthrow the contract asserted against him, by proving that it was materially different from the one so asserted.[91] In other words he may show what the contract really was.[92] And upon this principle he may show that the instrument has been materially altered since its delivery.[93] So also in an action on an implied contract for services rendered, the defendant may show under a general denial that there was an express contract for the same services, even though such express contract be unlawful and invalid.[94] But if rescission is relied on as a defense, it must be specially pleaded. Proof of the fact cannot be admitted under an answer which merely denies the making of the contract.[95]

(d) *Conjunctive Denials.* The pleader should take care not to deny the plaintiff's allegations in conjunctive form. Such qualified and copulative denials are insufficient to raise a substantial issue.[96]

g. Plea of Performance. The general plea of performance is allowable only when all the covenants or promises are in the affirmative and comprehend a multiplicity of matters which are general in their nature. If they are specific, a plea of general performance is not good. In such case the plea should specifically set forth the mode of performance.[97] In a declaration assigning specific breaches, a

84. Barr *v.* Henderson, 105 La. 691, 30 So. 158; Stewart *v.* Goodrich, 9 Mo. App. 125; Evans *v.* Williams, 60 Barb. (N. Y.) 346; Weinberg *v.* Blum, 13 Daly (N. Y.) 399.

85. Cavender *v.* Widdingham, 2 Mo. App. 551.

86. Stewart *v.* Goodrich, 9 Mo. App. 125.

But under the Iowa code, a general denial by the defendant of each and every allegation of a petition which alleges the performance of a condition precedent in a contract, does not controvert the performance of the condition, unless the facts relied on are specifically stated. Halferty *v.* Wilmering, 112 U. S. 713, 5 S. Ct. 364, 28 L. ed. 858.

87. Danenbaum *v.* Person, 3 N. Y. Suppl. 129.

88. Conner *v.* Swain, 32 Miss. 245.

In an action for work done under a contract, evidence that the plaintiff abandoned the work is admissible under a general denial. Eisert *v.* Brandt, 10 Misc. (N. Y.) 393, 31 N. Y. Suppl. 121, 63 N. Y. St. 405.

89. Hier *v.* Grant, 47 N. Y. 278.

90. Day *v.* Wamsley, 33 Ind. 145.

91. Wilkerson *v.* Farnham, 82 Mo. 672; National Cash Register Co. *v.* Riggs, 22 Misc. (N. Y.) 716, 50 N. Y. Suppl. 35. The defendant is allowed to show in any manner that the contract alleged was not the agreement by the parties, and this cannot be done more effectively than to prove an entirely different contract and promise of the defendant. Young *v.* Jones, 8 Iowa 219.

92. Marsh *v.* Dodge, 66 N. Y. 533; McGill *v.* Hall, (Tex. Civ. App. 1894) 26 S. W. 132.

93. Schwarz *v.* Oppold, 74 N. Y. 307; Hirschman *v.* Budd, L. R. 8 Exch. 171, 42 L. J. Exch. 113, 28 L. T. Rep. N. S. 602, 21 Wkly. Rep. 582.

94. Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. 1020.

95. Riggins *v.* Missouri River, etc., R. Co., 73 Mo. 598.

96. Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Doll *v.* Good, 38 Cal. 287. There is only one proposition contained in an allegation that the defendant assumed and agreed to pay a mortgage debt, and it may be denied in the language of the allegation, and such denial will not be open to objection that it is a conjunctive or evasive denial. Jones *v.* Eddy, 90 Cal. 147, 27 Pac. 190.

97. Dickinson *v.* Burr, 7 Ark. 34; Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

plea of general performance is inapplicable and vicious; for the court is forced to the alternative of regarding it either as a nullity or as putting in issue only the acts of omission or commission imputed to the defendant as violations of his compact. If it were otherwise, and the plea were regarded as putting in issue every covenant on the part of the defendant to be performed, it might produce the strange absurdity that the plaintiff would recover damages for breaches of covenants of which he had never complained.[98] The plea of covenants performed admits the execution of the instrument;[99] and such a plea with no *absque hoc* to a declaration averring performance also admits performance on the part of the plaintiff.[1] But a plea of covenants performed *absque hoc* puts the plaintiff upon proof of his own performance of the contract.[2]

h. Tender of Specific Articles — (i) *Description of Articles.* In a plea of tender of goods upon an obligation payable in merchandise, the articles tendered must be described so that they can be distinguished and known.[3]

(ii) *Readiness to Perform.* In such a case a plea that the defendant was ready and willing to deliver the articles at the time and place stipulated is insufficient. Readiness does not amount to a tender.[4] The articles must have been designated and set apart, and placed absolutely at the disposal of the creditor, as upon a sale;[5] and the plea must state that they were kept ready for delivery until the uttermost convenient time of the day of payment.[6]

(iii) *Need Not Be Pleaded With an Uncore Prist.* If there has been an actual tender it need not be pleaded with an *uncore prist;* and the reasons assigned for not requiring the party to go beyond his contract and incur a further obligation attempted to be cast upon him by the creditor are that goods are perishable, and that there is an expense attendinging their keeping which the debtor must incur if he is obliged to keep his tender good.[7]

(iv) *Effect of the Tender.* A tender, properly made, is a satisfaction of the demand; and while it is true that the property tendered is no longer lost to the creditor merely by his neglect or refusal to receive it, it is also true that by the tender the debt is paid and the articles tendered become the property of the creditor and are afterward kept at his risk and expense. The relation of debtor and creditor no longer subsists between the parties, but that of trustee and *cestui*

98. Finley *v.* Boehme, 3 Gill & J. (Md.) 42.

99. Zents *v.* Legnard, 70 Pa. St. 192; Neave *v.* Jenkins, 2 Yeates (Pa.) 107.

1. Zents *v.* Legnard, 70 Pa. St. 192. In an early *nisi prius* case, it was held that such a plea did not admit the plaintiff's performance of his part of the agreement, but it does not appear in the case as reported whether or not the plea contained the *absque hoc.* Neave *v.* Jenkins, 2 Yeates (Pa.) 107.

2. Reiter *v.* Morton, 96 Pa. St. 229.

3. Nichols *v.* Whiting, 1 Root (Conn.) 443. Where the contract was to pay four hundred and ninety-six dollars, in money or in negroes, it was held that a plea of the tender of one negro which two disinterested men valued at four hundred and ninety-six dollars, without averring the time of day when it was made or the value of the negro tendered, was not good. Johnson *v.* Butler, 4 Bibb (Ky.) 97.

4. *Alabama.*— Cowan *v.* Harper, 2 Stew. & P. 236.

Indiana.— Pratt *v.* Graff, 15 Ind. 1; McKernon *v.* McCormick, 2 Ind. 318.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

Tennessee.— Nixon *v.* Bullock, 9 Yerg. 414.

Texas.— Dumas *v.* Hardwick, 19 Tex. 238.

Vermont.— Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

See 11 Cent. Dig. tit. "Contracts," § 1694.

5. Smith *v.* Loomis, 7 Conn. 110; Patton *v.* Hunt, 64 N. C. 163; Dewees *v.* Lockhart, 1 Tex. 535. Proof that the debtor had the property on hand at the time and place specified, and that he had prepared the same for payment of the note, is not sufficient evidence of the fulfilment of the contract. M'Connel *v.* Hall, Brayt. (Vt.) 223.

6. Aldrich *v.* Albee, 1 Me. 120, 10 Am. Dec. 45.

7. *Connecticut.*— Smith *v.* Loomis, 7 Conn. 110.

Indiana.— Mitchell *v.* Merrill, 2 Blackf. 87, 18 Am. Dec. 128.

Kentucky.— Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655.

New York.— Lamb *v.* Lathrop, 13 Wend. 95, 27 Am. Dec. 174; Sheldon *v.* Skinner, 4 Wend. 525, 21 Am. Dec. 161; Slingerland *v.* Morse, 8 Johns. 474.

North Carolina.— Patton *v.* Hunt, 64 N. C. 163.

Vermont.— Barney *v.* Bliss, 1 D. Chipm. 399, 12 Am. Dec. 696.

England.— Peytoe's Case, 9 Coke 77b.

que trust or bailor and bailee. In other words the effect of the tender is to give the promisee, instead of the *jus ad rem* which he loses, an absolute *jus in re*.[8]

i. Want of Consideration — (I) *In General.* The defendant may plead *non est factum* and a want of consideration, and he will not be compelled to elect upon which defense he will stand.[9] But the plea of no consideration standing alone admits the execution and delivery of the instrument.[10] A plea or answer which avers that a note, bond, or other like instrument was given without any consideration, although it is in the negative, does not traverse the whole of the declaration, complaint, or petition, and must be treated as pleading new matter not alleged by the plaintiff, and therefore presents an issuable defense, to which a reply is necessary to produce an issue.[11] A plea or answer that the defendant received no consideration is bad on demurrer. If the contract has a consideration to support it, that is sufficient, whether it was received by the defendant or by someone else by his consent.[12] A plea which sets forth facts showing a want of consideration, but states them as showing a failure of consideration, is nevertheless a good plea of want of consideration.[13] Want of consideration may be pleaded to a part, as well as the whole, of the cause of action, when limited to that part.[14] Ordinarily the defense of a want of consideration may be made at law, but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it becomes a question for equitable jurisdiction.[15]

(II) *Proof Under the General Issue or General Denial.* If the plaintiff declares specially upon an express contract a want of consideration cannot be proved under the general issue.[16] But if he declares on the common counts instead of declaring specially, the defendant may show either a want or a total or partial failure of consideration under the general issue; and this upon the principle that the plea of *non assumpsit* puts the plaintiff upon proof of his whole case and entitles the defendant, without prior special notice, to give evidence of anything which shows *ex æquo et bono* that the plaintiff ought not to recover.[17] If the instrument be one that imports a consideration, none need be alleged by the plaintiff; and if the defendant relies upon a want of consideration, he must plead it. He cannot avail himself of the defense under the general issue or a general denial.[18] But if the instrument be such that the plaintiff is bound to plead and prove the consideration, a general denial puts in issue the existence of the consideration as well as other material facts.[19] So also where the consideration is

8. Mitchell *v.* Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; Lamb *v.* Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Rep. 174; Shelden *v.* Skinner, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; Slingerland *v.* Morse, 8 Johns. (N. Y.) 474; Patton *v.* Hunt, 64 N. C. 163; Dewees *v.* Lockhart, 1 Tex. 535.

9. Pavey *v.* Pavey, 30 Ohio St. 600; Citizens' Bank *v.* Closson, 29 Ohio St. 78.

10. Conway *v.* U. S. Bank, 6 J. J. Marsh. (Ky.) 128.

11. Evans *v.* Stone, 80 Ky. 78; Coyle *v.* Fowler, 3 J. J. Marsh. (Ky.) 472; Boone *v.* Shackleford, 4 Bibb (Ky.) 67; Ralston *v.* Bullitt, 3 Bibb (Ky.) 264; Brown *v.* Ready, 20 S. W. 1036, 14 Ky. L. Rep. 583.

12. Bingham *v.* Kimball, 33 Ind. 184; Anderson *v.* Meeker, 31 Ind. 245.

13. Armstrong *v.* Webster, 30 Ill. 333.

14. Moore *v.* Boyd, 95 Ind. 134; Manly *v.* Hubbard, 9 Ind. 230; Webster *v.* Parker, 7 Ind. 185.

15. Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

16. Passenger *v.* Brookes, 1 Bing. N. Cas. 587, 27 E. C. L. 775, 7 C. & P. 110, 32 E. C. L. 524, 1 Hodges 123, 4 L. J. C. P. 195, 1 Scott 560.

17. Wilson *v.* King, 83 Ill. 232; Ferguson *v.* Oliver, 8 Sm. & M. (Miss.) 332; Buckels *v.* Cunningham, 6 Sm. & M. (Miss.) 358; Brewer *v.* Harris, 2 Sm. & M. (Miss.) 84, 41 Am. Dec. 587; Evans *v.* Williams, 60 Barb. (N. Y.) 346; Payne *v.* Cutler, 13 Wend. (N. Y.) 605; People *v.* Niagara C. Pl., 12 Wend. (N. Y.) 246; Blessing *v.* Miller, 102 Pa. St. 45; Pownall *v.* Blair, 78 Pa. St. 403; Von Storch *v.* Griffin, 77 Pa. St. 504; Falconer *v.* Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Gaw *v.* Wolcott, 10 Pa. St. 43; Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700; Keen *v.* Ranck, 14 Phila. (Pa.) 168, 37 Leg. Int. (Pa.) 37.

18. Winters *v.* Rush, 34 Cal. 136; Happe *v.* Stout, 2 Cal. 460; Beeson *v.* Howard, 44 Ind. 413; Frybarger *v.* Cockefair, 17 Ind. 404; State *v.* Wright, 37 Iowa 522; Goodpaster *v.* Porter, 11 Iowa 161; Linder *v.* Lake, 6 Iowa 164.

19. Alden *v.* Carpenter, 7 Colo. 87, 1 Pac. 904; Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Butler *v.* Edgerton, 15 Ind. 15; Beech

implied, the implication stands in the place of the alleged consideration in the other class, and the defendant's averment of a want of consideration is in effect but a denial of the implication; and it would seem that as complete an issue is thereby formed in the one case as in the other.[20]

(III) *General and Special Averments.* In an action upon an executory contract, a general averment that the contract was executed without any consideration whatever would seem to be sufficient without going into circumstantial details which are matters of evidence rather than averment.[21] But according to another line of decisions, an allegation that the contract set forth by the plaintiff is inoperative and void for the want of a sufficient and adequate consideration is deemed to be merely an allegation of a conclusion of law; and it is considered necessary to aver the facts which show that there was no consideration.[22] It has been held that the objection that no consideration is shown upon the face of the instrument, or that none is averred by the plaintiff, cannot be taken by demurrer; but that the want or failure of consideration must be averred and shown by way of defense when the action is upon a written contract.[23]

j. Failure of Consideration — (I) *Partial Failure.* A plea of partial failure of consideration, in an action on a sealed instrument reciting a consideration, is bad.[24] And at common law, partial failure of consideration could not be set up as a defense, unless the transaction was fraudulent in its inception. The defendant was obliged to resort to a cross action to recover his damages, unless he could show an entire failure of consideration.[25] But now generally, either by statute or judicial determination, the defense of partial want or failure of con-

v. White, 12 A. & E. 668, 10 L. J. Q. B. 4, 4 P. & D. 399, 40 E. C. L. 333; Raikes *v.* Todd, 8 A. & E. 846, 35 E. C. L. 873; Sutherland *v.* Pratt, 2 Dowl. N. S. 813, 7 Jur. 261, 12 L. J. Exch. 235, 11 M. & W. 296.

20. Alden *v.* Carpenter, 7 Colo. 87, 1 Pac. 904.

21. *Alabama.*— Kolsky *v.* Euslen, 103 Ala. 97, 15 So. 558; Giles *v.* Williams, 3 Ala. 316, 37 Am. Dec. 692.

Arkansas.— Catlin *v.* Horne, 34 Ark. 169; Dickson *v.* Burks, 11 Ark. 307; Cheney *v.* Higginbotham, 10 Ark. 273; Dickson *v.* Burk, 6 Ark. 412, 44 Am. Dec. 521.

Illinois.— Sheldon *v.* Lewis, 97 Ill. 640; Honeyman *v.* Jarvis, 64 Ill. 366.

Indiana.— Fisher *v.* Fisher, 113 Ind. 474, 15 N. E. 832; Beard *v.* Lofton, 102 Ind. 408, 2 N. E. 129; Moyer *v.* Brand, 102 Ind. 301, 26 N. E. 125; Moore *v.* Boyd, 95 Ind. 134; Bush *v.* Brown, 49 Ind. 573, 19 Am. Rep. 695; Billan *v.* Hercklebrath, 23 Ind. 71; Swope *v.* Fair, 18 Ind. 300; Frybarger *v.* Cockefair, 17 Ind. 404; Butler *v.* Edgerton, 15 Ind. 15; Webster *v.* Parker, 7 Ind. 185.

Kansas.— Miller *v.* Brumbaugh, 7 Kan. 343.

Kentucky.— Rudd *v.* Hanna, 4 T. B. Mon. 528; Boone *v.* Shackleford, 4 Bibb 67; Ralston *v.* Bullitts, 3 Bibb 261.

Mississippi.— In Matlock *v.* Livingston, 9 Sm. & M. 489, a plea "that the said note was executed without any consideration good or valuable at law" was held good on general demurrer; and this was followed without comment in Taylor *v.* McNairy, 42 Miss. 276; but now by statute the defendant must show by his plea the actual specific ground of his defense. Tittle *v.* Bonner, 53 Miss. 578.

Ohio.— Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

See 11 Cent. Dig. tit. "Contracts," § 1714 *et seq.*

22. Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Alden *v.* Carpenter, 7 Colo. 87, 1 Pac. 904; Munro *v.* King, 3 Colo. 238; Patterson *v.* Gile, 1 Colo. 200; Ahren *v.* Willis, 6 Fla. 359; Recknagel *v.* Steinway, 58 N. Y. App. Div. 352, 69 N. Y. Suppl. 132; Hammond *v.* Earle, 58 How. Pr. (N. Y.) 426.

Insufficient plea.— In an action on a note, a plea of want of consideration alleging that the payee was a son-in-law of the maker, and as heir of the maker's deceased daughter claimed an interest in the land in question, of which the maker was in possession under a homestead sued out in right of his wife and minor children, that the land was purchased with money of the maker, and that the note was given in settlement of the payee's claim and to prevent a threatened suit for partition, is insufficient in failing to allege that the maker took title to the premises in his own name or that his daughter in fact had no resulting trust in the property. Johnson *v.* Redwine, 98 Ga. 112, 25 S. E. 924.

23. Goodpaster *v.* Porter, 11 Iowa 161; Towsley *v.* Olds, 6 Iowa 526; Linder *v.* Lake, 6 Iowa 164.

24. Raritan R. Co. *v.* Middlesex, etc., Traction Co., (N. J. 1902) 51 Atl. 623.

25. Willett *v.* Forman, 3 J. J. Marsh. (Ky.) 292; Withers *v.* Greene, 9 How. (U. S.) 213, 13 L. ed. 109; Scudder *v.* Andrews, 2 McLean (U. S.) 464, 21 Fed. Cas. No. 12,564; Gray *v.* Cox, 4 B. & C. 108, 10 E. C. L. 502, 1 C. & P. 184, 12 E. C. L. 115, 6 D. & R. 200, 28 Rev. Rep. 769; Laing *v.* Fidgeon, 4 Campb. 169, 6 Taunt. 108, 16 Rev. Rep. 589, 1 E. C. L. 531; Fortune *v.* Lingham, 2 Campb. 416; Tye *v.* Gwynne, 2 Campb. 346; Morgan *v.*

sideration may be interposed in an action on a contract, when the facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered; and this rule promotes the ends of justice by avoiding the circuity of action necessary under the old rule.[26] Thus where the plaintiff has made a warranty, either *mala fide* or *bona fide*, of which there has been a breach, the defendant may plead and prove his damages in the vendor's action for the price of the articles sold instead of bringing a cross action on the warranty.[27]

(II) *Total Failure.* There can be no recovery on a contract or promise, the consideration of which the promisee by his own voluntary act has annulled and destroyed.[28] Where there is a total failure of consideration for a contract, induced by the fraudulent representations of the plaintiff, and the plaintiff is unable to perform, no notice of rescission is required to enable the defendant to plead failure of consideration as a defense.[29] A plea of failure of consideration must aver more than the mere failure; it must disclose the manner of the failure, and should state the consideration and its failure, not in general, but in specific, terms. In other words it must state the facts showing the substance of the matter relied on as a defense, for a mere general averment that the consideration has failed is a statement of a legal conclusion.[30]

(III) *Allegation as to Whether Failure Is Partial or Total.* If a failure of consideration is set up as a defense, it must be stated whether it is a partial or total failure.[31] And a plea which avers a total failure of consideration, but discloses only a partial failure, is bad on demurrer.[32] But under a good plea of total failure of consideration, a partial failure may be proved and made avail-

Richardson, 1 Campb. 40 note. 7 East 482, 10 Rev. Rep. 624 note, 3 Smith K. B. 487; Basten *v.* Butter, 7 East 479; Obbard *v.* Betham, 8 L. J. K. B. O. S. 254, M. & M. 483, 22 E. C. L. 569; Solomon *v.* Turner, 1 Stark. 51, 2 E. C. L. 30; Lewis *v.* Cosgrave, 2 Taunt. 2. See *supra*, IV, H.

26. *Alabama.*— Peden *v.* Moore, 1 Stew. & P. 71, 21 Am. Dec. 649.

Arkansas.—Berry *v.* Diamond, 19 Ark. 262; Keller *v.* Vowell, 17 Ark. 445.

Florida.— Stafford *v.* Anders, 8 Fla. 34.

Georgia.— Robinson *v.* Wilson, 19 Ga. 505; Simmons *v.* Blackman, 14 Ga. 318.

Kentucky.— Culver *v.* Blake, 6 B. Mon. 528.

New York.— Payne *v.* Cutler, 13 Wend. 605; People *v.* Niagara C. Pl., 12 Wend. 246; Reab *v.* McAlister, 8 Wend. 109; Burton *v.* Stewart, 3 Wend. 236, 20 Am. Dec. 692; Spalding *v.* Vandercook, 2 Wend. 431.

Texas.— Fortson *v.* Caldwell, 17 Tex. 627.

United States.— Withers *v.* Greene, 9 How. 213, 13 L. ed. 109; Miller *v.* Smith, 1 Mason 437, 17 Fed. Cas. No. 9,590.

See also *supra*, IV, H.

27. Fisher *v.* Somuda, 1 Campb. 190; King *v.* Boston, 7 East 481, note *a*; Cormack *v.* Gillis [*cited* in Basten *v.* Butter, 7 East 479, 481]. See SALES.

28. White *v.* White, 107 Ala. 417, 18 So. 3. See *supra*, IV, H.

29. Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

30. *Alabama.*— In this state a plea of failure of consideration not stating the facts is demurrable on that account, unless it is pleaded "in short by consent." Sims *v.* Herzfeld, 95 Ala. 145, 10 So. 227; Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913.

California.— Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

Illinois.— Wilson *v.* King, 83 Ill. 232; Hough *v.* Gage, 74 Ill. 257; Gage *v.* Lewis, 68 Ill. 604; Christopher *v.* Cheney, 64 Ill. 26; Johnson *v.* Wilson, 54 Ill. 419; Evans *v.* Green County School Com'rs, 6 Ill. 654; Swain *v.* Cawood, 3 Ill. 505; Sims *v.* Klein, 1 Ill. 302; Bradshaw *v.* Newman, 1 Ill. 133, 12 Am. Dec. 149; Poole *v.* Vanlandingham, 1 Ill. 47; Cornelius *v.* Vanorsdall, 1 Ill. 23; Taylor *v.* Sprinkle, 1 Ill. 17.

Indiana.— Moore *v.* Boyd, 95 Ind. 134; Billan *v.* Hercklebrath, 23 Ind. 71; Swope *v.* Fair, 18 Ind. 300; Applegate *v.* Crawford, 2 Ind. 579.

Missouri.— Staley *v.* Ivory, 65 Mo. 74; George T. Smith Middlings Purifier Co. *v.* Rembaugh, 21 Mo. App. 390.

New Jersey.— Raritan R. Co. *v.* Middlesex, etc., Traction Co., (1902) 51 Atl. 623.

New York.— Dubois *v.* Hermance, 56 N. Y. 673; Weaver *v.* Barden, 49 N. Y. 286; Eldridge *v.* Mather, 2 N. Y. 157.

Texas.— Clifton *v.* Brundage, 25 Tex. 331; Fortson *v.* Caldwell, 17 Tex. 627.

England.— Head *v.* Baldrey, 6 A. & E. 459, 7 L. J. Q. B. 94, 2 N. & P. 217, 33 E. C. L. 252.

31. Clough *v.* Murray, 19 Abb. Pr. (N. Y.) 97.

32. Christopher *v.* Cheney, 64 Ill. 26; Tyler *v.* Borland, 17 Ind. 298; Manly *v.* Hubbard, 9 Ind. 230; Street *v.* Mullin, 5 Blackf. (Ind.) 563.

able at the trial.[33] So also a plea which sets out the consideration, but does not allege wherein it is insufficient, is bad on demurrer.[34]

k. Illegality of Consideration — (I) *In General.* As we have seen an action cannot be maintained on an illegal contract, whether the illegality be because the contract contemplates a violation of a rule of the common law or of a statute, or because it is contrary to public policy.[35] A plea or answer therefore which sets up facts showing that the contract sued upon is illegal for either of these reasons is good.[36]

(II) *Proof Under the General Issue or General Denial.* In assumpsit at common law illegality of consideration may be shown under the general issue. The courts, in the due administration of justice, will not enforce a contract in violation of law or permit the plaintiff to recover upon a transaction contrary to public policy, even if the invalidity of the contract or transaction be not specially pleaded; and this is still the rule in some states.[37] In England, since the adoption of the Hilary rules, if a good cause of action at common law appear in the

33. Petillo *v.* Hopson, 23 Ark. 196; Landry *v.* Durham, 21 Ind. 232; Wynn *v.* Hiday, 2 Blackf. (Ind.) 123; Willis *v* Bullitt, 22 Tex. 330.

34. Mead *v.* Hughes, 15 Ala. 141, 1 Am. Rep. 123.

35. See *supra*, VII.

36. *Alabama.*— Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; Harrison *v.* Jones, 80 Ala. 412.

Arkansas.— Tucker *v.* West, 29 Ark. 386; Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717.

California.— Prost *v.* More, 40 Cal. 347.

Illinois.— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Indiana.— Crowder *v.* Reed, 80 Ind. 1.

Iowa.— Dillon *v.* Allen, 46 Iowa 299, 26 Am. Rep. 145; Chambers *v.* Games, 2 Greene 320.

Louisiana.— Harvey *v.* Fitzgerald, 6 Mart. 530.

Massachusetts.— Jones *v.* Smith, 3 Gray 500.

Minnesota.— Solomon *v.* Dreschler, 4 Minn. 278.

Pennsylvania.— Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

South Carolina.—McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

37. *Alabama.*— Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523.

Illinois.— Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39 [*affirming* 64 Ill. App. 453].

Kansas.— Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709.

Louisiana.— Bowman *v.* Gonegal, 19 La. Ann. 328, 92 Am. Dec. 537; Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527.

Massachusetts.— This was formerly the rule in Massachusetts. Dixie *v.* Abbott, 7 Cush. 610; Wheeler *v.* Russell, 17 Mass. 258. But it was changed by Stat. (1852), c. 312, §§ 14, 15. Bradford *v.* Tinkham, 6 Gray 494; Granger *v.* Ilsley, 2 Gray 521. See *infra*, note 39.

Michigan.— Snyder *v.* Willey, 33 Mich. 483; Hill *v.* Callaghan, 31 Mich. 424; Dean *v.* Chapin, 22 Mich. 275; Myers *v.* Carr, 12 Mich. 63; State Prison *v.* Lathrop, 1 Mich. 438; Kinnie *v.* Owen, 1 Mich. 249.

New Hampshire.— Brackett *v.* Hoyt, 29 N. H. 264; Pray *v.* Burbank, 10 N. H. 377.

Tennessee.— Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

Vermont.— Elkins *v.* Parkhurst, 17 Vt. 105.

United States.— Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899; Hall *v.* Coppell, 7 Wall. 542, 19 L. ed. 244; Providence Tool Co. *v.* Norris, 2 Wall. 45, 17 L. ed. 868; Craig *v.* Missouri, 4 Pet. 410, 7 L. ed. 903; Gauthier *v.* Cole, 17 Fed. 716. In Oscanyan *v.* Winchester Repeating Arms Co., *supra*, Field, J., said: "The position of the plaintiff, that the illegality of the contract in suit cannot be noticed because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is, therefore, sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract." The learned justice quoted with approval the language of Swayne, J., in Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244, where it was said: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neu-

declaration, the defendant must plead any statutable illegality upon which he relies as a defense.[38] And in many cases decided under American statutes requiring the facts constituting the cause of action or defense to be pleaded, it has been decided that evidence tending to show the illegality of the contract in suit cannot be given under a general denial or the general issue, if the contract is valid on its face, and the illegality does not appear from plaintiff's proof; but the defense must be specially pleaded, and the facts going to show in what the illegality consists must be stated.[39]

(III) *Plaintiff Must Make Out a Good Prima Facie Case.* As intitralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

England.— Holman *v.* Johnson, Cowp. 341; Norman *v.* Cole, 3 Esp. 252.

Where facts showing the illegality of the contract in suit are alleged in the answer, the plaintiff cannot recover on the pleadings, although such facts are not pleaded or insisted upon as a defense. Prost *v.* More, 40 Cal. 347.

38. Martin *v.* Smith, 1 Arn. 194, 4 Bing. N. Cas. 436, 6 Dowl. P. C. 639, 2 Jur. 376, 7 L. J. C. P. 201, 6 Scott 268, 33 E. C. L. 792; Barnett *v.* Glossop, 1 Bing. N. Cas. 633, 3 Dowl. P. C. 625, 4 L. J. C. P. 174, 1 Scott 621, 27 E. C. L. 796; Triebnerr *v.* Duerr, 1 Bing. N. Cas. 266, 3 Dowl. P. C. 133, 1 Scott 102, 27 E. C. L. 634; Macnabb *v.* Johnson, 2 F. & F. 293.

Under the judicature act of Ontario, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration. Clark *v.* Hagar, 22 Can. Supreme Ct. 510.

39. *Arkansas.*— Dickson *v.* Burk, 6 Ark. 412, 44 Am. Dec. 521.

Georgia.— Kimbro *v.* Fulton Bank, 49 Ga. 419.

Indiana.— Fisher *v.* Fisher, 113 Ind. 474, 15 N. E. 832; Casad *v.* Holdridge, 50 Ind. 529. See also Crowder *v.* Reed, 80 Ind. 1; Kain *v.* Rinker, 1 Ind. App. 86, 27 N. E. 328.

Iowa.— Chambers *v.* Games, 2 Greene 320.

Kansas.— Missouri, etc., R. Co. *v.* Bagley, 60 Kan. 424, 56 Pac. 759; Barber Asphalt Paving Co. *v.* Botsford, 56 Kan. 532, 44 Pac. 3.

Kentucky.— Coyle *v.* Fowler, 3 J. J. Marsh. 472.

Louisiana.— Harvey *v.* Fitzgerald, 6 Mart. 530.

Massachusetts.— Suit *v.* Woodhall, 116 Mass. 547; Cassidy *v.* Farrell, 109 Mass. 397; Goss *v.* Austin, 11 Allen 525; Bradford *v.* Tinkham, 6 Gray 494; Granger *v.* Ilsley, 2 Gray 521. See *supra*, note 37.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93. *Compare* Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466, holding that when the facts appear upon which the illegality of a contract depends, either party may assert such illegality, although it is not pleaded.

Missouri.— McDearmott *v.* Sedgwick, 140 Mo. 172, 39 S. W. 776; St. Louis Agricultural, etc., Assoc. *v.* Delano, 108 Mo. 217, 18 S. W. 1101; Musser *v.* Adler, 86 Mo. 445; Moore *v.* Ringo, 82 Mo. 468; George *v.* Williams, 58 Mo. App. 138; Cummiskey *v.* Williams, 20 Mo. App. 606. When the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must be pleaded in order to be available, and in so far as Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505, is in conflict with this rule it has been overruled in McDearmott *v.* Sedgwick, *supra*.

Nebraska.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899; Atchison, etc., R. Co. *v.* Miller, 16 Nebr. 661, 21 N. W. 451.

New York.— Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31, 38 N. Y. St. 910, 24 Am. St. Rep. 454; Honegger *v.* Wettstein, 94 N. Y. 252; Cummins *v.* Barkalow, 1 Abb. Dec. 479, 4 Keyes 514; Drake *v.* Siebold, 81 Hun 178, 30 N. Y. Suppl. 697, 62 N. Y. St. 694; O'Toole *v.* Garvin, 1 Hun 92; Stafford Pavement Co. *v.* Monheimer, 41 N. Y. Super. Ct. 184; Schreyer *v.* New York, 39 N. Y. Super. Ct. 1; Stoddart *v.* Key, 62 How. Pr. 137.

North Carolina.— Boyt *v.* Cooper, 6 N. C. 286.

Oregon.— Ah Doon *v.* Smith, 25 Oreg. 89, 34 Pac. 1093; Buchtel *v.* Evans, 21 Oreg. 309, 28 Pac. 67.

Pennsylvania.— Simons *v.* West, 2 Miles 196.

Texas.— Turner *v.* Gibson, 2 Tex. App. Civ. Cas. § 714; Markle *v.* Scott, 2 Tex. App. Civ. Cas. § 674; Nunn *v.* Lackey, 1 Tex. App. Civ. Cas. § 1331.

Washington.—Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117.

United States.— Jefferson *v.* Burhans, 85 Fed. 949, 29 C. C. A. 481.

See 11 Cent. Dig. tit. "Contracts," § 1716.

If the contract is merely voidable, and not void, the defense of the invalidity cannot be made under a general denial. Kearns *v.* New York, etc., Ferry Co., 19 Misc. (N. Y.) 19, 42 N. Y. Suppl. 771.

Failure of consideration.— Illegality in the consideration cannot be pleaded as a failure of consideration. Wilkins *v.* Riley, 47 Miss. 306.

mated above, the rule last stated is subject to the qualification that the plaintiff must, to support his action, allege and prove a contract valid on its face. If he fails to do this, his complaint may be dismissed, although the invalidity of the contract has not been pleaded as a defense.[40] Consequently the rule does not apply where the illegality of the contract is disclosed by the plaintiff's own evidence; for then, under a general denial, the defendant may object that the plaintiff's evidence shows that no valid contract was made.[41] Although it is frequently necessary to plead the facts upon which the illegality of a contract or transaction depends, it is never necessary to plead the law. When the facts appear, either upon the pleadings or proof, either party may insist upon the law applicable to such facts.[42]

(IV) *AGREEMENT TO SUPPRESS CRIMINAL PROSECUTION.*[43] A plea or answer alleging that the consideration of the contract was a promise to suppress a criminal prosecution is sufficient, although it does not aver that a crime has in fact been committed.[44]

l. Fraud or Duress — (I) *IN GENERAL.* If the defendant pleads fraud or duress in defeasance of the contract in suit, he must generally set forth the issuable facts upon which he relies to establish the defense.[45] For although fraud in the procurement of any contract vitiates it, such a defense must be pleaded, and it must be shown that the plaintiff was connected with, or was cognizant of, the

40. Cardoze *v.* Swift, 113 Mass. 250; Goss *v.* Austin, 11 Allen (Mass.) 525; Baird *v.* Sheehan, 38 N. Y. App. Div. 7, 56 N. Y. Suppl. 228; Drake *v.* Siebold, 81 Hun (N. Y.) 178, 30 N. Y. Suppl. 697, 62 N. Y. St. 694; Russell *v.* Burton, 66 Barb. (N. Y.) 539; Isler *v.* Brunson, 6 Humphr. (Tenn.) 277; Willis *v.* Weatherford Compress Co., (Tex. Civ. App. 1901) 66 S. W. 472.

41. *Minnesota.*— Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

Missouri.— Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

New York.— Honegger *v.* Wettstein, 94 N. Y. 252; Wilking *v.* Richter, 25 Misc. 735, 55 N. Y. Suppl. 582; Parks *v.* Jacob Dold Packing Co., 6 Misc. 570, 27 N. Y. Suppl. 289, 57 N. Y. St. 788.

Oregon.— Ah Doon *v.* Smith, 25 Oreg. 89, 34 Pac. 1093; Buchtel *v.* Evans, 21 Oreg. 309, 28 Pac. 67.

Washington.—Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117.

United States.— Jefferson *v.* Burhans, 85 Fed. 949, 29 C. C. A. 481.

42. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

43. See *supra*, VII, B, 3, f, (II), (I), (2).

44. Crowder *v.* Reed, 80 Ind. 1; Cheltenham Fire Brick Co. *v.* Cook, 44 Mo. 29; Steuben County Bank *v.* Mathewson, 5 Hill (N. Y.) 249; Welborn *v.* Norwood, 1 Tex. Civ. App. 614, 20 S. W. 1129. An answer which alleges that the consideration of the note sued on was illegal and void, and that the payee represented to the maker that if he would sign it a prosecution against a third person for perjury should be discontinued and suppressed, and that the defendant signed it for that purpose, and in consideration thereof the payee agreed to discontinue and suppress the prosecution, is sufficiently explicit to give the defendant the full benefit of all evidence tending to support the allegation. Clark *v.* Pomeroy, 4 Allen (Mass.) 534.

45. *Arkansas.*— Keller *v.* Vowell, 17 Ark. 445.

Georgia.— Carswell *v.* Hartridge, 55 Ga. 412.

Indiana.— Swope *v.* Fair, 18 Ind. 300. And see Clodfelter *v.* Hulett, 72 Ind. 137; O'Donald *v.* Evansville, etc., Straight Line R. Co., 14 Ind. 259.

Kentucky.— Barlow *v.* Wiley, 3 A. K. Marsh. 457.

Massachusetts.— Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Mississippi.— Bingham *v.* Sessions, 6 Sm. & M. 13.

New York.— Sternback *v.* Friedman, 23 Misc. 173, 50 N. Y. Suppl. 1025; Smith *v.* Hildenbrand, 15 Misc. 129, 36 N. Y. Suppl. 485; Gouverneur *v.* Elmendorf, 5 Johns. Ch. 79.

Pennsylvania.— Reilly *v.* Daly, 2 Pa. Super. Ct. 540.

United States.— Hitchcock *v.* Galveston, 3 Woods 287, 12 Fed. Cas. No. 6,534.

See 11 Cent. Dig. tit. "Contracts," § 1692.

Sufficiency of plea of fraud.— In Beck, etc., Lithographing Co. *v.* Houppert, 104 Ala. 503, 16 So. 522, 53 Am. St. Rep. 77, the facts averred in the plea were that the parties came to an agreement, that the plaintiff's agent reduced it to writing and then read it to the defendant in the terms agreed upon, when the defendant, believing the instrument was written as read, executed it. The plea then showed the difference in the instrument signed and the one the defendant intended to sign, and it was held good on demurrer. And see *infra*, XII, G, 2, l, (II).

As to false representations see *infra*, XII, G, 2, l, (III).

In pleading duress per minas the nature of

fraud.[46] It has been held in Delaware, however, that in an action of assumpsit proof of fraud is admissible under the general issue.[47]

(II) *Whether Averment May Be General or Should Be Specific.* As a rule a mere general averment of fraud, without stating the facts and circumstances on which the charge is based, is deemed to be an averment of a mere conclusion of law, presenting no issue, and not rendering proof admissible to establish the defense.[48] But while this general rule has gone unquestioned where the plaintiff alleges fraud and seeks affirmative relief,[49] cases are not wanting in which it has been considered that a general allegation of fraud as a defense is sufficient, because covin is usually so secret that the defendant cannot be supposed to have full knowledge of the facts.[50] Indeed it has been said that there may be considerable risk in pleading the fraud specially, for if the plea states in what the fraud and covin consist, it will preclude the defendant from going into general evidence of fraud.[51] And in a number of cases it has been held that, in the absence of a statutory requirement to the contrary, a plea or answer to an action on a note, bond, or other like instrument, alleging in general terms that the writing was obtained, or its execution procured, by fraud, misrepresentation, and covin, without specifically averring the facts constituting the fraud, is sufficient, and presents a substantive and issuable fact which is not a mere conclusion of law, and which must be taken as true unless denied.[52]

(III) *False Representations.* Where the defense is grounded on false and fraudulent representations, as an inducement to enter into the contract, the defendant must set forth the alleged false and fraudulent representations, together with

the threats and the defendant's fear of their execution must be alleged. Murdock *v.* Lewis, 26 Mo. App. 234.

A plea that the contract was executed under duress of imprisonment at the instance of the plaintiff must charge that the act of the officer was unlawful and that he had no authority to arrest and imprison the defendant. Diller *v.* Johnson, 37 Tex. 47.

46. Madison County Bank *v.* Graham, 74 Mo. App. 251.

47. Thomas *v.* Grise, 1 Pennew. (Del.) 381, 41 Atl. 883.

48. *Alabama.*— Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31; Giles *v.* Williams, 3 Ala. 316, 37 Am. Dec. 692.

Arizona.—History Co. *v.* Dougherty, (1892) 29 Pac. 649.

Arkansas.— Jackson *v.* Reeve, 44 Ark. 496; McIlroy *v.* Buckner, 35 Ark. 555; Seaborn *v.* Sutherland, 17 Ark. 603; Keller *v.* Vowell, 17 Ark. 445.

California.— Albertoli *v.* Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Gushee *v.* Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

Illinois.— Cole *v.* Joliet Opera House Co., 79 Ill. 96; Hopkins *v.* Woodward, 75 Ill. 62; Wood *v.* Goss, 21 Ill. 604.

Indiana.—Clodfelter *v.* Hulett, 72 Ind. 137; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355.

Kansas.— Barber Asphalt Paving Co. *v.* Botsford, 56 Kan. 532, 44 Pac. 3; State *v.* Williams, 39 Kan. 517, 18 Pac. 727.

New Jersey.— Connor *v.* Dundee Chemical Works, 50 N. J. L. 257, 12 Atl. 713. See also to same effect Hudson *v.* Winslow Tp., 35 N. J. L. 437.

New York.— Eccardt *v.* Eisenhauer, 74 N. Y. App. Div. 35, 77 N. Y. Suppl. 18; Reed *v.* Clark Cove Guano Co., 47 Hun 410; McMurray *v.* Gifford, 5 How. Pr. 14.

Oklahoma.— Fire Extinguisher Mfg. Co. *v.* Perry, 8 Okla. 429, 58 Pac. 635.

United States.— Hazard *v.* Griswold, 21 Fed. 178.

49. See FRAUD.

50. Raphael *v.* Goodman, 8 A. & E. 565, 7 L. J. Q. B. 220, 3 N. & P. 547, 1 W. W. & H. 363, 35 E. C. L. 733; Tresham's Case, 9 Coke 108*a*; D'Aranda *v.* Houston, 6 C. & P. 511, 25 E. C. L. 551; Robson *v.* Luscombe, 2 D. & L. 859; Lawton *v.* Elmore, 27 L. J. Exch. 141.

51. Took *v.* Tuck, 4 Bing. 224, 227, 12 Moore C. P. 435, 13 E. C. L. 478.

52. *Iowa.*— Strawser *v.* Johnson, 2 Greene 373; Hildreth *v.* Tomlinson, 2 Greene 360, 50 Am. Dec. 510; Hampton *v.* Pearce, Morr. 489.

Kentucky.— Evans *v.* Stone, 80 Ky. 78; Whitehead *v.* Root, 2 Metc. 584; Ross *v.* Braydon, 2 Dana 161, 26 Am. Dec. 445; Sharp *v.* White, 1 J. J. Marsh. 106.

New Jersey.— Mason *v.* Evans, 1 N. J. L. 211.

New York.— Culver *v.* Hollister, 17 Abb. Pr. 405; Sherwood *v.* Johnson, 1 Wend. 443.

Ohio.— Saunders *v.* Stotts, 6 Ohio 380, 37 Am. Dec. 263.

United States.— McClintick *v.* Johnston, 1 McLean 414, 15 Fed. Cas. No. 8,700.

This was formerly the rule in Missouri (Corby *v.* Weddle, 57 Mo. 452; Edgell *v.* Sigerson, 20 Mo. 494; Pemberton *v.* Staples, 6 Mo. 59; Montgomery *v.* Tipton, 1 Mo. 446), although now, under the code, it is held that the facts and circumstances constituting the fraud must be pleaded (Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 26 L. R. A. 36). And so are the English precedents. See 2 Chitty Pl. (16th Am. ed.) 393.

the facts as they actually exist.[53] He must state by whom the false representations were made in order that it may be ascertained whether they were made by a person in a position to speak for the plaintiff;[54] and he must distinctly negative the truth of the alleged false representations.[55] So also he must allege that the representations were made with a knowledge of their falsity on the part of the plaintiff;[56] and that he was misled and induced to enter into the contract through a belief in their truth.[57] At common law fraud could not be pleaded or given in evidence in an action on a specialty, unless it vitiated the execution of the instrument, and the defendant in such action was not permitted to show that he was induced to execute it by fraudulent representations as to the nature or value of the consideration.[58] But under modern statutes the rule is otherwise.[59] A distinction has been raised between a defense resting upon facts which were misstated in order to induce a party to enter into a bond, the contents of which he knew, and one resting on a misrepresentation of the contents of the instrument itself to an illiterate person. In the former it is said the bond is the obligation of the party who seals it, but is avoided by the false inducement to enter into it, the facts of which must be pleaded; but in the latter it is not his deed or bond at all, and he may successfully defend under the plea of *non est factum*.[60]

m. Plea of Non Est Factum. The plea of *non est factum* puts in issue only the actual execution of the instrument. All other material averments of the declaration are deemed to be admitted, and all other defenses must be specially pleaded, including matters which make the instrument absolutely void as well as those which make it voidable.[61] Under this plea it is not competent for the defendant to show matter in evidence which goes only to the avoidance of the contract; the reason being that the instrument remains his deed notwithstanding its liability to be avoided, until plea pleaded; so that he cannot in truth say that it is not his deed.[62]

3. Replication or Reply and Subsequent Pleadings — a. Replication at Common Law — (i) *In General.* When the plea properly concludes to the country, which can be only when the allegations of the declaration have merely been traversed or denied, the plaintiff cannot in general reply otherwise than by adding what is termed the *similiter*.[63] But when the plea has introduced new matter and has

53. Clodfelter *v.* Hulett, 72 Ind. 137.

54. O'Donald *v.* Evansville Straight Line, etc., R. Co., 14 Ind. 259.

55. Clodfelter *v.* Hulett, 72 Ind. 137.

56. Eccardt *v.* Eisenhauer, 74 N. Y. App. Div. 35, 77 N. Y. Suppl. 18; Walsh *v.* Hyatt, 74 N. Y. App. Div. 20, 77 N. Y. Suppl. 8. See *supra*, VI, D, 2, g.

57. Eccardt *v.* Eisenhauer, 74 N. Y. App. Div. 35, 77 N. Y. Suppl. 18; Van de Sande *v.* Hall, 13 How. Pr. (N. Y.) 458. See *supra*, VI, D, 2, i.

58. Gage *v.* Lewis, 68 Ill. 604.

59. *Illinois.*— Gage *v.* Lewis, 68 Ill. 604; White *v.* Watkins, 23 Ill. 480.

Indiana.— Fitzgerald *v.* Smith, 1 Ind. 310; Leonard *v.* Bates, 1 Blackf. 172.

Iowa.— Burlington Lumber Co. *v.* Evans Lumber Co., 100 Iowa 469, 69 N. W. 558. See also to same effect Chambers *v.* Games, 2 Greene 320.

New York.— Case *v.* Boughton, 11 Wend. 106.

United States.— Greathouse *v.* Dunlap, 3 McLean 303, 10 Fed. Cas. No. 5,742.

See *supra*, VI, D, 3, b, (IV).

60. Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441; Green *v.* North Buffalo Tp., 56 Pa. St. 110; Stoever *v.* Weir, 10 Serg. & R. (Pa.) 25; Thoroughgood's Case, 2 Coke 9*a*. See *supra*, VI, D, 3, b, (IV).

61. *Alabama.*— Gadsden, etc., R. Co. *v.* Gadsden Land, etc., Co., 128 Ala. 510, 29 So. 549.

Iowa.— Chambers *v.* Games, 2 Greene 320.

New York.— Woolley *v.* Newcombe, 87 N. Y. 605; Goulding *v.* Hewitt, 2 Hill 644; Cooper *v.* Watson, 10 Wend. 202; Legg *v.* Robinson, 7 Wend. 194; Barney *v.* Keith, 6 Wend. 555; Dale *v.* Roosevelt, 9 Cow. 307; McNeish *v.* Stewart, 7 Cow. 474; Thomas *v.* Woods, 4 Cow. 173; Kane *v.* Sanger, 14 Johns. 89.

Ohio.— Granger *v.* Granger, 6 Ohio 35.

Rhode Island.— Douglas *v.* Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

South Carolina.— Bollinger *v.* Thurston, 2 Mill 447.

West Virginia.— American Button-Hole Overseaming Sewing Mach. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

United States.— U. S. *v.* Dair, 4 Biss. 280, 25 Fed. Cas. No. 14,913.

See Bonds, 5 Cyc. 831.

62. Worcester *v.* Eaton, 13 Mass. 371, 374, 7 Am. Dec. 155.

63. 1 Chitty Pl. (16th Am. ed.) 604. See Pleading.

therefore concluded with a verification, and the plaintiff does not demur, he must reply, and it is error to proceed to trial without a replication to the plea.[64] A good replication may conclude the defendant by matter of estoppel, may traverse or deny the matter alleged in the plea, may confess and avoid the plea, or lastly, in case of an evasive plea, may new assign the cause of action.[65] But the facts alleged in the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.[66] And if the plaintiff resorts to a traverse the replication must answer the whole of the plea.[67]

(II) *Replication De Injuria.* Formerly the general traverse, or the replication *de injuria*, as it is called, was confined in practice to actions of trespass, replevin, and cases for personal injuries, where some excuse was set up by the defendant in his plea.[68] But when the exigency of the new rules rendered special pleas in excuse frequent in actions of assumpsit and debt on simple contracts, it became reasonable that the plaintiff should be allowed to take issue by a general traverse on the whole matter of excuse alleged; and accordingly the courts soon sanctioned the use of such a form of replication, changing only such words as are merely formal.[69] This replication, however, is not to be allowed where the plea is in denial and not in excuse, as where it amounts to the general issue, to a denial of the contract, or the breach of it, on which the action is founded.[70] Nor is this replication allowed where the plea amounts to matter of discharge and not of excuse, as when the plea is payment, accord and satisfaction, release, or the like.[71]

64. *Arkansas.*— Reagan *v.* Irvin, 25 Ark. 86; Fesmire *v.* Brock, 25 Ark. 20; Williams *v.* Perkins, 21 Ark. 18; Taylor *v.* Coolidge, 17 Ark. 454; Stone *v.* Robinson, 9 Ark. 477; Cole *v.* Wagnon, 2 Ark. 154.

Florida.— Frank *v.* Williams, 36 Fla. 136, 18 So. 851; Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270; Livingston *v.* L'Engle, 22 Fla. 427.

Kentucky.— McGuffin *v.* Helm, 5 Litt. 47.

Mississippi.— Hogue *v.* Lewellen, 42 Miss. 302; Rushing *v.* Key, 4 Sm. & M. 191; Bozman *v.* Brown, 6 How. 349; Webster *v.* Tiernan, 4 How. 352.

Pennsylvania.— Maxwell *v.* Beltzhover, 9 Pa. St. 139.

West Virginia.—Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

England.— Rowlinson *v.* Roantre, 6 C. & P. 551, 25 E. C. L. 571.

See Pleading.

65. 1 Chitty Pl. (16th Am. ed.) 604. See Gaylord *v.* Van Loan, 15 Wend. (N. Y.) 308; Took *v.* Glascock, 1 Saund. 250*d*. And see Pleading. When a plaintiff replies that the defendant is estopped to plead his plea he may demand judgment generally. Shelley *v.* Wright, Willes 9.

66. U. S. *v.* Buford, 3 Pet. (U. S.) 12, 31, 7 L. ed. 585.

67. Reynolds *v.* Torrance, 1 Treadw. (S. C.) 125. See Pleading.

68. Coffin *v.* Bassett, 2 Pick. (Mass.) 357; Ridgefield Park R. Co. *v.* Ruckman, 38 N. J. L. 98; Tubbs *v.* Caswell, 8 Wend. (N. Y.) 129; Cowper *v.* Garbett, 13 M. & W. 33; White *v.* Stubbs, 2 Saund. 294. See Pleading.

69. Reynolds *v.* Blackburn, 7 A. & E. 161, 34 E. C. L. 104; Watson *v.* Wilks, 5 A. & E. 237, 31 E. C. L. 596; Griffin *v.* Yates, 2 Bing. N. Cas. 579, 29 E. C. L. 670; Noel *v.* Rich, 2 C. M. & R. 360, 4 Dowl. P. C. 228, 1 Gale 225, 5 Tyrw. 632; Gibbons *v.* Mottram, 6 M. & G. 692, 7 Scott N. R. 535, 46 E. C. L. 692; Isaac *v.* Farrar, 1 M. & W. 65; White *v.* Stubbs, 2 Saund. 294; Chitty Pl. (16th Am. ed.) 606. In New Jersey this form of replication may be used in actions *ex contractu*, whenever a special plea in excuse of the alleged breach of contract may be pleaded, as a general traverse to put in issue the material allegations of the plea. Ridgefield Park R. Co. *v.* Ruckman, 38 N. J. L. 98. In Vermont, in an action on a promissory note, where the defendant set up in his plea an agreement by the former owner to extend the time of payment and notice to the plaintiff, it was held that the replication *de injuria* was a traverse of, and put in issue all, the material facts alleged in the plea. Paddock *v.* Jones, 40 Vt. 474.

70. Whittaker *v.* Mason, 2 Bing. N. Cas. 359, 6 Dowl. P. C. 429, 5 Scott 740, 29 E. C. L. 572; Solly *v.* Neish, 2 C. M. & R. 355; Cleworth *v.* Pickford, 8 Dowl. P. C. 873, 10 L. J. Exch. 41, 7 M. & W. 314; Elwell *v.* Grand Junction R. Co., 8 Dowl. P. C. 225, 5 M. & W. 669; Pelly *v.* Rose, 12 M. & W. 435; Schild *v.* Kilpin, 8 M. & W. 673; Parker *v.* Riley, 3 M. & W. 230; White *v.* Stubbs, 2 Saund. 294.

71. Edwards *v.* Greenwood, 2 Arn. 27, 5 Bing. N. Cas. 476, 7 Scott 482, 35 E. C. L. 257; Crisp *v.* Griffiths, 2 C. M. & R. 159; Crogate's Case, 8 Coke 66*b*; Jones *v.* Senior, 4 M. & W. 123; White *v.* Stubbs, 2 Saund. 294.

(III) *Departure.* The replication must not depart from the allegations made in the declaration in any material matter; the reason for the rule being that if the parties were permitted to wander from fact to fact, and to supply a new cause of action as often as the defendant should interpose a legal bar to that which the plaintiff previously set out, it would lead to endless prolixity, and it would even be possible by this means to prevent them from ever coming to issue.[72]

b. Replies Under Code System — (I) *Office of Reply.* The office of a reply under the code system of pleading is to deny new matter alleged in the answer as an affirmative defense or counter-claim or to allege new facts in avoidance of such defenses.[73] And the plaintiff by failing to reply admits the truth of all material allegations of new matter of such character as to call for a reply.[74]

(II) *Not Required Where Answer is Substantially a Denial.* Facts stated in the answer, however, which could have been given in evidence under a general or special denial do not constitute new matter calling for a reply;[75] and no reply is required to an answer if its legal effect is a mere denial of the plaintiff's cause of action.[76] An answer setting up a different contract from that sued on does not constitute new matter calling for a reply.[77]

(III) *Statutory Regulations in Regard to Necessity For.* By statute in some jurisdictions no replication or reply is required, but all new matter set up in the answer is deemed to be controverted.[78] In others a reply is not necessary unless the defendant has set up new matter constituting a counter-claim.[79] In still others the law operates as a denial of an affirmative defense pleaded in the

72. Wells *v.* Teall, 5 Blackf. (Ind.) 306; Jamison *v.* Lindsay, 4 McCord (S. C.) 93; Allen *v.* Mayson, 3 Brev. (S. C.) 207. See Pleading.

73. Evans *v.* Stone, 80 Ky. 78; Stoddard *v.* Onondaga Methodist Protestant Church, 12 Barb. (N. Y.) 573. See Pleading.

74. Allenspach *v.* Wagner, 9 Colo. 127, 10 Pac. 802; Scofield *v.* Clark, 48 Nebr. 711, 67 N. W. 754; National Lumber Co. *v.* Ashby, 41 Nebr. 292, 59 N. W. 913; Hamilton L. & T. Co. *v.* Gordon, 32 Nebr. 663, 49 N. W. 699. An answer of payment is new matter, and must be taken as true in the absence of any reply. Fewster *v.* Goddard, 25 Ohio St. 276. Where allegations in the answer which constitute a complete defense to the plaintiff's cause of action are not denied by the reply, judgment should be rendered for the defendant notwithstanding a verdict for the plaintiff. Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

75. State *v.* Williams, 48 Mo. 210; Helena Nat. Bank *v.* Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628; Mauldin *v.* Ball, 5 Mont. 96, 1 Pac. 409; Corry *v.* Campbell, 25 Ohio St. 134; Iba *v.* State Cent. Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. See Pleading.

76. *Colorado.*— Meyer *v.* Binkleman, 5 Colo. 262.

Indiana.— Walker *v.* Woollen, 54 Ind. 164, 23 Am. Rep. 639.

Kansas.— Burrton *v.* Harvey County Sav. Bank, 28 Kan. 390; Reed *v.* Arnold, 10 Kan. 102; Wilson *v.* Fuller, 9 Kan. 176; Ferguson *v.* Tutt, 8 Kan. 370; Zane *v.* Zane, 5 Kan. 134.

Kentucky.— Ermert *v.* Dietz, 44 S. W. 138, 19 Ky. L. Rep. 1639; Collins *v.* Partin, 42 S. W. 1111, 19 Ky. L. Rep. 1027.

Missouri.— Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153.

Ohio.— Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Dec. 612.

Wyoming.— Iba *v.* Wyoming Cent. Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

77. Simmons *v.* Green, 35 Ohio St. 104.

78. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 631; Grangers' Business Assoc. *v.* Clark, 84 Cal. 201, 23 Pac. 1081; Colton Land, etc., Co. *v.* Raynor, 57 Cal. 588; Curtiss *v.* Sprague, 49 Cal. 301; Herold *v.* Smith, 34 Cal. 122; Hickman *v.* Dawson, 33 La. Ann. 438; McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516. In Louisiana replications are not admissible, and all the allegations of the answer are open to any objections of law or fact. Bayly *v.* Stacey, 30 La. Ann. 1210.

79. *Arkansas.*— In this state the statute forbids the plaintiff to reply to new matter contained in the answer, unless such new matter constitutes a set-off or a counter-claim. Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612.

Montana.— In this state new matter set up in the answer as a defense and not constituting a counter-claim is deemed to be denied without a replication. Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943.

New York.— Putnam *v.* De Forest, 8 How. Pr. 146.

North Carolina.— Askew *v.* Koonce, 118 N. C. 526, 24 S. E. 218; Fitzgerald *v.* Shelton, 95 N. C. 519.

North Dakota.— Heebner *v.* Shephard, 5 N. D. 56, 63 N. W. 892.

South Carolina.— Egan *v.* Bissell, 54 S. C. 80, 32 S. E. 1; Davis *v.* Schmidt, 22 S. C. 128.

South Dakota.— Seiberling *v.* Mortinson, 10 S. D. 644, 75 N. W. 202.

answer,[80] although any matter in confession and avoidance of the answer must be set up in a reply, for such is the office of a reply.[81]

(IV) *DEPARTURE.* It is not the office of a reply to state a cause of action,[82] and the plaintiff is not permitted to plead in his reply matters which are material only to the cause of action alleged in his complaint or petition.[83] Much less will he be permitted to recover on a distinct cause of action which is pleaded for the first time in the reply.[84] When an answer is filed, he may be awarded any relief consistent with the case made by his initial pleading or embraced in the issue made by the answer; but he cannot be awarded an entirely different judgment from that prayed for in the first instance.[85] A reply which sets up matter which is not inconsistent with the complaint, but which tends to support and justify it, is not a departure.[86]

c. Pleadings Subsequent to Replication. If the replication be in confession and avoidance, and not by way of traverse, the defendant may in turn traverse or confess and avoid its allegations. Such a plea is called the rejoinder. And so after this there may be surrejoinder, rebutter, and surrebutter.[87] The defendant must conform his rejoinder to a maintenance of the defense made by the plea.[88]

H. Pleading and Proof — 1. GENERAL PRINCIPLES — a. Strictness of Proof Required. Matter of allegation or averment need be proved only in substance, and only so much thereof as makes out a legal claim. The remainder may be rejected as surplusage.[89] But matter of description must be proved as set forth. It cannot be rejected as surplusage, although the insertion was unnecessary.[90]

b. Evidence Confined to Issues. When a material matter is put in issue by the pleadings, any competent evidence tending to sustain the contention of either party is admissible;[91] and it is not essential to the admissibility of evidence that it should prove the issue under which it is offered. It is necessary only that it should tend to prove the issue or some part of it.[92] But neither party is at liberty to introduce evidence of facts which are not alleged in the pleadings and are not within the issues made thereby.[93] Under an allegation of performance, an excuse

Wisconsin.— Wood *v.* Lake, 13 Wis. 84.

80. Kinkead *v.* McCormick Harvesting Mach. Co., 106 Iowa 222, 76 N. W. 663; Kirk *v.* Woodbury County, 55 Iowa 190, 7 N. W. 498. In Iowa no reply is necessary to put in issue allegations in the answer which do not set up a counter-claim or plead matter to be avoided by new matter to be stated in the reply. Mills County Nat. Bank *v.* Perry, 72 Iowa 15, 33 N. W. 341, 2 Am. St. Rep. 228; Meadows *v.* Hawkeye Ins. Co., 62 Iowa 387, 17 N. W. 600.

81. Kinkead *v.* McCormick Harvesting Mach. Co., 106 Iowa 222, 76 N. W. 663; Marshalltown First Nat. Bank *v.* Wright, 84 Iowa 728, 48 N. W. 91, 50 N. W. 23; Kervick *v.* Mitchell, 68 Iowa 273, 24 N. W. 151, 26 N. W. 434.

82. Small *v.* Kennedy, 137 Ind. 299, 33 N. E. 674, 19 L. R. A. 337; Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799; Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241; Hastings School Dist. *v.* Caldwell, 16 Nebr. 68, 19 N. W. 634.

83. Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799; Jones *v.* Marshall, 56 Iowa 739, 10 N. W. 264.

84. Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799; Lillienthal *v.* Hotaling Co., 15 Oreg. 371, 15 Pac. 630.

85. Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799; Lafever *v.* Stone, 55 Iowa 49, 7 N. W. 400; Wilson *v.* Miller, 16 Iowa 111.

86. Shirts *v.* Irons, 47 Ind. 445. The plaintiff may, in reply to new matter set up in the answer by way of defense, allege any new matter not inconsistent with the petition which in law constitutes an answer to the new matter relied on by the defendant. Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 344.

87. See PLEADING.

88. McGavock *v.* Whitfield, 45 Miss. 452; Tarleton *v.* Wells, 2 N. H. 306; Sterns *v.* Patterson, 14 Johns. (N. Y.) 132.

89. Allen *v.* Goff, 13 Vt. 148. See *infra*, XII, H, 2, o.

90. Allen *v.* Goff, 13 Vt. 148. See *infra*, XII, H, 2, o.

91. Mobile, etc., R. Co. *v.* Worthington, 95 Ala. 598, 10 So. 839; Ferguson *v.* McBean, (Cal. 1894) 35 Pac. 559; Thompson *v.* Kilborne, 28 Vt. 750, 67 Am. Dec. 742. See EVIDENCE.

92. Ferguson *v.* McBean, (Cal. 1894) 35 Pac. 559. In an action brought against a railroad company for labor done, where the defense is that the work was done for a contractor and not for the defendant, the contract between the defendant and the general contractor is admissible in evidence as tending to prove the defense. Downs *v.* Union Pac. R. Co., 4 Kan. 201.

93. Byers *v.* Daugherty, 40 Ind. 198; Turner *v.* Maddox, 3 Gill (Md.) 190; Pucci *v.* Barney, 2 Misc. (N. Y.) 354, 21 N. Y. Suppl.

for non-performance is not admissible in evidence.[94] Nor can defendant show a reason for non-performance under a plea of covenants performed, as it negatives instead of supporting the issue.[95] So where the defendant avers breaches of the contract in suit by the plaintiff, the latter cannot introduce evidence of matter in avoidance, unless he sets it up in his replication or reply.[96] Upon this principle it has been held that under an averment of performance it cannot be shown that performance was waived.[97] But on the other hand it has been held that under an allegation of performance the plaintiff may introduce proof of a waiver of any condition of the contract by the defendant.[98] Where this rule obtains, if there is a general allegation of performance, and the answer sets up affirmatively a breach of one or more of the conditions, an issue of waiver may be made by the reply.[99] If the plaintiff alleges performance of the contract on his part, the defendant may give evidence of a breach under a general allegation of a violation of the contract.[1]

c. Traversable Matter Not Denied. All traversable matter not denied is deemed to be admitted, and it is not necessary to prove it.[2]

2. VARIANCE — a. General Correspondence Between Allegations and Proof. It is a fundamental rule that judgment shall be *secundum allegata et probata*, and any departure from that rule is certain to produce surprise, confusion, and injustice.[3] Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them; and if a party can allege one cause of action and then recover upon another, his pleadings can serve no useful purpose, but will rather ensnare and mislead his adversary.[4]

1099, 51 N. Y. St. 581; Mehurin *v.* Stone, 37 Ohio St. 49.

Where defendant pleads total failure of consideration he cannot be allowed to prove a rescission of the contract by reason of a partial failure. H. A. Pitts' Sons Mfg. Co. *v.* Lewis, 30 Kan. 541, 1 Pac. 812.

Rescission of a contract under seal cannot be proved under a plea of accord and satisfaction. Barelli *v.* O'Conner, 6 Ala. 617.

94. Fauble *v.* Davis, 48 Iowa 462; Roy *v.* Boteler, 40 Mo. App. 213; Hosley *v.* Black, 28 N. Y. 438; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Crandall *v.* Clark, 7 Barb. (N. Y.) 169; O'Leary *v.* Board of Education, 9 Daly (N. Y.) 161; Lajos *v.* Eden Musee American Co., 10 Misc. (N. Y.) 148, 30 N. Y. Suppl. 916, 62 N. Y. St. 494; Baldwin *v.* Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Freeman *v.* Adams, 9 Johns. (N. Y.) 115; Philips *v.* Rose, 8 Johns. (N. Y.) 392; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; Bruen *v.* Astor, Anth. N. P. (N. Y.) 185.

95. Stone *v.* Dennis, 3 Port. (Ala.) 231; Poague *v.* Richardson, Litt. Sel. Cas. (Ky.) 134; Cherry *v.* Newby, 11 Tex. 457.

96. Gerald *v.* Turnstall, 109 Ala. 567, 20 So. 43. See *supra*, XII, G, 3.

97. Fauble *v.* Davis, 48 Iowa 462; Lumbert *v.* Palmer, 29 Iowa 104; Edminster *v.* Cochrane, 8 Daly (N. Y.) 138; Elting *v.* Dayton, 17 N. Y. Suppl. 849, 43 N. Y. St. 363.

98. Schultz *v.* Merchants' Ins. Co., 57 Mo. 331; Russell *v.* State Ins. Co., 55 Mo. 585; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 49 Am. Dec. 74; Pierce City Water Co. *v.* Pierce City, 61 Mo. App. 471; St. Louis Steam-Heating, etc., Co. *v.* Bissell, 41 Mo. App. 426; Okey *v.* State Ins. Co., 29 Mo. App. 105.

99. Ehrlich *v.* Ætna Ins. Co., 103 Mo. 231, 15 S. W. 530; Pierce City Water Co. *v.* Pierce City, 61 Mo. App. 471; Smith *v.* Haley, 41 Mo. App. 611; St. Louis Steam-Heating, etc., Co. *v.* Bissell, 41 Mo. App. 426.

1. Bethemont *v.* Davis, 8 Mart. (La.) 391.

2. *Illinois.*— McKee *v.* Brandon, 3 Ill. 339.

Maryland.— Howard *v.* Wilmington, etc., R. Co., 1 Gill 311.

Minnesota.— Farrington *v.* Wright, 1 Minn. 241.

Missouri.— Merrill *v.* Central Trust Co., 46 Mo. App. 236.

New York.— Thomas *v.* Woods, 4 Cow. 173.

Defendant may traverse the express contract sued on, and yet leave enough undenied to render him liable by implication of law. Baum *v.* Winston, 3 Metc. (Ky.) 127.

3. Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698; Day *v.* New Lots, 107 N. Y. 148, 13 N. E. 915. See PLEADING.

4. Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698; Southwick *v.* Memphis First Nat. Bank, 61 How. Pr. (N. Y.) 164. No recovery can be had on a declaration alleging the sale of a team of horses directly to the defendant, who paid for them by note which he represented was good and collectable, but which was worthless, where the proof showed that the defendant sold the horses as the plaintiff's agent to a third person and accepted in payment paper which he was unauthorized to receive and which the plaintiff accepted upon false representations. Bilsborrow *v.* Warner, 117 Mich. 506, 76 N. W. 7.

b. Allegation of Express, and Proof of Implied, Contract. In an action upon an express contract the plaintiff cannot recover upon proof of an implied contract.[5] Where the plaintiff declares upon an express contract, proof of reasonable value is not admissible under the contract.[6] So where the action is to recover for work and materials alleged to have been furnished under a contract, which is not denied, the only issue made being as to the contract price, it is error to admit evidence of reasonable value.[7] Such evidence, however, may sometimes be admitted in support of the contract to show that it is reasonable and one likely to be made under the circumstances.[8] An allegation that the party charged a certain sum for his services, without any allegation of their value or of an agreed compensation, is not sufficient to let in proof of a claim for that or any amount.[9]

c. Allegation of Implied, and Proof of Express, Contract. Where an action is on an implied contract to recover the reasonable value of goods or services, and the proof shows a special contract for a stipulated price, the variance is fatal,[10] except in certain cases heretofore referred to in which there can be a recovery on implied contract notwithstanding the existence of an express contract.[11]

d. Rule Under Code System. Under the code system of pleading the plaintiff may sometimes allege the same cause of action in two counts, one on the special contract and the other on a *quantum meruit*, so as to meet any possible state of the proof, and where this is permitted the plaintiff cannot be compelled to elect on which he will go to the jury.[12] And it has been held that under a pleading alleging an express contract, a recovery on an implied contract may be sustained, where the defendant's rights have been fully protected. At most it is but a variance between the pleadings and the proof which may be disregarded unless it appears that the defendant was misled by it.[13] So also where the court can see

5. *Indiana.*— Davis *v.* Chase, 159 Ind. 242, 64 N. E. 88, 853.

Iowa.— Walker *v.* Irwin, 94 Iowa 448, 62 N. W. 785; Lines *v.* Lines, 54 Iowa 600, 7 N. W. 87; Formholz *v.* Taylor, 13 Iowa 500; Beebe *v.* Brown, 4 Greene 406.

Kansas.— Modell Tp. *v.* King Iron-Bridge, etc., Co., 2 Kan. App. 237, 41 Pac. 1059.

Kentucky.— Newton *v.* Field, 98 Ky. 186, 32 S. W. 623, 17 Ky. L. Rep. 769; Morfort *v.* Mastin, 6 T. B. Mon. 609, 17 Am. Dec. 168.

Louisiana.— Condran *v.* New Orleans, 43 La. Ann. 1202, 9 So. 31; Provost *v.* Carlin, 28 La. Ann. 595; Mazureau *v.* Morgan, 25 La. Ann. 281.

Michigan.— Swarthout *v.* Lucas, 101 Mich. 609, 60 N. W. 306.

Minnesota.— Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

Mississippi.— Drake *v.* Surget, 36 Miss. 458.

Missouri.— Warson *v.* McElroy, 33 Mo. App. 553; Traders' Bank *v.* Payne, 31 Mo. App. 512.

Nebraska.— Dorrington *v.* Powell, 52 Nebr. 440, 72 N. W. 587; Mayer *v.* Ver Bryck, 46 Nebr. 221, 64 N. W. 691; Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019.

New York.— Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103, 27 N. Y. St. 852; Lydecker *v.* Nyack, 6 N. Y. App. Div. 90, 39 N. Y. Suppl. 509; Dennison *v.* Musgrave, 29 Misc. 627, 61 N. Y. Suppl. 188.

South Dakota.— Morrow *v.* Board of Education, 7 S. D. 553, 64 N. W. 1126.

Texas.— Nunn *v.* Townes, (Civ. App. 1893) 23 S. W. 1117.

Wisconsin.— Pearson *v.* Switzer, 98 Wis. 397, 74 N. W. 214; White *v.* Lueps, 55 Wis. 222, 12 N. W. 376.

See 11 Cent. Dig. tit. "Contracts," § 1748.

6. Piffet's Succession, 37 La. Ann. 871; Bright *v.* Metairie Cemetery Assoc., 33 La. Ann. 58.

7. Fladung *v.* Dawson, (Cal. 1896) 43 Pac. 1107.

8. Piffet's Succession, 37 La. Ann. 871; Bright *v.* Metairie Cemetery Assoc., 33 La. Ann. 58.

9. Farrington *v.* Wright, 1 Minn. 241.

10. *Illinois.*— Bean *v.* Elton, 44 Ill. App. 442.

Indiana.— Bradley *v.* Harter, 156 Ind. 499, 60 N. E. 139. But see Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98.

Louisiana.— Willis *v.* Melville, 19 La. Ann. 13.

Nebraska.— Imhoff *v.* House, 36 Nebr. 28, 53 N. W. 1032.

New York.— Morris *v.* Sire, 61 N. Y. Suppl. 1098.

Texas.— Wisbey *v.* Boyce, (Civ. App. 1894) 27 S. W. 590.

11. See *supra*, XII, A.

12. Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975; Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439; Beers *v.* Kuehn, 84 Wis. 33, 54 N. W. 109. See also Linningdale *v.* Livingston, 10 Johns. (N. Y.) 36.

13. *Indiana.*— Palmer *v.* Miller, 19 Ind. App. 624, 49 N. E. 975. See Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98.

that a trial has been had upon the real issues without objection, it will not disturb a recovery upon the ground that it was not embraced in the pleadings.[14] There are cases which have proceeded in disregard of the pleadings and wherein the whole case has been presented by both parties in their proofs without objection, in which an amendment has been allowed after the evidence was closed to conform the pleadings to the proofs.[15] But when objection is seasonably taken or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings. The court will not ignore the whole office of a pleading and compel the parties to try their cases in the dark.[16]

e. Misstatement of Whole Contract — (i) *In General.* The elementary rules of evidence require the contract set out to be substantially proved as stated, as this is essential to the establishment of the identity of the claim;[17] and it is a well-settled legal principle that a recovery cannot be had upon proof without corresponding allegations.[18] And if the contract alleged is materially different from that offered in evidence, the plaintiff cannot recover, for the contract must be rejected as evidence, inasmuch as the variance is fatal.[19] A plaintiff is not allowed to declare on one cause of action and recover upon proof of another,

Montana.— Nyhart *v.* Pennington, 20 Mont. 158, 50 Pac. 413.

Nevada.— Burgess *v.* Helm, 24 Nev. 242, 51 Pac. 1025.

New York.— Sussdorf *v.* Schmidt, 55 N. Y. 319; Terwilliger *v.* Ontario, etc., R. Co., 73 Hun 335, 26 N. Y. Suppl. 268, 55 N. Y. St. 919; Smith *v.* Lippincott, 49 Barb. 398.

United States.— Wittkowski *v.* Harris, 64 Fed. 712.

14. Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698.

15. Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698.

16. Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698.

17. Hoke *v.* Wood, 26 Md. 453.

Distinguished from torts.— In this respect there is a material distinction between the statement of torts and of contracts, the former being divisible in their nature, and the proof of part of the tort or injury being in general sufficient to support the declaration. 1 Chitty Pl. (16th Am. ed.) 312; Fisk *v.* Hicks, 31 N. H. 535.

18. *Alabama.*— Wellman *v.* Jones, 124 Ala. 580, 28 So. 416; Boylston *v.* Sherran, 31 Ala. 538.

Connecticut.— Russell *v.* South Britain Soc., 9 Conn. 508.

Louisiana.— Jordan *v.* Anderson, 29 La. Ann. 749.

Maryland.— Hoke *v.* Wood, 26 Md. 453; Turner *v.* Maddox, 3 Gill 190.

North Carolina.— Smith *v.* Eastern Bldg., etc., Assoc., 116 N. C. 102, 109, 21 S. E. 33; Greer *v.* Herren, 99 N. C. 492, 6 S. E. 257; Abernathy *v.* Seagle, 98 N. C. 553, 4 S. E. 542; McLaurin *v.* Cronly, 90 N. C. 50.

Texas.— Loudon *v.* Robertson, (Civ. App. 1899) 54 S. W. 783; Eldridge *v.* McAdams, (Civ. App. 1893) 24 S. W. 310.

19. *Alabama.*— Boylston *v.* Sherran, 31 Ala. 538; Brantley *v.* West, 27 Ala. 542; Davis *v.* Campbell, 3 Stew. 319.

Arkansas.— Weir *v.* Pennington, 11 Ark. 745; Speer *v.* McLaughlin, 11 Ark. 732.

California.— Cox *v.* McLaughlin, 63 Cal. 196; Johnson *v.* Moss, 45 Cal. 515.

Colorado.— Calhoun *v.* Girardine, 13 Colo. 103, 21 Pac. 1017.

Connecticut.— Russell *v.* South Britain Soc., 9 Conn. 508; Shepard *v.* Palmer, 6 Conn. 95; Bunnel *v.* Taintor, 5 Conn. 273. A declaration on a note for "West India India goods" is not supported by proof of a note for "West India India rum and sugar." Brewster *v.* Dana, 1 Root 266.

Illinois.— Keiser *v.* Topping, 72 Ill. 226; Menifee *v.* Higgins, 57 Ill. 50; Crittenden *v.* French, 21 Ill. 598; Stickney *v.* Cassell, 6 Ill. 418; Brooks *v.* Gates, 8 Ill. App. 428.

Indiana.— Lindley *v.* Downing, 2 Ind. 418; Jacobs *v.* Finkel, 7 Blackf. 432; Buckley *v.* Stanley, 5 Blackf. 162; Louisville, etc., R. Co. *v.* Barnes, 16 Ind. App. 312, 44 N. E. 1113; Riley *v.* Walker, 6 Ind. App. 622, 34 N. E. 100.

Iowa.— Walker *v.* Irwin, 94 Iowa 448, 62 N. W. 785; York *v.* Wallace, 48 Iowa 305. See also to same effect Beebe *v.* Brown, 4 Greene 406.

Kentucky.— Sebastian *v.* Thompkins, 1 A. K. Marsh. 63. A promise to pay the plaintiff such sums of money as may be necessary for food, raiment, etc., is variant in legal effect from a promise to support and take care of the plaintiff. Bull *v.* McCrea, 8 B. Mon. 422.

Louisiana.— Shaw *v.* Noble, 15 La. Ann. 305.

Maryland.— Hoke *v.* Wood, 26 Md. 453; Walsh *v.* Gilmor, 3 Harr. & J. 283, 6 Am. Dec. 503.

Massachusetts.— Woodruff *v.* Wentworth, 133 Mass. 309; Whelton *v.* Tompson, 121 Mass. 346; Stone *v.* White, 8 Gray 589; Cleaves *v.* Lord, 3 Gray 66. A declaration setting forth an agreement to obtain insurance on property "in consideration of a reasonable commission" is not supported by evidence of an agreement to obtain the insurance in consideration of a definite sum. Cleaves *v.* Lord, 3 Gray 66.

because, if such variances are tolerated, however diligent the defendant may be he cannot so prepare his defense as to meet surprises.[20] But in an action to recover back money paid by mistake, where the plaintiff alleges a demand and a refusal to pay back the money, and the defendant admits the refusal to pay, proof of a subsequent promise by the defendant does not present such a variance between the cause of action alleged and the evidence as precludes a recovery.[21] A variance between a contract set forth in a plea or answer and that given in evidence is equally fatal to the defense.[22]

(II) *Mistake in Pleading Legal Effect of Contract.* Where the plaintiff sets out the contract *in hæc verba* and makes it a part of his initial pleading there can be no variance.[23] Where the declaration, complaint, or petition purports to set out an instrument according to its substance and legal effect, it is ordinarily sufficient if the instrument proved and the one alleged correspond in all essential particulars; but if the writing given in evidence is substantially different from that declared on, the variance will be fatal to a recovery.[24] Thus an allegation that a promise was to pay a sum of money in a reasonable time or on request is not supported by proof of a promise to pay on a day certain.[25] An action for wages will be sustained only by proof that the services were performed; and where the plaintiff seeks damages for a breach of contract to employ the case must be so pleaded.[26] A declaration which alleges a contract to tow a vessel

Michigan.— Potter *v.* Brown, 35 Mich. 274; Tillman *v.* Fuller, 13 Mich. 113.

Mississippi.— Phipps *v.* Ingraham, 41 Miss. 256; Drake *v.* Surget, 36 Miss. 458.

New Hampshire.— Colburn *v.* Pomeroy, 44 N. H. 19.

New Jersey.— Obert *v.* Whitehead, 11 N. J. L. 293; Mulford *v.* Bowen, 8 N. J. Eq. 751.

New York.— Leland *v.* Douglass, 1 Wend. 490; Crawford *v.* Morrell, 8 Johns. 253; Perry *v.* Aaron, 1 Johns. 129; Snell *v.* Moses, 1 Johns. 96. Under a complaint for services performed under a contract between the plaintiff and the defendant's executive committee, the plaintiff cannot prove another contract with an agent of the defendant. Brigger *v.* Mutual Reserve Fund L. Assoc., 75 N. Y. App. Div. 149, 77 N. Y. Suppl. 362.

Ohio.— Mulford *v.* Young, 6 Ohio 294.

Texas.— Shipman *v.* Fulcrod, 42 Tex. 248; Mason *v.* Kleberg, 4 Tex. 85; Kildow *v.* Irick, (Civ. App. 1895) 33 S. W. 315.

Vermont.— Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

Virginia.— McAlexander *v.* Montgomery, 4 Leigh 61.

England.— Gwinnet *v.* Phillips, 3 T. R. 643; King *v.* Pippett, 1 T. R. 240.

See 11 Cent. Dig. tit. "Contracts," § 1740.

20. *Arkansas.*— Speer *v.* McLaughlin, 11 Ark. 732.

Georgia.— Central R., etc., Co. *v.* Tucker, 79 Ga. 128, 5 S. E. 5.

Indiana.— Carter *v.* Gordon, 121 Ind. 383, 23 N. E. 268; Hasselman *v.* Carroll, 102 Ind. 153, 26 N. E. 202; Thomas *v.* Dale, 86 Ind. 435; Johnston *v.* Griest, 85 Ind. 503; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406.

Iowa.— Fauble *v.* Davis, 48 Iowa 462.

Missouri.— Green *v.* Cole, 127 Mo. 587, 30 S. W. 135; Hancock *v.* Buckley, 18 Mo. App. 459.

New Hampshire.— Blake *v.* Crowninshield, 9 N. H. 304.

New York.— Curtiss *v.* Marshall, 8 Bosw. 22.

North Carolina.— Smith *v.* Eastern Bldg., etc., Assoc., 116 N. C. 102, 21 S. E. 33; Conley *v.* Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 303; Willis *v.* Branch, 94 N. C. 142.

Pennsylvania.— Umbehocker *v.* Rassel, 2 Yeates 339.

England.— Cooke *v.* Munstone, 1 B. & P. N. R. 351.

21. Rosboro *v.* Peck, 48 Barb. (N. Y.) 92.

22. Lawrence *v.* Knies, 10 Johns. (N. Y.) 140.

23. Spencer *v.* McCarty, 46 Tex. 213.

24. Jordan *v.* Roney, 23 Ala. 758; McLendon *v.* Godfrey, 3 Ala. 181; Seigman *v.* Hoffacker, 57 Md. 321; Crawford *v.* Morrell, 8 Johns. (N. Y.) 253; Wooters *v.* International, etc., R. Co., 54 Tex. 294. The variance will not be fatal if the plaintiff's allegations taken as a whole aver a contract substantially the same as the one proved. Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

25. Willoughby *v.* Raymond, 4 Conn. 130. Where the promise laid in the declaration is to pay on request, and the promise proved on the trial is to pay in three months, the variance must be fatal, however strict a conformity there may be between the allegations and proof in every other particular. Query *v.* Brindlinger, Litt. Sel. Cas. (Ky.) 86. So an allegation that rent was to be paid on demand is not supported by proof that it was to be paid at the end of the year. Taylor *v.* Hickman, Litt. Sel. Cas. (Ky.) 434.

26. Culbertson Irrigating, etc., Co., 45 Nebr. 663, 63 N. W. 947; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

and cargo out safely and securely is not supported by proof of a contract to tow out free from a particular description of danger.[27] And an averment of a contract to build a ship is not supported by proof of a contract to finish a ship partly built.[28] In an action upon a contract to deliver certain articles when called for, the plaintiff must allege a demand for the articles and a refusal to deliver them; and an allegation of a demand for the amount of the articles in money will not admit proof of a demand for the articles themselves.[29]

(III) *Proof More Ample Than Allegations.* An averment of a single contract is not supported by proof of two subsisting contracts.[30] And the plaintiff cannot give in evidence an entire contract relating to two distinct subjects when he declares as to one of them only.[31] But it is no variance that the defendant promised other distinct matters in addition to that alleged, if the proof supports the averment as far as is requisite, unless the contract must be regarded as entire.[32]

f. Misstatement of Particular Part or Term of Contract. There are many instances of variance in the statement of some particular part or material term of the contract. Errors of this description are generally as fatal to the plaintiff's case as a misstatement of the whole contract.[33] A variance between the averment and the agreement offered in evidence as to the sum due is fatal.[34]

g. Alternative and Conditional Contracts. An averment of an absolute contract is not supported by proof of a contract in the alternative;[35] and on the other hand, when the contract is absolute and it is stated as an alternative contract, the variance will be equally serious.[36] So also where the contract is conditional it will be fatal to describe it as an absolute one,[37] even though the condition has been performed.[38]

h. Exceptions and Provisos. If the defendant's promise or engagement, whether it be verbal, in writing, or under seal, contain as a part of it an exception

27. Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

28. Smith *v.* Barker, 3 Day (Conn.) 312, 22 Fed. Cas. No. 13,013.

29. Snow *v.* Johnson, 1 Minn. 48.

30. Martin *v.* Boyce, 49 Mich. 122, 13 N. W. 386.

31. Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

32. Thomas *v.* Thomas, 2 A. K. Marsh. (Ky.) 430; Johnson *v.* White, 2 Mo. 223.

An averment of a promise by defendant to pay plaintiff a sum of money is supported by proof of a promise to do certain other things and to pay the money, if the payment of the money is all that remains to be done. Holbrook *v.* Dow, 1 Allen (Mass.) 397.

33. *Connecticut.*— Smith *v.* Barker, 3 Day 312, 22 Fed. Cas. No. 13,013.

Kentucky.— Scott *v.* Messick, 4 T. B. Mon. 535.

Massachusetts.— Hart *v.* Tyler, 15 Pick. 171; Robbins *v.* Otis, 1 Pick. 368; Goulding *v.* Skinner, 1 Pick. 162; Colt *v.* Root, 17 Mass. 229; Baylies *v.* Fettyplace, 7 Mass. 325.

New Jersey.— Obert *v.* Whitehead, 11 N. J. L. 293.

New York.— Crawford *v.* Morrell, 8 Johns. 253.

Vermont.— Clark *v.* Todd, 1 D. Chipm. 213.

Virginia.— Harris *v.* Harris, 2 Rand. 431.

United States.— Pope *v.* Barrett, 1 Mason 117, 19 Fed. Cas. No. 11,273.

34. *Connecticut.*— Beecher *v.* Chester, 2 Root 90.

Indiana.— Lucas *v.* Smith, 42 Ind. 103; Osborne *v.* Fulton, 1 Blackf. 233.

Iowa.— Beebe *v.* Brown, 4 Greene 406.

Kentucky.— Rogers *v.* Estis, Litt. Sel. Cas. 2; Adams *v.* Brown, 4 Litt. 7.

Ohio.— Mulford *v.* Young, 6 Ohio 294.

35. *Alabama.*— Williams *v.* Kinnard, Minor 196.

Connecticut.— Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

New York.— Stone *v.* Knowlton, 3 Wend. 374; Hatch *v.* Adams, 8 Cow. 35.

Vermont.— Strong *v.* Slicer, 33 Vt. 466.

England.— White *v.* Wilson, 2 B. & P. 116; Cooke *v.* Munstone, 1 B. & P. N. R. 351; Penny *v.* Porter, 2 East 2; Tate *v.* Wellings, 3 T. R. 531.

36. Clark *v.* Manstone, 5 Esp. 239. See also Hilt *v.* Campbell, 6 Me. 109.

37. *Massachusetts.*— Sheafe *v.* Locke, 1 Allen 369.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

North Carolina.— Starnes *v.* Erwin, 32 N. C. 226.

United States.— Trask *v.* Duval, 4 Wash. 97, 24 Fed. Cas. No. 14,143.

England.— Langston *v.* Corney, 4 Campb. 176.

38. Stanwood *v.* Scovel, 4 Pick. (Mass.) 422; Whitaker *v.* Smith, 4 Pick. (Mass.) 83; Wait *v.* Morris, 6 Wend. (N. Y.) 394; Lower *v.* Winters, 7 Cow. (N. Y.) 263; Couch *v.* Hooper, 2 Leigh (Va.) 557.

which qualifies his liability, or in certain instances renders him altogether free from liability, the exception must be stated or there will be a fatal variance.[39] But a proviso need not be stated, unless it goes to discharge the liability under the contract entirely, for this comes more properly from the other side.[40]

i. Averment as to Writing. If the plaintiff avers an express contract without stating whether it is written or verbal, evidence of a written agreement is admissible;[41] but if he declares on a written contract he cannot be allowed to recover upon proof of a verbal contract.[42] Nor can he prove a written contract if he declares on a verbal contract, even though the written instrument is lost.[43] Where the plaintiff seeks to recover upon an oral contract, a nonsuit should be granted if the evidence develops that there was an express written contract.[44]

j. Statement of Consideration. Great accuracy is required in the statement of the consideration, and if it is put in issue it must be proved strictly as stated.[45] In assumpsit, although it is sufficient for the plaintiff to state only those parts of the contract for the breach of which he seeks to recover, yet the whole consideration must be explicitly and correctly stated, and if any part of an entire consideration, or of a consideration consisting of several things, be omitted or misstated, the plaintiff will fail at the trial on the ground of variance.[46] But this rule does

39. Stanwood *v.* Scovel, 4 Pick. (Mass.) 422; Bridge *v.* Austin, 4 Mass. 115; Latham *v.* Rutley, 2 B. & C. 20, 3 D. & R. 211, 9 E. C. L. 19. Thus where a declaration in assumpsit stated that the defendant warranted a horse to be sound, and the proof was that the defendant warranted the horse to be sound everywhere except for a kick on the leg, it was held that this was a qualified, and not a general, warranty, and that the variance was fatal. Jones *v.* Cowley, 4 B. & C. 445, 6 D. & R. 533, 3 L. J. K. B. O. S. 263, 10 E. C. L. 653.

40. Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 291; Hotham *v.* East India Co., 1 T. R. 638, 1 Rev. Rep. 333.

A proviso in a contract which goes to discharge the liability under it entirely must be stated in the declaration, although it is otherwise if it goes only to diminish the liability. Karthaus *v.* Owings, 2 Gill & J. (Md.) 430; Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394.

41. Osborne *v.* Ayers, (Tex. Civ. App. 1895) 32 S. W. 73; Taylor *v.* Davis, 82 Wis. 455, 52 N. W. 756.

42. *Indiana.*— Carter *v.* Gordon, 121 Ind. 383, 23 N. E. 268.

Iowa.— Saatoff *v.* Scott, 103 Iowa 201, 72 N. W. 492.

Louisiana.— Duplantier *v.* Michoud, 19 La. Ann. 530 (holding that where the defendant, in an action against him for the value of services, alleges a written contract in support of a claim set up in his answer in reconvention, he will not be allowed to show a verbal contract in support of his claim); Fisk *v.* Cannon, 1 Mart. N. S. 346.

New York.— Crawford *v.* Tyng, 10 Misc. 143, 30 N. Y. Suppl. 907, 62 N. Y. St. 475.

United States.— Tilghman *v.* Tilghman, Baldw. 464, 23 Fed. Cas. No. 14,045.

Contract partly in writing.— Where a contract alleged to be in writing is proved to be partly in writing and partly in parol, but that alleged and that proved are the same contract, a contention that the plaintiff was permitted to count on one contract and to recover on a different one is not sustained. Sanders Pressed Brick Co. *v.* Columbia Real Estate, etc., Co., 86 Mo. App. 169.

43. Petersen *v.* Ochs, 40 Iowa 530.

Carrier's contract.— Where an action is brought for an alleged breach of a carrier's implied contract, and the goods are shown to have been shipped under a special written contract, the plaintiff cannot recover. Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89.

44. McMahan *v.* Canadian R. Co., 40 Oreg. 148, 66 Pac. 708.

45. Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Smith *v.* Barker, 3 Day (Conn.) 312, 22 Fed. Cas. No. 13,013; New Hampshire Mut. F. Ins. Co. *v.* Hunt, 30 N. H. 219; Robertson *v.* Lynch, 18 Johns. (N. Y.) 451; Saunderson *v.* Griffiths, 5 B. & C. 909, 8 D. & R. 643, 4 L. J. K. B. O. S. 318, 11 E. C. L. 734; King *v.* Robinson, Cro. Eliz. 79; Miles *v.* Sheward, 8 East 7; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

Illustration.— Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to build a ship, and the evidence was of a contract to finish a ship partly built, it was held that the variance was fatal. Smith *v.* Barker, 3 Day (Conn.) 312, 22 Fed. Cas. No. 13,013.

If the consideration is set forth in the words of the contract, there can be no variance. Smith *v.* Edmunds, 16 Vt. 687.

46. *Connecticut.*— Russell *v.* South Britain Soc., 9 Conn. 508; Hendrick *v.* Seely, 6 Conn. 176; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Bulkley *v.* Landon, 2 Conn. 404.

Kentucky.— Carrell *v.* Collins, 2 Bibb 429.

New Hampshire.— Smith *v.* Webster, 48 N. H. 142; Badger *v.* Burleigh, 13 N. H. 507; Benden *v.* Manning, 2 N. H. 289.

New York.— Stone *v.* Knowlton, 3 Wend. 374; De Forrest *v.* Frary, 6 Cow. 151; Lansing *v.* McKillip, 3 Cai. 286.

South Carolina.— Lowrie *v.* Brooks, 1 Nott & M. 342.

not apply where the consideration is in part good and in part frivolous and insufficient. The insufficient part is regarded as mere surplusage if alleged, and consequently it is not necessary to notice it in the pleadings or to prove it if stated.[47]

k. Performance and Breach — (i) *In General.* It is a general rule of pleading that an averment of performance will not be supported by proof of a legal excuse for non-performance.[48]

(ii) *Proof of Malfeasance or Defective Performance.* An averment of nonfeasance is not supported by proof tending to show a malfeasance.[49] Under an allegation that the defendant totally neglected and refused to perform his engagement, proof that he performed it in a negligent and unskilful manner is not admissible.[50] In an action to recover the contract price agreed to be paid for work and materials, the defendant cannot show that the work was done in an unworkmanlike manner, unless he has pleaded such defense.[51] But if he has alleged generally that the work was not performed in a good and workmanlike manner, he may prove defects other than those he may have specifically pointed out in his plea or answer.[52]

(iii) *Time of Performance.* As a general rule the date for the performance of a contract must be proved as laid,[53] unless the case be one in which the time

United States.— Watson *v.* Dunlap, 2 Cranch C. C. 14, 29 Fed. Cas. No. 17,282.

England.— Payne *v.* Wilson, 7 B. & C. 423, 6 L. J. K. B. O. S. 107, 1 M. & R. 708, 14 E. C. L. 193; Blyth *v.* Bampton, 3 Bing. 472, 4 L. J. C. P. O. S. 157, 11 Moore C. P. 387, 11 E. C. L. 233; White *v.* Wilson, 2 B. & P. 116; Symonds *v.* Carr, 1 Campb. 361; Andrews *v.* Whitehead, 13 East 102; Leeds *v.* Burrows, 12 East 1; Miles *v.* Sheward, 8 East 7; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

47. Loomis *v.* Newhall, 15 Pick. (Mass.) 159; King *v.* Sears, 2 C. M. & R. 48, 1 Gale 241, 4 L. J. Exch. 181, 5 Tyrw. 587; Bradburne *v.* Bradburne, Cro. Eliz. 149; Crisp *v.* Gamel, Cro. Jac. 128; Ring *v.* Roxbrough, 2 Cromp. & J. 418, 2 Tyrw. 468.

48. Thompson *v.* Jewell, 1 A. K. Marsh. (Ky.) 195; Shinn *v.* Haines, 21 N. J. L. 340; Tribune Assoc. *v.* Eisner, etc., Co., 70 N. Y. App. Div. 172, 75 N. Y. Suppl. 100; Gatling *v.* Central Spar Verein, 67 N. Y. App. Div. 50, 73 N. Y. Suppl. 496; Fox *v.* Davidson, 36 N. Y. App. Div. 159, 55 N. Y. Suppl. 524; McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153; Schnaier *v.* Nathan, 31 N. Y. App. Div. 225, 52 N. Y. Suppl. 812; Crandall *v.* Clark, 7 Barb. (N. Y.) 169; Tribune Assoc. *v.* Eisner, etc., Co., 34 Misc. (N. Y.) 658, 70 N. Y. Suppl. 706; Bloch *v.* Remelius, 30 Misc. (N. Y.) 804, 61 N. Y. Suppl. 1124. *Contra*, Huntingdon, etc., R. Co. *v.* McGovern, 29 Pa. St. 78, holding that evidence that a party plaintiff was prevented by the defendant from performing his covenants, whereon he brought suit alleging full performance, would support that allegation.

Proof of waiver.— A declaration alleging that the plaintiff has performed his part of a mutual contract is not supported by proof that the defendant has waived such performance. Palmer *v.* Sawyer, 114 Mass. 1; Colt *v.* Miller, 10 Cush. (Mass.) 49; Scheurer *v.* Monash, 76 N. Y. Suppl. 917. But see Smith *v.* Wetmore, 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513; Waite *v.* Trustees, etc., 54 N. Y. Suppl. 511.

49. South, etc., R. Co. *v.* Wilson, 78 Ala. 587.

50. Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

51. Kendall *v.* Vallejo, 1 Cal. 371.

52. Trimble *v.* Stilwell, 4 E. D. Smith (N. Y.) 512.

53. *Alabama.*— Goree *v.* Clements, 94 Ala. 337, 10 So. 906.

Illinois.— Koch *v.* Merk, 48 Ill. App. 26. *Compare* Frazer *v.* Smith, 60 Ill. 145, where it was alleged that the contract was made on the 20th day of February and to be performed within six weeks, and the proof was that the contract was made on the 1st of March and to be performed within thirty days; and it was held that although there was *prima facie* a variance, it was not a substantial one, for according to the allegation and proof the date of performance was practically the same, and the date of the execution of the contract was not material.

Indiana.— Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

Iowa.— Sturgeon *v.* Hock, 43 Iowa 155.

Kentucky.— Query *v.* Bringlinger, Litt. Sel. Cas. 85, holding that where the declaration avers a promise to pay on request and the evidence shows a promise to pay in three months the variance is fatal.

Louisiana.— Victoire *v.* Moulon, 8 Mart. 400, holding that where a promise to pay at a certain date is charged, evidence is not admissible to show a promise to pay on the happening of a certain event.

Minnesota.— Cowles *v.* Warner, 22 Minn. 449, holding that where the contract alleged was terminable at the will of either party, and that proved was by its terms to continue for more than one year, there was a fatal variance.

alleged is not of the essence of the contract;[54] and if a pleading aver a contract to be performed at a time specified, a written agreement offered in evidence naming a day for performance other than that alleged, should be excluded upon the objection of variance.[55] A note without date of payment expressed is payable immediately, and if the plaintiff alleges no date of payment, a note payable on a day certain after its execution cannot be received in evidence, as its legal effect is different from that of the note alleged.[56]

l. Place and Date of Execution. A distinction is established between allegations of matter of substance and allegations of matter of description. It is sufficient if the former be substantially proved, but the latter must be proved with a degree of strictness amounting in many cases to literal precision.[57] The place where a transitory contract purports to have been made is ordinarily immaterial;[58] but it may be made material by averments by way of description, and if it was executed at a different place, it seems that the variance is fatal.[59] So also the misstatement of the date of a written instrument is a fatal variance, where the date is alleged as a matter of description,[60] for in every written instrument the day laid is material and must be proved as laid where the action is brought on the instrument itself.[61] If the instrument bears no date, it may be alleged to have been executed on any day, but in that case the words, "bearing date" or "dated," being descriptive words, must be omitted.[62] It is usual to set out the true date of the contract, both as to time and place, and to lay the venue under the form of a *videlicet*, which obviates the necessity of strict proof.[63] And as time is not considered as forming a part of the material issue, where the day of making a contract is laid under a *videlicet* it need not be proved as laid. Consequently it is sufficient to prove that the damage occurred by reason of the breach of contract, without particular reference to the date of its execution.[64]

m. Parties — (i) *Averment of Joint and Proof of Several Contract.* There may be a fatal variance between the pleading and proof in respect to the parties to the contract in suit. Thus if the plaintiff declares on a joint contract of the defendants, and that offered in evidence is several, or was made by a part of the defendants only, the variance is fatal.[65] So also a misjoinder of plaintiffs

54. Perry *v.* Botsford, 5 Pick. (Mass.) 189.

55. Waugenheim *v.* Graham, 39 Cal. 169.

56. Sheehy *v.* Mandeville, 7 Cranch (U. S.) 208, 3 L. ed. 317.

57. Carter *v.* Preston, 51 Miss. 423.

58. Houriet *v.* Morris, 3 Campb. 303.

59. Carter *v.* Preston, 51 Miss. 423.

60. *Delaware.*— Wilmington Bank *v.* Simmons, 1 Harr. 331.

Indiana.— Richardson *v.* League, 21 Ind. App. 429, 52 N. E. 618.

Kentucky.— Thomas *v.* Thomas, 3 J. J. Marsh. 589, where a plea of another suit pending on the same note was interposed. The notes in the two records were in all respects alike, except as to the date of transfer, and upon this variance alone the plea was overruled, on the ground that because of the variance the pending suit pleaded was not a bar to the one in which the plea was filed.

Missouri.— Grant *v.* Winn, 7 Mo. 188.

New Hampshire.—Drown *v.* Smith, 3 N. H. 299.

New York.— Field *v.* Field, 9 Wend. 394, holding that an instrument dated "4 m. the 1st, 1817" was properly described as having been made on the 1st of April, 1817.

Pennsylvania.— Church *v.* Feterow, 2 Penr. & W. 301; Stephens *v.* Graham, 7 Serg. & R. 505, 10 Am. Dec. 485.

England.— Bentzing *v.* Scott, 4 C. & P. 24, 19 E. C. L. 390.

61. Church *v.* Feterow, 2 Penr. & W. (Pa.) 301; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.

62. Grant *v.* Winn, 7 Mo. 188.

63. Fairfield *v.* Adams, 16 Pick. (Mass.) 381; Munroe *v.* Cooper, 5 Pick. (Mass.) 412.

64. Singer *v.* Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Long *v.* Conklin, 75 Ill. 32; Reynolds Card Mfg. Co. *v.* New York Bank Note Co., 91 Hun (N. Y.) 463, 36 N. Y. Suppl. 756, 71 N. Y. St. 687; Stout *v.* Rassel, 2 Yeates (Pa.) 334; St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Morehouse *v.* Texas Trunk R. Co., (Tex. Civ. App. 1891) 17 S. W. 1086; St. Louis, etc., R. Co. *v.* Edwards, 3 Tex. App. Civ. Cas. § 342.

65. *Alabama.*— Cobb *v.* Keith, 110 Ala. 614, 18 So. 325; Jones *v.* Engelhardt, 78 Ala. 505. Where the complaint alleges that the contract sued on was made by three defendants jointly, and the proof shows a contract by only two of them, there is a fatal variance. Gamble *v.* Kellum, 97 Ala. 677, 12 So. 82.

Kentucky.— Gossom *v.* Badgett, 6 Bush 97, 99 Am. Dec. 658; Houngan *v.* Phillips, 7 Ky. L. Rep. 150.

in an action *ex contractu* is fatal;[66] and if they declare on a contract made with them jointly, and the proof shows a several contract with each plaintiff, a nonsuit is proper.[67]

(II) *AVERMENT OF SEVERAL AND PROOF OF JOINT CONTRACT.* And conversely it has been held that a joint contract cannot be given in evidence where a several contract only is alleged.[68] Proof of a copartnership contract will not sustain allegations of an individual contract.[69] But at common law, in a suit against one, proof may be given of a debt due from him and another jointly; and this is reasonable, for if the other joint debtor is living and not discharged, and is within reach of process, the defendant should plead the non-joinder in abatement.[70]

(III) *PROMISE FOR BENEFIT OF THIRD PERSON.* Where a promise is made by one person to pay the debt of another, it is necessary for the party for whose benefit the promise was made to declare specially, unless the case be one in which the action for money had and received can be maintained, because if he declares generally he will encounter a fatal variance between his pleading and proof.[71]

(IV) *CONTRACT MADE WITH CORPORATION.* An allegation that a contract was made with a corporation is supported by proof that it was made with the president and directors of the company.[72]

(V) *CONTRACT MADE THROUGH AGENT.* Proof of a contract made through the medium of an agent will sustain an allegation that it was made by the principal.[73]

n. Effect of Subsequent Agreement. If the plaintiff declares on a contract as originally made, and his evidence reveals that the original contract has been superseded or materially modified by a valid subsequent agreement, the variance will be fatal to a recovery.[74]

Missouri.— Davis *v.* Maysville Creamery Assoc., 63 Mo. App. 477; Davis *v.* Owings, 2 Mo. App. Rep. 647. But see Anstee *v.* Ober, 26 Mo. App. 665, where it was held that an allegation that two defendants promised in writing was sustained by proof that one of them promised in writing, that the other was jointly interested with him, and that they both intended to be bound.

Texas.— Stewart *v.* Gordon, 65 Tex. 344.

Virginia.— Rohr *v.* Davis, 9 Leigh 30.

See 11 Cent. Dig. tit. "Contracts," §§ 1744, 1745; and *supra*, XII, F, 2, b.

Under a statute providing that suit may be brought against any one or more of the parties liable on a joint contract, in assumpsit on a contract laid in the declaration as joint, proof of a several contract with one is sufficient to warrant a recovery against him. Kirschner *v.* Laughlin, 4 N. M. 386, 17 Pac. 132. And see *supra*, XII, F, 2, b, (III).

66. An allegation that a contract was made with five, who are plaintiffs, is not supported by proof of a contract made with three, and the variance is fatal as a ground of nonsuit. Murray *v.* Davis, 51 N. C. 341.

67. Whittemore *v.* Merrill, 87 Me. 456, 32 Atl. 1008. And see *supra*, XII, F, 2, a.

68. Stearns *v.* Martin, 4 Cal. 227. See *supra*, XII, F, 3.

69. McCord *v.* Seale, 56 Cal. 262; Black *v.* Struthers, 11 Iowa 459; Graves *v.* Boston Mar. Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324.

70. White *v.* Perley, 15 Me. 470; Scott *v.* Shears, 9 Cush. (Mass.) 504; Carter *v.* Hope, 10 Barb. (N. Y.) 180; Poirer *v.* Fisher, 8 Bosw. (N. Y.) 258; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

71. Mason *v.* Hall, 30 Ala. 599; Huckabee *v.* May, 14 Ala. 263; Mason *v.* Munger, 5 Hill (N. Y.) 613; Beers *v.* Culver, 1 Hill (N. Y.) 589; Quin *v.* Hanford, 1 Hill (N. Y.) 82.

Contract for plaintiff's benefit.— Where the complaint in an action alleged a contract between the plaintiff and the defendant, it was held to be error, in the trial of the action, to admit testimony of an alleged contract between defendant and a third person for the plaintiff's benefit. Sams *v.* Price, 119 N. C. 572, 26 S. E. 170.

72. Insurance Co. of North America *v.* McDowell, 50 Ill. 120, 99 Am. Dec. 497.

73. Root *v.* Fay, (Ariz. 1896) 43 Pac. 527; Blatcky *v.* Miller, (Nebr. 1902) 91 N. W. 523. See PRINCIPAL AND AGENT.

74. *Alabama.*— Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. 729; Nesbitt *v.* McGehee, 26 Ala. 748.

Kansas.— Pioneers' Sav., etc., Co. *v.* Kasper, 7 Kan. App. 813, 52 Pac. 623.

Maryland.— Kribs *v.* Jones, 44 Md. 396.

Missouri.— Harrison *v.* Kansas City, etc., R. Co., 50 Mo. App. 332.

Nebraska.— Miles *v.* Roberts, 34 N. H. 245.

New York.— Tumbridge *v.* Read, 51 Hun 644, 3 N. Y. Suppl. 908, 22 N. Y. St. 764.

North Carolina.— Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96.

Wisconsin.— Duval *v.* American Telephone, etc., Co., 113 Wis. 504, 89 N. W. 482; Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035.

o. **Surplusage.** Where matter is alleged, the whole of which might have been struck out without destroying the plaintiff's right of action, it need not be proved at the trial.[75] But it is otherwise if the whole cannot be struck out without getting rid of something essential to the cause of action, for then, although the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover.[76]

I. Burden of Proof — 1. In General. The usual test employed to determine on which side the burden of proof lies is to ascertain which party would be entitled to a verdict if no evidence were offered on either side of the issue,[77] for the general rule is that the burden of proof lies upon the party who takes the affirmative.[78]

2. Burden of Establishing Contract. The party who alleges a contract, either as a cause of action or a defense, has the burden of proving it, if the existence of the contract is put in issue,[79] and he has the burden of proving every fact essential to the cause of action or defense.[80] The rule applies to implied as well as to express contracts.[81] He must make out at least a *prima facie* case that the minds of the parties met in making the contract.[82] Where the existence of a special unrescinded contract is disclosed by the evidence, the plaintiff must show its

See 11 Cent. Dig. tit. "Contracts," § 1747. But see Leeds *v.* Fassman, 17 La. Ann. 32. See also *supra*, XII, A, 7.

75. Fisk *v.* Hicks, 31 N. H. 535; Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 52; Williamson *v.* Allison, 2 East 446. And see Pleading.

76. Fisk *v.* Hicks, 31 N. H. 535; Jerome *v.* Whitney, 7 Johns. (N. Y.) 321. See Pleading.

77. Shaw *v.* Waterhouse, 79 Me. 180, 8 Atl. 829. See Evidence.

78. Drummond *v.* The Castro, 23 La. Ann. 221; Gilmore *v.* Destrehan, 10 Rob. (La.) 521; Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; Shaw *v.* Waterhouse, 79 Me. 180, 8 Atl. 829. See Evidence.

Defense general denial and fraud.— In an action on a contract signed by one alleged to have been acting for others, the defenses were a general denial and that the signature was induced by fraud; and it was held that the burden of proof was on the plaintiff. De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. 886.

79. *Delaware.*— Truitt *v.* Fabey, (1902) 52 Atl. 339.

Illinois.— Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923; Berber *v.* Kerzinger, 23 Ill. 246.

Indiana.— Paris *v.* Strong, 51 Ind. 339; Kerstetter *v.* Raymond, 10 Ind. 199.

Iowa.— Burton *v.* Mason, 26 Iowa 392.

Louisiana.— Brusle *v.* Thomas, 7 La. Ann. 349.

Maine.— Mississippi, etc., Steamship Co. *v.* Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545, holding that the burden of proof was on the party maintaining that the agreement was completed without the necessity for the execution of a formal written instrument. See *supra*, II, C, 4, l.

Michigan.— Ferguson *v.* Hemingway, 38 Mich. 159.

Missouri.— Gibson *v.* German-American Town Mut. Ins. Co., 85 Mo. App. 41; Cox *v.* Bishop, 55 Mo. App. 135.

Montana.— Simonton *v.* Kelly, 1 Mont. 363.

Nebraska.—Plummer *v.* Shellhorn, 24 Nebr. 532, 39 N. W. 430.

New York.— Ritter *v.* Galitzenstein, 13 Daly 452; Templeton *v.* Wile, 3 N. Y. Suppl. 9; Lawrence *v.* Knies, 10 Johns. 140; Tuttle *v.* Love, 7 Johns. 470.

South Carolina.— Perkins *v.* McIntosh, 1 Brev. 18.

Texas.— Fine *v.* Freeman, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963; Keesey *v.* Old, 82 Tex. 22, 17 S. W. 928; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416; Wolfe City Oil Co. *v.* George, (Civ. App. 1895) 30 S. W. 672.

United States.— Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351; The Accame, 12 Fed. 345.

See 11 Cent. Dig. tit. "Contracts," § 1755.

80. Hood *v.* Disston, 90 Ala. 377, 7 So. 732; Bradley *v.* Morris, 4 Ill. 182.

81. Richardson *v.* Hoyt, 60 Iowa 68, 14 N. W. 122; Phipps *v.* Mahon, 141 Mass. 471, 5 N. E. 835.

Defense of express contract in action on quantum meruit.— If, in an action upon the *quantum meruit* for services, the defendant sets up an express contract that the plaintiff's compensation was to depend upon a specified contingent event, it is not incumbent upon the defendant to prove that the specified event did or did not happen. The burden of proof remains with the plaintiff (Evans *v.* Miller, 37 Minn. 371, 34 N. W. 596; Hull *v.* Cooper, 36 Mo. App. 389); for it would be very illogical to hold that because the rules of pleading permit the plaintiff to sue in assumpsit, and not on the special contract, the defendant is therefore saddled with the burden of establishing his version of the special contract (Hull *v.* Cooper, 36 Mo. App. 389).

82. Ferguson *v.* Hemingway, 38 Mich. 159.

stipulations; otherwise it would be impossible to determine whether he has a right to recover.[83] And this is true, although the paper containing the terms and conditions of the contract is in the possession of the defendant, for the plaintiff has the means of enforcing its production or of introducing secondary evidence of its contents in case it is not produced upon proper notice, or under a *subpœna duces tecum*.[84] If the contract is expressly admitted, or its existence is not put in issue, the party alleging it is relieved of the burden of proving its execution.[85]

3. Necessity of Putting Writing in Evidence. In no case, either in law or in equity, is a party required to prove facts alleged in his pleadings and admitted by the pleadings of the opposite party.[86] Accordingly, if the existence, execution, and contents of a written agreement are admitted as alleged, it is not incumbent on the plaintiff to offer the writing in evidence.[87] But in the absence of such admission, a written contract declared on must be put in evidence, unless a sufficient foundation be laid for the introduction of secondary evidence of its contents.[88]

4. Necessity of Proving Delivery. Where a written agreement signed by one of the parties is found in the possession of the other party, it is presumed to have been duly delivered; but this presumption may be rebutted and the possession explained by parol evidence.[89] And where the execution of the instrument sued on is denied under oath, the plaintiff must prove its delivery as well as the other elements of its execution.[90]

5. Burden of Establishing Joint Interest or Liability. Plaintiffs who sue as joint contractors must show a joint interest in the subject-matter.[91] And if two or more are sued jointly, the plaintiff has the burden of showing a joint substantial liability on the part of all the defendants,[92] although exceptions to this rule exist in case of the death of a defendant, and where one or more of the defendants plead and establish infancy, coverture, or a discharge under a bankrupt or insolvency law.[93] Where two or more persons are jointly interested to have

83. Alabama, etc., R. Co. *v.* Nabors, 37 Ala. 489.

84. Alabama, etc., R. Co. *v.* Nabors, 37 Ala. 489.

85. *Iowa.*— Christenson *v.* Gorsch, 5 Iowa 374.

Michigan.— Hemminger *v.* Western Assur. Co., 95 Mich. 355, 54 N. W. 949.

New York.— Spear *v.* Hart, 3 Rob. 420.

Pennsylvania.— Brock *v.* Watson, 10 Pa. Co. Ct. 182.

Tennessee.— Douglass *v.* Cross, 6 Coldw. 416.

Proof of the formal execution of a contract is unnecessary, where the defense is payment (Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271) or non-performance by the plaintiff (Wing *v.* Stewart, 68 Iowa 13, 25 N. W. 905).

86. Atkinson *v.* Linden Steel Co., 138 Ill. 187, 27 N. E. 919; Pankey *v.* Raum, 51 Ill. 88. See Pleading.

87. Atkinson *v.* Linden Steel Co., 138 Ill. 187, 27 N. E. 919.

88. Fulton County *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Schlosser *v.* State, 55 Ind. 82; Potter *v.* Earnest, 51 Ind. 384; Glenn *v.* Porter, 49 Ind. 500; Lucas *v.* Smith, 42 Ind. 103; Higman *v.* Hood, 3 Ind. App. 456, 29 N. E. 1141; Kimball *v.* Bellows, 13 N. H. 58; Ternes *v.* Dunn, 7 Utah 497, 27 Pac. 692.

If the agreement is evidenced by more than one paper all should be introduced. Cordray *v.* Mordecai, 2 Rich. (S. C.) 518.

89. Biederman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Seligman *v.* Ten Eyck, 49 Mich. 104, 13 N. W. 377, 60 Mich. 267, 27 N. W. 514.

90. Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.

91. Snell *v.* De Land, 43 Ill. 323.

92. *Georgia.*— Harriman *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117.

Illinois.— Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186.

Louisiana.— In an action on a joint obligation, no judgment can be obtained against any obligor unless it be proved that all joined in the obligation or are by law presumed to have done so. Dougart *v.* Desangle, 10 Rob. 430; Bird *v.* Doiron, 7 Rob. 181; Bourgerol *v.* Allard, 6 Rob. 351; Duggan *v.* De Lizardi, 5 Rob. 224.

Massachusetts.— Tuttle *v.* Cooper, 10 Pick. 281.

New York.— Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227.

Pennsylvania.— Keebler *v.* King, 4 Pa. Co. Ct. 105.

South Carolina.— Hammarskold *v.* Bull, 11 Rich. 493.

See 11 Cent. Dig. tit. "Contracts," § 1762. And see *supra*, XII, F, 2, b.

93. Tuttle *v.* Cooper, 10 Pick. (Mass.) 281; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227.

certain services performed, and one of them requests another to perform them, he may be presumed to have done it in behalf of all those interested, unless there be something to indicate a different intention.[94]

6. Burden of Proving Performance — a. In General. A party who sues on a special contract to recover compensation alleged to be due on its performance must show performance on his part, if that matter is put in issue.[95] But if the plaintiff's allegation of performance is not put in issue by the defendant, he is relieved of the burden of proving it.[96] Where a tender of performance has been declined, and the plaintiff seeks to recover damages for the breach, it is sufficient for him to prove a legal excuse for non-performance.[97] In an action on a contract to perform some duty, if the plaintiff proves the contract, it is then incumbent on the defendant to prove performance or its equivalent, without proof of non-performance on behalf of the plaintiff.[98] Thus where an affirmative contract to pay money is proved, it is incumbent on the defendant to prove payment if he relies on that defense.[99] One who seeks to recover payment for work partly performed must prove that the work which he did was done according to his covenant. Until he shows this, evidence that he was prevented from finishing it by the defendant is irrelevant;[1] and in such case the burden also rests on the plaintiff to excuse his failure to perform the contract.[2] The general principle undoubtedly is, in all cases where services are performed under a special contract, that the party claiming payment therefor must prove substantial performance or a waiver.[3] An acceptance or a voluntary use of the subject-matter of the contract will be evidence of performance or of a waiver, although not conclusive.[4] But if such acceptance or use is in ignorance of any deficiency of performance, it will not be held to be a waiver.[5] Under such circumstances, however, the burden of showing defective performance rests on the party alleging it.[6] Where the owner

94. Weston *v.* Davis, 24 Me. 374.

95. *Kentucky.*— Lehan *v.* Kiley, 54 S. W. 727, 21 Ky. L. Rep. 1186.

Maine.— Veazie *v.* Bangor, 51 Me. 509.

Michigan.— Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912.

Missouri.— Eyerman *v.* Mt. Sinai Cemetery Assoc., 61 Mo. 489; Marsh *v.* Richards, 29 Mo. 99; St. Joseph Iron Co. *v.* Halverson, 48 Mo. App. 383; Fairbanks *v.* De Lissa, 36 Mo. App. 711.

New York.— Pullman *v.* Corning, 9 N. Y. 93; Shedrick *v.* Young, 72 N. Y. App. Div. 278, 76 N. Y. Suppl. 56; Woolreich *v.* Fettretch, 51 Hun 640, 4 N. Y. Suppl. 326, 21 N. Y. St. 56; Moll *v.* Foery, 43 Hun 476; Allen *v.* Baus, 54 N. Y. Super. Ct. 447; West *v.* Conesus Lake Salt Min. Co., 4 N. Y. St. 384.

Oregon.— Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888; Briscoe *v.* Jones, 10 Oreg. 63.

United States.— U. S. *v.* Robeson, 9 Pet. 319, 9 L. ed. 142; Lacon First Nat. Bank *v.* Bensley, 9 Biss. 378, 2 Fed. 609; Webster *v.* Warren, 2 Wash. 456, 29 Fed. Cas. No. 17,339.

See 11 Cent. Dig. tit. "Contracts," § 1768.

96. Waterboro, etc., R. Co. *v.* Hampton, etc., R., etc., Co., 64 S. C. 383, 42 S. E. 191.

97. Dobbins *v.* Edmonds, 18 Mo. App. 307; Pullman *v.* Corning, 9 N. Y. 93.

98. McGregory *v.* Prescott, 5 Cush. (Mass.) 67.

99. McGregory *v.* Prescott, 5 Cush. (Mass.) 67; Van Gieson *v.* Van Gieson, 12 Barb. (N. Y.) 520; Douglass *v.* Central Land Co., 12 W. Va. 502.

1. Enniss *v.* O'Connor, 3 Harr. & J. (Md.) 163.

2. Walling *v.* Warren, 2 Colo. 434.

In an action on an implied contract, if the existence of a special contract is developed by the evidence, the plaintiff must show the stipulations and that he has complied with them on his part or that he has been prevented from doing so. Kerstetter *v.* Raymond, 10 Ind. 199.

3. Veazie *v.* Bangor, 51 Me. 509; Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

4. Veazie *v.* Bangor, 51 Me. 509; Abbott *v.* Hermon Third School Dist., 7 Me. 118; Haydon *v.* Madison, 7 Me. 76; Pullman *v.* Corning, 9 N. Y. 93; Bristol *v.* Tracy, 21 Barb. (N. Y.) 236; Smith *v.* Coe, 2 Hilt. (N. Y.) 365; White *v.* Hewitt, 1 E. D. Smith (N. Y.) 395; Draffin *v.* Charleston, etc., R. Co., (N. C. 1891) 13 S. E. 427; Taylor *v.* Williams, 6 Wis. 363.

5. Veazie *v.* Bangor, 51 Me. 509; Andrews *v.* Portland, 35 Me. 475; Morrison *v.* Cummings, 26 Vt. 486. And see *supra*, IX, F, 5, d.

Latent defects.— A party who has accepted work is not held to have waived defects in it if, like plastering, it may have latent defects which are not open to inspection. Van Buskirk *v.* Murden, 22 Ill. 446, 74 Am. Dec. 163.

6. Henderson *v.* Louisville, 4 S. W. 187, 8 Ky. L. Rep. 957; Fremont *v.* Harris, 9 Rob.

permits a contractor to proceed with the work after the expiration of the time for its completion, the presumption is that the stipulation in regard to the time of performance has been waived.[7] Where the plaintiff proves complete performance of his contract, it is not necessary for him to prove also an acceptance on the part of the defendant.[8]

b. Conditional Contracts. In an action on a special and conditional contract, the plaintiff has the burden of showing an actual compliance with the conditions imposed upon him before he can be heard to urge a breach by the defendant.[9] So where the covenants are dependent the plaintiff is bound to allege and prove performance on his part.[10] And where the defendant pleads performance specially in bar, the burden of proof is upon him, for the plea of conditions performed admits all the facts that are well alleged and assumes the proof of performance.[11] So if the defendant claims a waiver of performance by the plaintiff, the burden is upon him to show both knowledge and acquiescence necessary to constitute a waiver.[12] And where the defense is based on any excuse for non-performance the burden rests on the defendant to prove it.[13]

c. Demand For Performance. Where a demand for performance is a condition precedent to a right of action on a contract, the plaintiff must not only allege it, but has the burden of proving that a demand was actually made and that the defendant refused to perform.[14]

d. Readiness and Ability to Perform. Neither party to a contract can maintain an action for damages for its violation, without showing a readiness and ability to comply with his own engagements under the contract,[15] unless the averment of

(La.) 23; Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272.

7. Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316.

8. Gilliam *v.* Brown, 126 Cal. 160, 58 Pac. 466.

9. Taylor *v.* Beck, 13 Ill. 376; Richland County *v.* Millard, 9 Ill. App. 396; Springer *v.* Stewart, 2 Greene (Iowa) 390; Dean *v.* Frellsen, 23 La. Ann. 513; First Nat. Bank *v.* Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609; Webster *v.* Warren, 2 Wash. (U. S.) 456, 29 Fed. Cas. No. 17,339.

10. Fox *v.* Satterlee, 56 Hun (N. Y.) 640, 8 N. Y. Suppl. 879, 29 N. Y. St. 918.

11. Perkins *v.* Rogers, 20 Conn. 81; Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

12. Johnson County *v.* Lowe, 72 Mo. 637.

13. Ellison *v.* Dove, 8 Blackf. (Ind.) 571.

14. Widner *v.* Walsh, 3 Colo. 548; U. S. *v.* Corwin, 129 U. S. 381, 9 S. Ct. 318, 32 L. ed. 710.

15. *Illinois.*— Christy *v.* Stafford, 123 Ill. 463, 14 N. E. 680 [*affirming* 22 Ill. App. 430], holding, however, that in an action for the breach of a contract to buy a certain quantity of pickles by a given time in such quantities and at such times as the purchaser should designate, it was not necessary for the plaintiff to show that he actually had a sufficient quantity of pickles on hand on the last day of the time to fulfil the contract had the defendant ordered them, but that it was sufficient for him to show that by purchase from other dealers he had control of a sufficient quantity to fill the contract.

Louisiana.— Moore *v.* Hopkins, 15 La. Ann. 675.

Minnesota.— Cowley *v.* Davidson, 13 Minn. 92, holding, however, that where the defendant agreed to transport certain wheat for the plaintiff by a certain date, the plaintiff agreeing to deliver the wheat upon reasonable notice of the defendant's readiness to receive the same, the plaintiff need not show in the first instance an offer to deliver the wheat.

Missouri.— State *v.* Mooney, 65 Mo. 494, holding that one could not maintain an action for the value of wheat to be delivered when threshed, without proof of demand made for the wheat before the commencement of the action.

Tennessee.— Burns *v.* Welch, 8 Yerg. 117 (holding that in an action on a contract whereby the defendant engaged to deliver planks and lumber of a particular description at his mill the plaintiff need not prove that he attended to receive the lumber, for it is the defendant's duty to prove that he sawed and had the lumber ready to deliver); Tiernan *v.* Napier, 5 Yerg. 410, holding that where a plea states that the defendant was ready at the day specified and is yet ready to deliver specific articles according to the contract, he need not prove that he was ready, but that it devolves upon the plaintiff to falsify his averment, if he can, by proving subsequent demand and refusal).

United States.— Lonsdale *v.* Brown, 4 Wash. 86, 25 Fed. Cas. No. 8,493, holding however, that in an action of assumpsit on a promise by the drawer of a protested bill of exchange to pay the amount thereof to the payee when he was able, it was unnecessary for the plaintiff to prove the fact of ability by positive evidence, as it might be inferred from the defendant's apparent financial ability at the time the action was brought.

See also *supra*, XII, G, 1, e, (IV).

these matters is not denied by the defendant,[16] or it be alleged and proved that the defendant has refused to perform on his part, and has actually prevented performance by the plaintiff.[17] If by the terms of the contract the defendant is not required to do the first act, the plaintiff must allege and prove an offer to comply with the agreement or a sufficient excuse for not doing so.[18]

7. Fulfilment of Conditions. The burden rests on the plaintiff to show the fulfilment of a condition precedent to his right of recovery.[19] But in the case of a condition subsequent, the happening of which is to defeat the cause of action, the burden of proof rests on the defendant.[20] And the same is true where the fact in question is one peculiarly within the knowledge of the defendant.[21]

8. Burden of Proving Breach. In an action to recover damages for a breach of contract, it is as a rule incumbent on the plaintiff to prove the breach complained of.[22] But if an affirmative contract to pay money or perform some duty is proved, it is then incumbent on the defendant to prove payment, performance, or tender, or a sufficient excuse therefrom.[23]

9. Effect of Refusal to Perform. In a suit for breach of contract, a notice by one party to the contract that he will not perform it dispenses with the necessity of proof of readiness to perform by the other party.[24]

10. Subsequent Agreement. A party who relies on the execution of a subsequent written agreement as an abandonment of an oral agreement assumes the burden of proving it.[25] And generally the party who asserts a change or modification in a contract after it was made has the burden of establishing his assertion.[26]

11. Capacity in Which Party Signs. Where a party claims that he signed an

16. Wilbor *v.* McGillicuddy, 3 La. 382.

17. Howell *v.* Gould, 2 Abb. Dec. (N. Y.) 418, 3 Keyes (N. Y.) 422, 2 Transcr. App. (N. Y.) 360.

18. McNamara *v.* Gaylord, 1 Bond (U. S.) 302, 16 Fed. Cas. No. 8,910.

19. *California.*— Bachman *v.* Meyer, 49 Cal. 220.

Colorado.— Cheney *v.* Barber, 1 Colo. 73.

Illinois.— Gridley *v.* Bayless, 43 Ill. App. 503.

Indiana.— New York Home Ins. Co. *v.* Duke, 43 Ind. 418; Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607.

Iowa.— Young *v.* Hartford F. Ins. Co., 45 Iowa 377, 24 Am. Rep. 784; Arnold *v.* River R. Constr. Co., 35 Iowa 99.

Michigan.— Aurora F. & M. Ins. Co. *v.* Kranich, 36 Mich. 289.

New Jersey.— Hibernia Mut. F. Ins. Co. *v.* Meyer, 39 N. J. L. 482.

New York.— Blossom *v.* Lycoming F. Ins. Co., 64 N. Y. 162; Work *v.* Beach, 59 Hun 625, 13 N. Y. Suppl. 678, 37 N. Y. St. 751; Birmingham *v.* Farmers' Joint Stock Ins. Co., 67 Barb. 595; Ocean Ins. Co. *v.* Francis, 2 Wend. 64, 19 Am. Dec. 549; Scouton *v.* Eislord, 7 Johns. 36.

See 11 Cent. Dig. tit. "Contracts," § 1775.

20. Thayer *v.* Connor, 5 Allen (Mass.) 25.

21. Thus where a corporate bond sued upon contains an absolute promise to pay interest annually, coupled with a provision that the interest shall be paid out of the net earnings of the company, the defendant has the burden of proving that the earnings have been insufficient to pay the interest. Strauss *v.* United Telegram Co., 164 Mass. 130, 41 N. E. 57; Marlor *v.* Texas, etc., R. Co., 22 Blatchf. (U. S.) 464, 19 Fed. 867, 21 Fed. 383 [*affirmed* in 123 U. S. 687, 8 S. Ct. 311, 31 L. ed. 303].

22. *Arkansas.*— Bowman *v.* Browning, 17 Ark. 599.

Delaware.— Truitt *v.* Fahey, (1902) 52 Atl. 339.

Georgia.— Wight *v.* Commercial Bank, 115 Ga. 787, 42 S. E. 96.

Iowa.— Stevens *v.* Witter, 88 Iowa 636, 55 N. W. 535; Wolf *v.* Gerr, 43 Iowa 339.

Michigan.— Jones *v.* Dimmock, 2 Mich. N. P. 87.

New York.— Quinn *v.* Van Pelt, 56 N. Y. 417; Hall *v.* Abells, 57 Hun 589, 10 N. Y. Suppl. 581, 32 N. Y. St. 520.

See 11 Cent. Dig. tit. "Contracts," § 1776.

23. McGregory *v.* Prescott, 5 Cush. (Mass.) 67. Where the existence of a debt is admitted or proved payment will not be presumed, but it is an affirmative fact which must be established by the debtor. Atkinson *v.* Linden Steel Co., 138 Ill. 187, 27 N. E. 919. In an action on an oral contract to recover the stipulated price for digging a well, where the defendant set up as a defense a breach of warranty as to the quantity of water produced, it was held that he had the burden of proving it. Johnson *v.* Bowman, 26 Nebr. 745, 42 N. W. 754.

24. Chicago House Wrecking Co. *v.* James H. Rice Co., 67 Ill. App. 686. See *supra*, IX, F, 3.

25. Banewur *v.* Levenson, 171 Mass. 1, 50 N. E. 10. See *supra*, IX, B, 1; XII, G, 1, b, (VII).

26. Anderson *v.* English, 121 Ala. 272, 25 So. 748; Kenney's Appeal, (Pa. 1888) 12 Atl. 589.

instrument merely as a witness, the burden is upon him to prove that fact if there is nothing on the face of the instrument to show that he signed it in that capacity.[27]

12. Shifting Burden. When once the plaintiff has established a *prima facie* case, the burden is then shifted to the defendant to establish his defense.[28] And after proof of the execution of the contract and the breach by the defendant, the burden is then on the defendant to show an excuse for the breach.[29]

13. Proof of Fraud, Illegality, and Other Affirmative Defenses. The rule that he who alleges a fact must prove it affects defenses generally where fraud or illegality is set up, for where a transaction is not on its face unfair or illegal, the burden is on the party who assails its fairness or legality to substantiate his contention.[30] And the same is true where the defense is duress,[31] mistake, or misunderstanding of the parties,[32] or the alteration of the instrument sued on.[33] A party who alleges the bad faith of an umpire or arbitrator has the burden of

27. Hermiston *v.* Green, 11 S. D. 81, 75 N. W. 819.

28. Pughe *v.* Coleman, (Tex. Civ. App. 1898) 44 S. W. 576.

29. Luckhart *v.* Ogden, 30 Cal. 547.

30. *Georgia.*— Robinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491.

Illinois.— Hall *v.* Jarvis, 65 Ill. 302; Anderson *v.* Carlson, 99 Ill. App. 514; Postlewait *v.* Higby, 83 Ill. App. 414; Barnett *v.* Baxter, 64 Ill. App. 544.

Indiana.— Mendenhall *v.* Gately, 18 Ind. 149.

Kansas.— Woolacott *v.* Case, 63 Kan. 35, 64 Pac. 965; Buchanan *v.* Gibbs, 26 Kan. 277; Craft *v.* Bent, 8 Kan. 328.

Kentucky.— Spadone *v.* Reed, 7 Bush 455; Harper *v.* Cincinnati, etc., R. Co., 22 S. W. 849, 15 Ky. L. Rep. 223; Mayes *v.* Hiser, 7 Ky. L. Rep. 40.

Louisiana.— Palfrey *v.* Stinson, 11 La. 77.

Maine.— Shaw *v.* Waterhouse, 79 Me. 180, 8 Atl. 829; Winslow *v.* Gilbreth, 50 Me. 90; Nason *v.* Dinsmore, 34 Me. 391; Blaisdell *v.* Cowell, 14 Me. 370.

Massachusetts.— Trott *v.* Irish, 1 Allen 481.

Mississippi.— Merrill *v.* Melchior, 30 Miss. 516.

New Hampshire.— Doolittle *v.* Lyman, 44 N. H. 608.

New Jersey.—Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472.

New York.— Milbank *v.* Jones, 127 N. Y. 370, 28 N. E. 31, 38 N. Y. St. 910, 24 Am. St. Rep. 454; Cohoes *v.* Cropsey, 55 N. Y. 685; Dykers *v.* Townsend, 24 N. Y. 57; Smith *v.* Babcock, 3 N. Y. App. Div. 6, 37 N. Y. Suppl. 965, 73 N. Y. St. 14; Brown *v.* Brown, 34 Barb. 533.

North Carolina.— Gilmer *v.* Hanks, 84 N. C. 317.

Pennsylvania.— Jessop *v.* Ivory, 158 Pa. St. 71, 27 Atl. 840; Bonsall *v.* Kirkpatrick, 22 Pittsb. Leg. J. 69.

Texas.— Cundiff *v.* Campbell, 40 Tex. 142; Tucker *v.* Streetman, 38 Tex. 71.

United States.— Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592; Salinas *v.* Stillman, 66 Fed. 677, 14 C. C. A. 50; Kirkpatrick *v.* Adams, 20 Fed. 287.

See 11 Cent. Dig. tit. "Contracts," § 1760.

In an action for calls on shares, where the defendant pleads that he was induced to take the shares by fraud, it is not for him to show that he repudiated the shares as soon as he became aware of the fraud, but it lies on the plaintiff to show that he adhered to the contract notwithstanding the discovery of the fraud. Aaron's Reefs *v.* Twiss, 74 L. T. Rep. N. S. 794. Cee Corporations.

Public policy.— As an agreement is not void unless itself or its tendency is to injure the public, the burden of proof is on the party who asserts that it is against public policy. A party who seeks to put a restraint upon the freedom of contract in any case must make it plainly and obviously clear that the contract in question is against public policy.

Iowa.— Richmond *v.* Dubuque, etc., R. Co., 26 Iowa 191; Boardman *v.* Thompson, 25 Iowa 487.

Minnesota.— Peterson *v.* Christensen, 26 Minn. 377, 4 N. W. 623.

Wisconsin.— Kellogg *v.* Larkin, 3 Pinn. 123, 3 Chandl. 133, 56 Am. Dec. 164.

United States.— Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; Swann *v.* Swann, 21 Fed. 299.

England.— Richardson *v.* Mellish, 2 Bing. 229, 9 E. C. L. 557, 1 C. & P. 241, 12 E. C. L. 145, 3 L. J. C. P. O. S. 265, 9 Moore C. P. 435, R. & M. 66, 21 E. C. L. 703, 27 Rev. Rep. 603.

Knowledge of illegality.— It will be presumed that the plaintiff had no knowledge of the unlawful purpose of the defendant, if the evidence on this point is doubtful. Fee *v.* Gonegal, 19 La. Ann. 263; Gibson *v.* Pearsall, 1 E. D. Smith (N. Y.) 90.

As to presumption of undue influence see *supra*, VI, F, 5.

31. Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866; Horton *v.* Bloedorn, 37 Nebr. 666, 56 N. W. 321; Benjamin *v.* Drafts, 44 S. C. 430, 22 S. E. 470.

32. Brant *v.* Gallup, 5 Ill. App. 262.

33. Wing *v.* Stewart, 68 Iowa 13, 25 N. W. 905. See Alterations of Instruments, 2 Cyc. 233.

proving it.[34] Where the defendant pleads generally that there was no consideration for the contract sued on, the burden of the issue is on the plaintiff;[35] but if he pleads specially the matters showing the want of consideration, he thereby assumes the burden of proof of the issue.[36] A party who alleges a partial failure of consideration as a defense must prove the extent to which the consideration has failed.[37] Of course the defendant is relieved of the burden of proving such defenses as those mentioned above if the infirmity of the contract is disclosed by the plaintiff's own evidence.[38]

J. Admissibility of Evidence — 1. Evidence of Contract — a. In General. Where the parties have deliberately reduced their agreement to writing, the writing itself, if it can be produced, is the only admissible evidence of the contract, and parol evidence is not admissible to contradict, vary, or modify the written contract in any particular.[39] So also if the contract be such as requires a writing under the statute of frauds, parol evidence cannot be admitted to prove the contract or any essential terms thereof, or to prove a subsequent agreement materially modifying it.[40] But if a simple contract, although reduced to writing, would have been valid without writing, a subsequent modification of it may be proved by parol evidence; or a new and distinct agreement, upon a new consideration, may be thus proved, whether it be a substitute for the old or something in addition to it.[41] And where the contract has been modified, but not entirely superseded by a subsequent parol agreement, the original written contract is admissible in evidence in an action on the contract as modified.[42] If an agreement, valid without writing, rests in parol, it may of course be proved by oral evidence.[43] And written instruments may be evidence of an oral contract.[44] A contract may

34. Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332; Fowler *v.* Deakman, 84 Ill. 130; State *v.* McGinley, 4 Ind. 7.

35. Brown *v.* Wright, 17 Ark. 9.

36. Brown *v.* Wright, 17 Ark. 9.

37. Farrar *v.* Toliver, 88 Ill. 408; Davis *v.* Davis, 84 Mich. 324, 47 N. W. 555.

38. Brickell *v.* Halifax County, 81 N. C. 240; Leak *v.* Richmond County Com'rs, 64 N. C. 132; Kirkpatrick *v.* Adams, 20 Fed. 287.

In the case of lobbying contracts, the plaintiff's pleadings and proof usually reveal the vicious tendency of the contract, and the burden then rests on the plaintiff to show that his services were of a legitimate character. Mills *v.* Mills, 40 N. Y. 543, 100 Am. Dec. 535; Harris *v.* Simonson, 28 Hun (N. Y.) 318; Brown *v.* Brown, 34 Barb. (N. Y.) 533; Rose *v.* Truax, 21 Barb. (N. Y.) 361; Clippinger *v.* Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Powers *v.* Skinner, 34 Vt. 274, 80 Am. Dec. 677; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953.

39. See Evidence.

A mere memorandum of an actual agreement, signed by the defendant, is admissible in evidence, although the parties may have intended to execute a more formal instrument as a substitute for it. Bohn *v.* Newton, 81 Va. 480. See *supra*, II, C, 4, l.

Where plaintiff alleges a written contract with defendant containing certain conditions, the plaintiff's performance of the conditions and the defendant's default, the written agreement is admissible in evidence, although it contains conditions not alleged, provided they are not inconsistent with the allegations. Bowers' California Dredging Co. *v.* San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475.

40. See Frauds, Statute of.

41. *Louisiana.*—Mathias *v.* Lebret, 10 Rob. 94.

Massachusetts.— Cummings *v.* Arnold, 3 Metc. 486, 37 Am. Dec. 155.

New Jersey.— Perrine *v.* Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388.

North Carolina.— Harris *v.* Murphy, 119 N. C. 34, 25 S. E. 708, 56 Am. St. Rep. 656.

Pennsylvania.— Malone *v.* Dougherty, 79 Pa. St. 46; Le Fevre *v.* LeFevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

United States.— Pecos Valley Bank *v.* Evans-Snyder-Buel Co., 107 Fed. 654, 46 C. C. A. 534; Lockwood *v.* U. S., 5 Ct. Cl. 379.

England.— Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34.

42. White *v.* Soto, 82 Cal. 654, 23 Pac. 210; Spangler *v.* Springer, 22 Pa. St. 454.

43. Woodstock Iron Co. *v.* Reed, 84 Ala. 493, 4 So. 369. See Evidence.

When a written contract in suit is treated in the pleadings as resting in parol, the writing is not admissible, and hence the contract may be proved by parol. Durflinger *v.* Baker, 149 Ind. 375, 49 N. E. 276.

Acts of parties.— Where the issue is as to what a verbal agreement is, the acts, as well as the words of the parties with respect to the matter of the agreement at the time of making it, are admissible in evidence and should be considered by the jury. Egan *v.* Faendel, 19 Minn. 231.

44. An unsigned writing, admitted by both parties to contain a correct statement of an

be proved by the correspondence of the parties, provided it shows that a definite offer was made on one side and was accepted without qualification on the other.[45] Where the making of a contract is denied, and the defendant is precluded from testifying by reason of the death of the other alleged contracting party, it is the right and privilege of the defendant to put before the jury every fact and circumstance which may have any tendency to show or raise the presumption that such contract never existed.[46]

b. Distinction Between Express and Implied Contracts. There is a distinction between an express and an implied contract in the mode of substantiation. An express contract is proved by evidence of an actual agreement; an implied contract by circumstances and the general course of dealing between the parties.[47] But there are cases in which it is held that an express contract may be established either by direct and positive evidence or by circumstantial evidence equivalent to that which is direct and positive.[48]

c. Memoranda of Witnesses. While it is clearly the privilege of the jury or any member of it to take notes of the oral testimony as aids to memory, there is no principle of law which authorizes memoranda of calculations made by a witness to assist his own memory, to be placed before the jury, if objection be made.[49]

d. Execution of Instrument. The execution of a written instrument by a person may be proved by positive evidence, such as the testimony of subscribing witnesses or proof of his handwriting;[50] but as it is not essential that he should write his own name to the instrument in order to make it his contract, if facts are proved amounting to an acknowledgment on his part that it was his act, the jury may infer that it was executed by him or by his authority.[51] As the plea of

oral agreement entered into by them, although it may not be introduced as the contract, is competent evidence of what the oral agreement was. Grand Rapids Chair Co. *v.* Lyon, 73 Mich. 438, 41 N. W. 497.

An instrument which is void on its face is not admissible to prove the contract of which it was intended to be the memorial. Craig *v.* Andrews, 7 Iowa 17. But an instrument, although void, may be admissible in evidence, in an action on a valid contract, as a written admission of the party who signed it. Iron Mountain, etc., R. Co. *v.* Stansell, 43 Ark. 275. And a party may show that he acted under a void or illegal contract, when the evidence is offered merely for the purpose of showing with what intention an act was done, such intention being material, and the contract being otherwise immaterial. Harvey *v.* Stevens, 58 N. H. 338.

45. Bellamy *v.* Debenham, 45 Ch. D. 481, 60 L. J. Ch. 166, 63 L. T. Rep. N. S. 220, 39 Wkly. Rep. 257; Oliver *v.* Hunting, 44 Ch. D. 205, 59 L. J. Ch. 255, 62 L. T. Rep. N. S. 108, 38 Wkly. Rep. 618; Warner *v.* Willington, 3 Drew. 523, 2 Jur. N. S. 433, 25 L. J. Ch. 662, 4 Wkly. Rep. 531. See *supra*, II, C, 7.

Upon the question whether there was an agreement made by letters, all the correspondence between the parties on that subject is admissible in evidence. Bryant *v.* Lord, 19 Minn. 396. Where a declaration on a contract of sale does not count upon it as in writing, a letter offering to sell may be received in evidence, without showing that it constitutes the entire correspondence between the parties. Trench *v.* Hardin County Canning Co., 168 Ill. 135, 48 N. E. 64 [*affirming* 67 Ill. App. 269]. But where, after the minds of the parties meet, they deliberately reduce the whole contract to writing, their previous correspondence on the subject, not referred to in the written contract, is not admissible in evidence. Randall *v.* Rhodes, 1 Curt. (U. S.) 90, 20 Fed. Cas. No. 11,556.

46. Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772.

47. Duffey *v.* Duffey, 44 Pa. St. 399; Lynn *v.* Lynn, 29 Pa. St. 369; Bash *v.* Bash, 9 Pa. St. 260; Hartman's Appeal, 3 Grant (Pa.) 271; Candor's Appeal, 5 Watts & S. (Pa.) 513; Marzetti *v.* Williams, 1 B. & Ad. 415, 9 L. J. K. B. O. S. 42, 20 E. C. L. 541.

48. Wells *v.* Perkins, 43 Wis. 160; Tyler *v.* Burrington, 39 Wis. 376.

Services performed by member of family. — Thus it has been held that an express contract to pay for services rendered by a member of a family may be proved, not only by direct evidence of the actual agreement and the express words used by the parties but also by circumstantial evidence. Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583; Ridler *v.* Ridler, 93 Iowa 347, 61 N. W. 994. See *supra*, II, C, 4, a, note 72.

49. Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51.

50. See EVIDENCE.

51. Sigfried *v.* Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427; Hill *v.* Scales, 7 Yerg. (Tenn.) 410; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416; Mapes *v.* Leal, 27 Tex. 345.

Proof of the confession of a party signing

non est factum relates to the time of pleading, proof of an acknowledgment or ratification at any time *ante litem motam* is sufficient to establish the issue raised by such plea in favor of the plaintiff.[52] But before the plaintiff can introduce evidence of a ratification of the alleged contract by the defendant, he must show a compliance with its terms on his own part.[53] When the making of an alleged contract is directly put in issue, all the surrounding circumstances which may be considered part of the *res gestæ* are admissible in evidence.[54] Where evidence as to the existence of a contract is conflicting, the plaintiff may show in corroboration that the defendant has, either in person or by his agent, actually performed it in part.[55] A paper which has never been delivered is not admissible in evidence to prove a contract.[56]

2. Evidence of Performance or Breach. The defendant has a right to introduce any competent evidence to show non-performance of the contract on the part of the plaintiff, and plaintiff may introduce any competent evidence to show performance.[57] Where the defense is that the plaintiff did not complete the work as agreed upon, the defendant may introduce evidence of the amount necessarily expended in getting the work completed, because it tends to prove the defense and also the extent of the damage occasioned by the non-performance.[58] Where the plaintiff sues on a contract which he has not fully performed, he may prove any legal excuse for non-performance, if he has so framed his pleadings as to let in such evidence.[59] And where the defendant has objected to the sufficiency of work performed by the plaintiff, it is competent for the plaintiff to prove any fact bearing on the good faith of the defendant's objec-

an instrument not under seal that he executed it is sufficient without calling the subscribing witnesses. Hall *v.* Phelps, 2 Johns. (N. Y.) 451.

Ratification of act of an agent.— Where an agreement was made through an agent of one of the parties, it is error to exclude evidence that it was submitted to the principal and ratified by him. Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

Execution not denied under oath.— A contract which is the foundation of the suit is admissible in evidence without proof of its execution, under Ala. Code, § 1801, where the execution is not denied by plea filed, verified under oath. Thornton *v.* Savage, 120 Ala. 449, 25 So. 27.

52. Hill *v.* Scales, 7 Yerg. (Tenn.) 410; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416.

53. Wrought Iron Bridge Co. *v.* Greene, 53 Iowa 562, 5 N. W. 770.

54. Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195. And see Evidence.

Proof of absence at time and place of execution.— Evidence that an alleged maker of a note was not present at the time and place it was claimed to have been signed is relevant and material to support the defense of forgery. Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195.

Facts not part of res gestæ.— The question being whether the contract was in fact made or not, evidence that one party did not at the time have the property agreed to be delivered, or that one of the defendants told the other, his partner, not to make the contract, is inadmissible. Such facts are no part of the *res gestæ*. Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408.

55. Burns *v.* Peck, 17 Mo. App. 580.

56. Ruckman's Appeal, 61 Pa. St. 251.

57. Thompson *v.* Richards, 14 Mich. 172.

Where the issue is whether the contract was performed within a reasonable time, evidence of the condition of the market for materials used at the time is admissible as tending to show what was a reasonable time. Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975.

The difference in the results produced by a model and its imitation is admissible in corroboration of the testimony of a witness that there is a difference in their construction. Tilton *v.* Miller, 66 Pa. St. 388, 5 Am. Rep. 373.

Performance interrupted by defendant.—In an action on a contract which the plaintiff has not been permitted to complete, evidence is admissible to show that he performed in a proper manner so far as he went. Americus *v.* Alexander, 64 Ga. 447. And where, in an action for breach of contract, the plaintiff claims that his performance was prevented by certain correspondence with the defendant's agent, it is proper to submit the correspondence to the jury. Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646.

Tender of performance.— On an issue of the sufficiency of a tender of performance, evidence that aside from the tender made the party was in a position to perform the contract is not admissible. Hawley *v.* Mason, 9 Dana (Ky.) 32, 33 Am. Dec. 522.

58. Clark *v.* Russell, 110 Mass. 133; Moulton *v.* McOwen, 103 Mass. 587; Walker *v.* Orange, 16 Gray (Mass.) 193; Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. St. 167, 32 Atl. 432.

59. Patterson *v.* Judd, 27 Mo. 563; Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac.

tion.[60] Great lapse of time will raise a presumption that a covenant has been performed, but this presumption may be rebutted.[61]

3. EVIDENCE OF DAMAGES. The plaintiff's case includes not only the making and breach of the agreement declared on, but the amount of damages if any to which the plaintiff is entitled, and evidence tending to ascertain such amount is pertinent to the issue.[62]

4. EVIDENCE OF ABANDONMENT. On an issue as to the abandonment of a contract and the rights under it, it is competent to prove not only acts, admissions, and declarations tending to show an abandonment in fact, but also, in connection therewith and to characterize such acts, admissions, and declarations to show a reason or motive for abandonment, such as that, owing to low prices or values of the property involved, the venture and the rights under the contract appeared to be of no value.[63] In determining whether a party has given his consent to a rescission or abandonment of a contract, it is always proper to inquire whether it was to his interest to do so.[64]

5. EVIDENCE OF ILLEGALITY. Where a contract is assailed on the ground that it is illegal and void, the defense may be and generally is established by evidence *aliunde*,[65] for the rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law.[66] It is competent to prove that a written contract was executed on Sunday and is therefore invalid,

532; Raven *v.* Smith, 87 Hun (N. Y.) 90, 33 N. Y. Suppl. 972.

60. Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975.

61. Phillips *v.* Morrison, 3 Bibb (Ky.) 105, 6 Am. Dec. 638.

62. Victor G. Bloede Co. *v.* Jos. Bancroft, etc., Co., 98 Fed. 175. See DAMAGES.

63. Smith *v.* Glover, 50 Minn. 58, 52 N. W. 210, 912.

Evidence as to deviations.— In order to show the abandonment of a contract by reason of a departure from its terms, the first step in the proof is to show the deviation, and the next to show that it was not under the contract, for deviations which are allowable under the terms of the contract are no evidence of abandonment. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

64. Chouteau *v.* Jupiter Iron-Works, 94 Mo. 388, 7 S. W. 467; Fine *v.* Rogers, 15 Mo. 315.

65. *Alabama.*— Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

California.— Buffendeau *v.* Brooks, 28 Cal. 641.

Georgia.— Southern Express Co. *v.* Duffey, 48 Ga. 358.

Iowa.— Rosenbaum Bros. *v.* Levitt, 109 Iowa 292, 80 N. W. 393.

Kansas.— St. Louis Wire-Mill Co. *v.* Consolidated Barb-Wire Co., 46 Kan. 773, 27 Pac. 118.

Kentucky.— Wilhite *v.* Roberts, 4 Dana 172.

Massachusetts.— Clark *v.* Pomeroy, 4 Allen 534; Allen *v.* Hawks, 13 Pick. 79.

New York.— Plath *v.* Kline, 18 N. Y. App. Div. 240, 45 N. Y. Suppl. 951; Nellis *v.* Clarke, 20 Wend. 24. As to compounding crime see Maxfield *v.* Hœcker, 49 Hun 605, 7 N. Y. Suppl. 77.

North Carolina.— Martin *v.* Amos, 35 N. C. 201.

South Carolina.—Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

West Virginia.— Winternitz *v.* Hyland, 3 W. Va. 461.

England.— Pole *v.* Harrobin, 9 East 417 note.

See 11 Cent. Dig. tit. "Contracts," § 1785.

Too late to object after performance.— After a party has performed a contract it is too late for him to assail its validity in a suit between the same parties on another cause of action. Ellis *v.* Drake, 52 Ga. 617.

66. *Kansas.*— Friend *v.* Miller, 52 Kan. 139, 24 Pac. 397, 39 Am. St. Rep. 340.

Maine.— Lime Rock Bank *v.* Hewett, 50 Me. 267.

Massachusetts.— Clemens Electrical Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820.

Rhode Island.— Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

Wisconsin.— Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

Evidence of public policy.— The constitution, laws, and judicial decisions of a state are the only authentic and admissible evidence of its public policy on any given subject. The law points out the sources of information to which courts must appeal, and vague surmises as to what would be shocking to the moral sense of the people are not to be indulged in when contracts are assailed on the ground that they are contrary to public policy. Swann *v.* Swann, 21 Fed. 299. See *supra*, VII, B, 3, c.

although it purports on its face to have been executed on another day.[67] When the consideration for a contract is the compounding of a felony, the contract is void, and evidence tending to show that no crime was in fact committed is not admissible.[68] And *a fortiori* statements of the prosecuting attorney in regard to the merits of the prosecution are not admissible.[69]

6. EVIDENCE OF VALUE OR PRICE. In assumpsit to recover for services rendered, evidence of the value of such services is admissible, where there is nothing to show an agreement to pay a particular sum or at a particular rate.[70] But where the compensation for services rendered or the price of property sold or materials furnished is stipulated by express agreement no evidence of value is admissible.[71] Thus in an action upon an executory agreement to purchase property at a stipulated price the value of the property is immaterial and need not be proved.[72] It has been held, however, that it is not error to admit evidence of the value of services in corroboration of evidence of the express agreement.[73] And where there is a direct conflict of evidence as to the agreed rate of payment, the actual value of the services rendered, of the property sold, or of materials furnished at the time of making the contract may be proved, as such evidence tends to show whose contention is probably correct.[74] In an action on a contract for services at

67. Ames *v.* Quimby, 106 U. S. 342, 1 S. Ct. 116, 27 L. ed. 100. See SUNDAY.

68. Bigelow *v.* Woodward, 15 Gray (Mass.) 560, 77 Am. Dec. 389.

69. Bigelow *v.* Woodward, 15 Gray (Mass.) 560, 77 Am. Dec. 389; Smith *v.* Crego, 54 Hun (N. Y.) 22, 7 N. Y. Suppl. 86, 26 N. Y. St. 64.

70. Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583; Banks *v.* House, (Tex. Civ. App. 1899) 50 S. W. 1022. See MASTER AND SERVANT; WORK AND LABOR.

71. *Arkansas.*— Gibney *v.* Turner, 52 Ark. 117, 12 So. 201.

California.— Pettibone *v.* Lake View Town Co., 134 Cal. 227, 66 Pac. 218; Whitton *v.* Sullivan, 96 Cal. 480, 31 Pac. 1115.

Illinois.— Byrne *v.* Byrne, 47 Ill. 507; Brigham *v.* Hawley, 17 Ill. 38.

Kentucky.— Hart *v.* Coram, 3 Bibb 26.

Massachusetts.—Craig *v.* French, 181 Mass. 282, 63 N. E. 893; Knowlton *v.* Sewall, 10 Allen 34.

Michigan.— Campau *v.* Moran, 31 Mich. 280.

New York.— Carpenter *v.* Taylor, 164 N. Y. 171, 58 N. E. 53; Van Orden *v.* Fox, 32 N. Y. App. Div. 173, 52 N. Y. Suppl. 863.

South Dakota.— Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322.

Texas.— Lohner *v.* Wilcox, (Civ. App. 1897) 43 S. W. 27.

Express contract fully performed.—In Missouri it has been held that in an action of assumpsit, where an express contract has been fully performed, and the contract is either proved or admitted, the plaintiff may nevertheless prove the reasonable value of his services, and this is put upon the ground that inasmuch as the plaintiff can recover no more than the contract price, if he is willing to take the risk of getting less by proving the reasonable value, the defendant ought not to be heard to complain. Barnett *v.* Sweringen, 77 Mo. App. 64; Legg *v.* Gerardi, 22 Mo. App. 149; Crump *v.* Rebstock, 20 Mo. App. 37.

72. Taft *v.* Church, 162 Mass. 527, 39 N. E. 283.

Contract to pay in depreciated medium of exchange.— But in an action on a contract to pay so many dollars in a depreciated medium of exchange, the value of the thing agreed to be delivered is material and must be proved. Ward *v.* Latimer, 4 Tex. 385.

73. Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817.

74. *Illinois.*— Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815.

Kansas.— Klopp *v.* Jill, 4 Kan. 482.

Massachusetts.— Parker *v.* Coburn, 10 Allen 82; Bradbury *v.* Dwight, 2 Metc. 31.

Michigan.— Richardson *v.* McGoldrick, 43 Mich. 476, 5 N. W. 672; Campau *v.* Moran, 31 Mich. 280.

Nebraska.— Spurck *v.* Dean, 49 Nebr. 66, 68 N. W. 375; Fry *v.* Tilton, 11 Nebr. 456, 9 N. W. 638.

New Hampshire.— Swain *v.* Cheney, 41 N. H. 232.

New York.— Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007, 44 N. Y. St. 902; Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103, 27 N. Y. St. 852; Weidner *v.* Phillips, 114 N. Y. 458, 21 N. E. 1011, 23 N. Y. St. 762; Flagg *v.* Reilly, 23 N. Y. App. Div. 57, 48 N. Y. Suppl. 544; H. M. Whitney Co. *v.* Stevenson, 17 N. Y. App. Div. 224, 45 N. Y. Suppl. 552.

Ohio.— Allison *v.* Horning, 22 Ohio St. 138.

Pennsylvania.— Rauch *v.* Scholl, 68 Pa. St. 234.

Vermont.— Kidder *v.* Smith, 34 Vt. 294; Kimball *v.* Locke, 31 Vt. 683.

Washington.— Dimmick *v.* Collins, 24 Wash. 78, 63 Pac. 1101; Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566.

Wisconsin.— Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

See 11 Cent. Dig. tit. "Contracts," § 1796.

These cases proceed upon the principle that in controversies where a special agreement is alleged on one side and is denied on the

an alleged stipulated rate, where the contract is denied, and it is insisted that a contract to pay the alleged compensation would be unreasonable, and that it is therefore improbable that it was entered into, evidence of the plaintiff's earning capacity in other employment is admissible to repel the imputation of unreasonableness.[75] But it has been held that where the making of an alleged contract of sale is in dispute, the value of the thing alleged to have been sold cannot be proved to show the making of the contract.[76] If the circumstances are such that the plaintiff, without full performance, may sue in assumpsit, evidence of the value of what has actually been done is admissible.[77] And it has been held that where the plaintiff alleges an interruption of performance by the act of the defendant and brings his action on the special contract evidence of the value of what he has done is admissible.[78]

7. TENDENCY TO SUPPORT ISSUE. It is not essential to the admissibility of evidence that it will actually establish a cause of action or defense. When otherwise competent it should be received if it has a tendency to do so,[79] particularly if a transaction is assailed on the ground that it is tainted with fraud, for courts will not trouble themselves about fine distinctions in the admissibility of evidence when the purpose is to unkennel a fraud.[80] Evidence of facts outside the issue is not admissible, although such facts may tend to prove the issue in an argumentative way.[81]

other, it is relevant to put in evidence any circumstances which tend to make the proposition at issue either more or less improbable; and this not to change the contract, but as evidence bearing upon the probability that the contention of one party is correct rather than that of the other. Miller *v.* Early, 58 S. W. 789, 22 Ky. L. Rep. 825; Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77; Moore *v.* Davis, 49 N. H. 45, 6 Am. Rep. 460; Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. 1007, 44 N. Y. St. 902; Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103, 27 N. Y. St. 852; Ostrander *v.* Snyder, 73 Hun (N. Y.) 378, 26 N. Y. Suppl. 263, 57 N. Y. St. 289; Cornell *v.* Markham, 19 Hun (N. Y.) 275; Standish *v.* Brady, 18 Misc. (N. Y.) 371, 41 N. Y. Suppl. 651.

Although defendant asserts an agister's lien under an express contract, he may show the reasonable value of the pasturage on an issue whether an agreed charge therefor was for the season or for a month. Harper *v.* Lockhart, 9 Colo. App. 430, 48 Pac. 901.

75. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41.

76. Hodges *v.* Richmond Mfg. Co., 10 R. I. 91.

77. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325. And if the plaintiff seeks to recover on a *quantum meruit*, after failing to fulfil the contract according to its terms, evidence of the value of his work is pertinent. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455; Campau *v.* Moran, 31 Mich. 280.

78. Lacroix *v.* Tournillion, 15 La. Ann. 69.

79. *Alabama.*— Mobile, etc., R. Co. *v.* Worthington, 95 Ala. 598, 10 So. 839.

Michigan.— McKay *v.* Evans, 48 Mich. 597, 12 N. W. 868.

Missouri.— Taylor *v.* The Robert Campbell, 20 Mo. 254.

New York.— Abele *v.* Falk, 28 N. Y. App. Div. 191, 50 N. Y. Suppl. 876; Bumsted *v.* Hoadley, 11 Hun 487.

Pennsylvania.— Gallagher *v.* Philadelphia, 9 Pa. Super. Ct. 498, 43 Wkly. Notes Cas. 499.

Utah.— Anthony *v.* Savage, 3 Utah 277, 3 Pac. 546.

See 11 Cent. Dig. tit. "Contracts," § 1781 *et seq.*

Evidence that one is acting as president of a corporation is competent as tending to show that he is president. Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 484, 10 S. E. 897.

In an action for the breach of a contract not to engage in a similar business within a certain territory, testimony offered by the plaintiff that the vendor, at the time of the sale, estimated his stock in trade to be worth eight thousand dollars, while the purchase price was fourteen thousand dollars, is admissible for the purpose of showing the value of the patronage and good-will of the business. Helphenstine *v.* Downey, 7 App. Cas. (D. C.) 343.

Where logs were to be sawed into lumber by the plaintiff and paid for by the measurement on delivery at the cars, evidence of plaintiff's measurement of the logs in the woods is admissible as tending to show fraudulent measurement of the lumber at the cars by the defendant. Sigler *v.* Beebe, 44 W. Va. 587, 30 S. E. 76.

80. Gilmer *v.* Hanks, 84 N. C. 317; Brink *v.* Black, 77 N. C. 59; Robertson *v.* Reed, 47 Pa. St. 115. And see FRAUD.

Fraud may be shown by the positive declarations or admissions of the person charged or by indirect evidence, such as the acts, conduct, and other circumstances attending the transaction. Thomas *v.* Grise, 1 Pennew. (Del.) 381, 41 Atl. 883. See FRAUD.

81. Bluntzer *v.* Dewees, 79 Tex. 272, 15 S. W. 29.

8. DECLARATIONS AND ADMISSIONS.[82] Letters written by a party to a suit are not admissible in his own behalf, unless they are part of a mutual correspondence resulting in a contract. A party can no more make evidence for himself by writing letters than by making oral declarations.[83] And the same is true of the written statements of a party's agent.[84] But the written admissions of a party are competent evidence on behalf of his adversary, if they are relevant to the issue.[85] And the same is true of oral admissions and declarations against interest.[86] When the admissions of a party are given in evidence in the course of a trial, the whole of what he said at the same time and relating to the same subject must be given in evidence, but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted in his own favor as those making against his interest.[87] So also

Thus where a contract provides that lumber is to be manufactured in a good and workmanlike manner, no reference being made as to the kind of mill to be used, it is error to admit evidence that portable mills are not expected to make as good lumber as stationary ones. Grice *v.* Noble, 59 Mich. 515, 26 N. Y. 688.

Where, in an action to recover for the storage of railroad ties, the jury find that a special contract for storage existed between the plaintiff and defendant, evidence as to the value of the ties and of the lots on which they were stored is inadmissible. Lansburgh *v.* Wimsatt, 7 App. Cas. (D. C.) 271.

Under a contract for excavating, providing for payment by the yard, evidence as to the number of days' work done, the number of trips per day, and the capacity of the scrapers is incompetent. American Silica Sand Co. *v.* McGarry, 68 Ill. App. 333.

In determining whether arc lights of an electric plant fulfil the contract under which they are furnished, it is not competent to introduce evidence comparing them with arc lights at other places, or of a former plant at the same place, even when the character and capacity of the lamps, or the conditions under which the other lights were operated, are shown by the witnesses. A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Tex. Civ. App. 1898) 44 S. W. 929.

Defendant's reputation for honesty.— In an action for breach of contract, evidence of the reputation of the defendant for honesty and fair dealing is not admissible. Jackson *v.* Martin, (Tex. Civ. App. 1897) 41 S. W. 837.

82. Evidence of declarations and admissions see, generally, EVIDENCE.

83. Graham *v.* Eiszner, 28 Ill. App. 269. See EVIDENCE.

84. Anderson *v.* Fetzer, 75 Wis. 562, 44 N. W. 838.

85. Phinney *v.* Bronson, 43 Kan. 451, 23 Pac. 624; Conner *v.* Mt. Vernon Co., 25 Md. 55. Where the execution of the contract sued on is denied by the defendant, a letter offering to compromise the claim and making an express recognition of the contract is admissible in evidence as an admission of the execution of the contract. Scofield *v.* Parlin, etc., Co., 61 Fed. 804, 10 C. C. A. 83. And to prove that a party to a contract knew its contents and was bound by it, evidence was held competent that several months after its execution he directed a telegram to the other party to the effect that it bound himself and the others who signed it to make good the account referred to therein. Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431. See also EVIDENCE.

86. *Alabama.*— Wharton *v.* Thomason, 78 Ala. 45.

California.— Robinson *v.* Dugan, (1894) 35 Pac. 902.

Georgia.— Churchman *v.* Robinson, 93 Ga. 731, 20 S. E. 215.

Maine.— McCobb *v.* Healy, 17 Me. 158.

Maryland.— Coates *v.* Sangston, 5 Md. 121.

Massachusetts.— Batchelder *v.* Rand, 117 Mass. 176.

Michigan.—Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235; Dumanoise *v.* Townsend, 80 Mich. 302, 45 N. W. 179.

New York.— Brahe *v.* Kimball, 5 Sandf. 237; Wohlfarth *v.* Chamberlain, 14 Daly 178, 6 N. Y. St. 207.

North Carolina.— McDonald *v.* Carson, 94 N. C. 497.

Pennsylvania.— Silvis *v.* Ely, 3 Watts & S. 420.

Vermont.— Goodnow *v.* Parsons, 36 Vt. 46.

Virginia.—Kelly *v.* Board of Public Works, 75 Va. 263.

United States.— Goldsborough *v.* Baker, 3 Cranch C. C. 48, 10 Fed. Cas. No. 5,516.

See 11 Cent. Dig. tit. "Contracts," § 1793; and, generally, EVIDENCE.

87. *Alabama.*— Wilson *v.* Calvert, 8 Ala. 757.

Maryland.— Reynolds *v.* Manning, 15 Md. 510.

New York.— Dorlon *v.* Douglass, 6 Barb. 451; Kelsey *v.* Bush, 2 Hill 440; Garey *v.* Nicholson, 24 Wend. 350.

Pennsylvania.— Newman *v.* Bradley, 1 Dall. 240, 1 L. ed. 118.

South Carolina.— Smith *v.* Hunt, 1 McCord 449.

Vermont.— Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138.

England.— Fletcher *v.* Froggatt, 2 C. & P. 569, 12 E. C. L. 738; Smith *v.* Blandy, R. & M. 257, 21 E. C. L. 746; Randle *v.* Blackburn, 5 Taunt. 245, 1 E. C. L. 133.

All acts and declarations of the parties offered and tending to prove or establish an oral contract alleged in the complaint should

an admission contained in a pleading or other writing is to be taken as a whole. It cannot be extended beyond its fair import, and is limited by any statement therein which qualifies or explains it.[88] The admissions of an agent as to past transactions are not admissible in evidence against the principal unless they were part of the *res gestæ*.[89]

9. COLLATERAL WRITINGS. A collateral writing which involves no departure from the contract sued on, but which supplements it, is admissible in evidence, where the contract in suit manifestly does not express the whole agreement.[90] Where plans and specifications are advertised or furnished, on the basis of which a contract is made, they cannot be excluded as evidence in an action on the contract.[91] So also an engineer's estimates of the quality and probable quantity of work to be done under a contract based on them are admissible in evidence in an action for a breach of the contract.[92] But estimates prepared by the defendant's engineer after the breach are not admissible in evidence in behalf of the defendant,[93] although estimates of the defendant's engineer have been held to be admissible on behalf of the plaintiff as tending to show that the defendant

be admitted on the trial, and it is error to exclude such evidence. Idaho Mercantile Co. *v.* Kalanquin, (Ida. 1900) 62 Pac. 925; Clerihew *v.* Standard Railroad-Signal Co., 31 Misc. (N. Y.) 760, 64 N. Y. Suppl. 1108.

88. Oakley *v.* Oakley, 69 Hun (N. Y.) 121, 23 N. Y. Suppl. 267, 53 N. Y. St. 326 [*affirmed* in 144 N. Y. 637, 39 N. E. 494, 64 N. Y. St. 867]; Grant *v.* Pratt, 52 N. Y. App. Div. 540, 65 N. Y. Suppl. 486; Duschnes *v.* Heyman, 2 N. Y. App. Div. 354, 37 N. Y. Suppl. 841, 73 N. Y. St. 53.

89. Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892. In an action on a contract it was held that evidence was properly rejected which was offered in support of alleged representations made by the plaintiff's agent after the transaction in controversy had been entered into, as such representations, even though false, would not legitimately tend to establish the defense, which was deceit. McNeile *v.* Cridland, 6 Pa. Super. Ct. 428. See also PRINCIPAL AND AGENT.

90. Liebke *v.* Methudy, 18 Mo. App. 143; Tuttle *v.* Hennegan, 4 Daly (N. Y.) 92. A written instrument which is part of a contract entered into, and which was delivered to the defendant by the other party thereto at the time the contract sued on was executed, is admissible in evidence. Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151.

The effect of letters between parties to cure a defect in the contract may be considered in an action thereon, although the petition is based on the original contract, if such letters are received in evidence without the objection of variance being made. Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384.

In an action to recover on a paving contract, where the plaintiffs had read in evidence a written contract, under the terms of which the plaintiff agreed to pave the street in front of the defendant's premises to the satisfaction of the superintendent of streets, a resolution of the board of supervisors stating that the work had been constructed to the satisfaction of the superintendent and accepting the same was held to be competent evidence. Thomason *v.* Richards, (Cal. 1902) 67 Pac. 1056.

In assumpsit for extras furnished under a building contract, a paper prepared by the architect containing a list of the extras and their value was held to be properly admitted in evidence in connection with the testimony of the contractor and the architect. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449].

Conditions printed on the back of a paper on which a contract is written, and referred to on the face of the paper, are admissible in evidence. Haddaway *v.* Post, 35 Mo. App. 278. See also *supra*, II, C, 3, c, (VI).

Parol evidence to connect printed rules.—Where a contract is written on paper upon which are printed extracts from the rules of an exchange, parol evidence is admissible on both sides upon the question whether or not the contract was made subject to such rules. Berry *v.* Kowalsky, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101.

91. Campbell County *v.* Youtsey, 12 S. W. 305, 11 Ky. L. Rep. 529; Burling *v.* Lighte, 51 N. Y. App. Div. 603, 64 N. Y. Suppl. 264.

A contract for the construction of a railway road-bed referred to certain specifications and plans, and required that the road-bed should be constructed in accordance therewith; but it was shown that although such specifications might have accompanied the contract, the plaintiff's attention had never been called thereto, and that they were never seen by him, nor used in entering into or in carrying out the contract. The contract, however, was performed according to its terms and to the satisfaction of the defendant's engineer. It was held, in an action to recover a balance on the contract, that the contract was admissible to show the stipulated prices for the work executed, although no specifications were attached. Terrell Coal Co. *v.* Lacey, (Ala. 1901) 31 So. 109.

92. Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51; Clarke *v.* Williams, 29 Nebr. 691, 46 N. W. 82.

93. Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51.

had accepted the work and acted understandingly in promising to make a payment.[94]

10. EVIDENCE OF OTHER CONTRACTS. Evidence of subsequent contracts between the parties is not admissible, unless it is proposed to show that in making such subsequent contracts the matter in controversy was adjusted.[95] Neither is evidence of a similar contract previously made admissible to prove the terms of the contract in suit.[96] But a prior contract concerning the same subject-matter may become material on the question as to what is a reasonable time for the performance of the contract in suit.[97]

11. COLLECTIVE STATEMENTS OF FACTS. In order to avoid prolixity it is permissible, and frequently desirable, for a witness to make a collective statement of facts; then if the other side wishes to go into the details they may be brought out on cross-examination.[98]

12. VALIDITY OF ASSENT. When the pleadings are in proper shape, any competent evidence is admissible to show that the contract was procured by fraud.[99] And so of duress. Evidence of what took place at the time of taking a married woman's acknowledgment is admissible to prove duress.[1] And where a married woman sets up fear and compulsion of her husband as a defense, the plaintiff may prove her voluntary acts of partial performance of the contract as tending to rebut the evidence of duress.[2] Where a contract is assailed on the ground that one of the parties was mentally incapacitated to make it, the inquiry for the jury is as to his mental condition at the very time of entering into the contract; but evidence of his condition both before and after that time, within reasonable limits, is proper for the consideration of the jury, as bearing upon the question of his mental condition at the time of making the contract.[3] In such cases no absolute rule limiting the inquiry to fixed periods, to be applied uniformly, can be laid down.[4]

94. Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Hamilton County *v.* Newlin, 132 Ind. 27, 31 N. E. 465; Swank *v.* Barnum, 63 Minn. 447, 65 N. W. 722.

95. Evans *v.* George, 80 Ill. 51.

96. Walworth *v.* Barron, 54 Vt. 677.

97. Bellows *v.* Crane Lumber Co., 119 Mich. 424, 78 N. W. 536.

98. Mobile, etc., R. Co. *v.* Worthington, 95 Ala. 598, 10 So. 839; Hood *v.* Disston, 90 Ala. 377, 7 So. 732; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349; Woodstock Iron Co. *v.* Reed, 84 Ala. 493, 4 So. 369; Elliott *v.* Stocks, 67 Ala. 290.

Performance of contract.— Thus the witness may be permitted to state in general terms that a contract was performed when the answer amounts to no more than a conclusion of fact, and the opposing party may bring out the particular facts on cross-examination. Hood *v.* Disston, 90 Ala. 377, 7 So. 732.

Terms of contract.— And a witness may be permitted to state in his own language what the contract was, provided he does not state a conclusion or the legal effect of the contract. If the opposing party wishes to draw out what was said and done by the parties at the time this may be done on cross-examination. Woodstock Iron Co. *v.* Reed, 84 Ala. 493, 4 So. 369.

99. See FRAUD.

1. Davis *v.* Van Wie, (Tex. Civ. App. 1894) 30 S. W. 492.

2. Edwards *v.* Bowden, 103 N. C. 50, 9 S. E. 194.

3. *Alabama.*— Walker *v.* Clay, 21 Ala. 797.
Arkansas.— Clinton *v.* Estes, 20 Ark. 216.
Connecticut.— Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119.
Indiana.— Koile *v.* Ellis, 16 Ind. 301.
Iowa.— Ashcraft *v.* De Armond, 44 Iowa 229.
Massachusetts.— Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Peaslee *v.* Robbins, 3 Metc. 164.
North Carolina.— Berry *v.* Hall, 105 N. C. 154, 10 S. E. 903.
Pennsylvania.— Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439.
England.— Beavan *v.* McDonnell, 10 Exch. 184, 23 L. J. Exch. 326.
See INSANE PERSONS.

Intoxication as a defense.— So also on the question as to one's capacity to contract, by reason of intoxication, his condition on days previous to the transaction may be shown. Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538. See DRUNKARDS.

4. Clinton *v.* Estes, 20 Ark. 216. On the trial of an action to set aside a deed of conveyance of real estate on account of the insanity of the grantor, evidence tending to prove his sanity or insanity previous to, or subsequent to, the execution of the deed, including the record of a subsequent inquisition by which he was found to be insane, is admissible as tending to show his mental con-

13. Evidence to Aid Construction — a. In General. If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument.[5]

dition at the time of the making of the contract. Nichol *v.* Thomas, 53 Ind. 42.

5. *Alabama.*— Dexter *v.* Ohlander, 89 Ala. 269, 7 So. 115; Griel *v.* Lomax, 86 Ala. 132, 5 So. 325.

Arkansas.— Haney *v.* Caldwell, 35 Ark. 156; Glanton *v.* Anthony, 15 Ark. 543; Scott *v.* Henry, 13 Ark. 112.

California.— Lassing *v.* James, 107 Cal. 348, 40 Pac. 534; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Pierce *v.* Robinson, 13 Cal. 116.

Connecticut.—Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Collins *v.* Tillon, 26 Conn. 368, 68 Am. Dec. 398; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

District of Columbia.— Rogers *v.* Garland, 19 D. C. 24.

Florida.— Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745; Solary *v.* Webster, 35 Fla. 363, 17 So. 646.

Georgia.— Skinner *v.* Moye, 69 Ga. 476; Ferrell *v.* Hurst, 68 Ga. 132.

Illinois.— Espert *v.* Wilson, 190 Ill. 629, 60 N. E. 923; Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271.

Indiana.— Indianapolis, etc., R. Co. *v.* Reynolds, 116 Ind. 356, 19 N. E. 141; Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; Heath *v.* West, 68 Ind. 548.

Iowa.— Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Wilts *v.* Mulhall, 102 Iowa 458, 71 N. W. 418; Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756.

Kansas. — Citizens' Bank *v.* Brigham, 61 Kan. 727, 60 Pac. 754; Erie Cattle Co. *v.* Guthrie, 56 Kan. 754, 44 Pac. 984; Walrath *v.* Whittekind, 26 Kan. 482; Mason *v.* Ryus, 26 Kan. 464.

Kentucky.— Chapman *v.* Clements, 56 S. W. 646, 22 Ky. L. Rep. 17.

Louisiana.— Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739.

Maine.— Bolton *v.* Bolton, 73 Me. 299; Cotton *v.* Smithwick, 66 Me. 360.

Maryland.— Scott *v.* Baltimore, etc., R. Co., 93 Md. 475, 49 Atl. 327; Morrison *v.* Beachtold, 93 Md. 319, 48 Atl. 926; Haile *v.* Pierce, 32 Md. 327, 3 Am. Rep. 139.

Massachusetts.— Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Matthews *v.* Westborough, 134 Mass. 555; Stoops *v.* Smith, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76.

Michigan.— Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339.

Minnesota.— Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Mississippi.— Ham *v.* Carniglia, 73 Miss. 290, 18 So. 577.

Missouri.— Black River Lumber Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Edwards *v.* Smith, 63 Mo. 119; Bunce *v.* Beck, 43 Mo. 266; Newberry *v.* Durand, 87 Mo. App. 290.

Nebraska.— Seth Thomas Clock Co. *v.* Cass County, 60 Nebr. 566, 83 N. W. 733; Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

New Hampshire.—Ordway *v.* Dow, 55 N. H. 11; French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127.

New York.— Rickerson *v.* Hartford F. Ins. Co., 149 N. Y. 307, 43 N. E. 856; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961, 38 N. Y. St. 692; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 22 N. Y. St. 160, 11 Am. St. Rep. 621; Greenwood *v.* Marvin, 111 N. Y. 433, 19 N. E. 228, 19 N. Y. St. 612; Union Trust Co. *v.* Whiton, 97 N. Y. 172; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 70 N. Y. Suppl. 956; Syracuse State Bank *v.* Lighthall, 46 N. Y. App. Div. 396, 61 N. Y. Suppl. 794; Ely *v.* Adams, 19 Johns. 313.

Ohio.— Monnett *v.* Monnett, 46 Ohio St. 3, 17 N. E. 659; Masters *v.* Freeman, 17 Ohio St. 323.

Oklahoma. — Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484.

Oregon.— Weiler *v.* Henarie, 15 Oreg. 28, 13 Pac. 614.

Pennsylvania.— Crown Slate Co. *v.* Allen, 199 Pa. St. 239, 48 Atl. 968; Centenary M. E. Church *v.* Clime, 116 Pa. St. 146, 9 Atl. 163; Foster *v.* McGraw, 64 Pa. St. 464.

Rhode Island.— Bailey *v.* Larchar, 5 R. I. 530.

Tennessee.— Kansas City, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 18 S. W. 391; McCallum *v.* Jobe, 9 Baxt. 168, 40 Am. Rep. 84.

Texas.— Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56; Schleicher *v.* Runge, (Civ. App. 1896) 37 S. W. 982.

Utah.— Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont.— Lawrence *v.* Grave, 60 Vt. 657, 15 Atl. 342; Lyon *v.* Kidder, 48 Vt. 42; Houghton *v.* Clough, 30 Vt. 312.

Virginia.— Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 413; French *v.* Williams, 82 Va. 462, 4 S. E. 591; Tulcy *v.* Barton, 79 Va. 387; Knick *v.* Knick, 75 Va. 12; Crawford *v.* Jarrett, 2 Leigh 630.

Washington.— Pennsylvania Mortg. Invest. Co. *v.* Simms, 16 Wash. 243, 47 Pac. 441.

West Virginia.— Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581; Hansford *v.* Chesapeake Coal Co., 32 W. Va. 70.

b. Practical Construction by Parties. And where the contract is of this character, evidence of what the parties have actually done in the partial performance of it is admissible in order to show their practical construction of it, and to enable the court to determine their intention at the time of making the contract.[6] This rule is peculiarly applicable in the construction of ancient charters and grants.[7] So also in interpreting a contract, a subsequent contract between the same parties respecting the same matter is admissible in evidence to show how the parties understood the first contract.[8]

c. Where Instrument Is Not Ambiguous. Where, however, there is no imperfection or ambiguity in the language of a contract, and it contains no technical terms of art, science, or trade, it will be considered as containing the entire and exact meaning of the parties. In such case the court needs the assist-

Wisconsin.— Murray Hill Land Co. *v.* Milwaukee Light, etc., Co., 110 Wis. 555, 86 N. W. 199; Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 435; Roe *v.* Bachelder, 41 Wis. 360.

United States.— Merriam *v.* U. S., 107 U. S. 437, 9 S. Ct. 536, 27 L. ed. 537; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341; Barreda *v.* Silsbee, 21 How. 146, 16 L. ed. 86; Mauran *v.* Bullus, 16 Pet. 528, 10 L. ed. 1056; D'Wolf *v.* Rabaud, 1 Pet. 476, 7 L. ed. 227; Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163.

England.— New Zealand Bank *v.* Simpson, [1900] A. C. 182, 69 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591; Australasia Bank *v.* Palmer, [1897] A. C. 540, 66 L. J. P. C. 105; McCollin *v.* Gilpin, 6 Q. B. D. 516, 45 J. P. 828, 44 L. T. Rep. N. S. 914, 29 Wkly. Rep. 408; Grant *v.* Grant, L. R. 5 C. P. 727; Davis *v.* Symonds, 1 Cox Ch. 402, 1 Rev. Rep. 63, 29 Eng. Reprint 1221; Stokes *v.* Moore, 1 Cox Ch. 219, 1 Rev. Rep. 24, 29 Eng. Reprint 1137; Macdonald *v.* Longbottom, 1 E. & E. 977, 9 Jur. N. S. 724, 29 L. J. Q. B. 256, 8 Wkly. Rep. 614, 102 E. C. L. 977; Brown *v.* Fletcher, 35 L. T. Rep. N. S. 165. See also EVIDENCE.

6. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408.

California.— Brewster *v.* Lathrop, 15 Cal. 21.

Illinois.— Ramsay *v.* Whitbeck, 183 Ill. 550, 56 N. E. 322; Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406; Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622; Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

Indiana.— Frazier *v.* Myers, 132 Ind. 71, 31 N. E. 536; Louisville, etc., R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711; Lyles *v.* Lescher, 108 Ind. 382, 9 N. E. 365; Vinton *v.* Baldwin, 95 Ind. 433.

Louisiana.— Amory *v.* Black, 13 La. 264.

Maine.— Northrop *v.* Hale, 72 Me. 275; Bradford *v.* Cressey, 45 Me. 9; Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

Maryland.— Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

Massachusetts.— Dodd *v.* Witt, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700; Lovejoy *v* Lovett, 124 Mass. 270.

Minnesota.— Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39, 61 N. W. 825.

Missouri.— Dallas *v.* Berger, 59 Mo. App. 221.

New York.— Wilson *v.* Randall, 67 N. Y. 338; Dana *v.* Munson, 23 N. Y. 564; Giles *v.* Comstock, 4 N. Y. 270, 53 Am. St. Rep. 374; French *v.* Carhart, 1 N. Y. 96.

Ohio.— Caldwell *v.* Carthage, 40 Ohio St. 453.

Oregon.— Vance *v.* Wood, 22 Oreg. 77, 29 Pac. 73; Wills *v.* Leverick, 20 Oreg. 168, 25 Pac. 398; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057.

Pennsylvania.— Barnhart *v.* Riddle, 29 Pa. St. 92.

Rhode Island.— Phetteplace *v.* British, etc., Mar. Ins. Co., 23 R. I. 26, 49 Atl. 33.

Texas.— Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

Vermont.— Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

Virginia.— Knick *v.* Knick, 75 Va. 12; Old Dominion Bank *v.* McVeigh, 32 Gratt. 530.

West Virginia.— Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

Wisconsin.— Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433; Hosmer *v.* McDonald, 80 Wis. 54, 49 N. W. 112.

United States.— Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 11 S. Ct. 360, 34 L. ed. 1019; District of Columbia *v.* Gallaher, 124 U. S. 505, 8 S. Ct. 585, 31 L. ed. 526; Topliff *v.* Topliff, 122 U. S. 121, 7 S. Ct. 1057, 30 L. ed. 1110; Newton *v.* Wooley, 105 Fed. 541; Goodyear *v.* Cary, 4 Blatchf. 271, 10 Fed. Cas. No. 5,562.

England.— Baird *v.* Fortune, 7 Jur. N. S. 926, 5 L. T. Rep. N. S. 2, 4 Macq. 127, 10 Wkly. Rep. 2; Wadley *v.* Bayliss, 5 Taunt. 752, 15 Rev. Rep. 645, 1 E. C. L. 385. See also EVIDENCE.

7. Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Atty.-Gen. *v.* Parker, 3 Atk. 576, 26 Eng. Reprint 1132, 1 Ves. 43, 27 Eng. Reprint 879; Weld *v.* Hornby, 7 East 195, 3 Smith K. B. 244, 8 Rev. Rep. 608; Rex *v.* Osbourne, 4 East 327; Bradley *v.* Newcastle-upon-Tyne, 2 E. & B. 427, 18 Jur. 240, 23 L. J. Q. B. 35, 1 Wkly. Rep. 394, 75 E. C. L. 427; Waterpark *v.* Fennell, 7 H. L. Cas. 650, 5 Jur. N. S. 1135, 7 Wkly. Rep. 634; Rex *v.* Bellringer, 4 T. R. 810.

8. Brewster *v.* Bates, 81 Hun (N. Y.) 294, 30 N. Y. Suppl. 780, 62 N. Y. St. 744.

ance of no extrinsic evidence to aid it in the interpretation of the instrument and none will be received.[9]

d. Witness Not Permitted to Construe Contract. Under no circumstances is a witness to be allowed to testify to his understanding of the legal effect of a contract, for it is the province of the court alone to construe and interpret contracts.[10] Much less may a party testify to his secret intention in entering into a contract, for it must be interpreted as expressing the intention of both parties.[11]

9. *Alabama.*— Dexter *v.* Ohlander, 93 Ala. 441, 9 So. 361; Phillips *v.* Longstreth, 14 Ala. 337.

Arkansas.— Moore *v.* Terry, 66 Ark. 393, 50 S. W. 998; Haney *v.* Caldwell, 35 Ark. 156.

California.— Braun *v.* Woollacott, 129 Cal. 107, 61 Pac. 801.

Connecticut.— Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

Georgia.— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471; Terrell *v.* Huff, 108 Ga. 655, 34 S. E. 345.

Illinois.— Rector *v.* Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528; Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49.

Indiana.— Davis *v.* Liberty, etc., Gravel Road Co., 84 Ind. 36.

Iowa.— Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14.

Kentucky.— Vansant *v.* Runyon, 44 S. W. 949, 19 Ky. L. Rep. 1981; Mullins *v.* Taylor, 8 Ky. L. Rep. 531.

Louisiana.— Weinberger *v.* Merchants' Ins. Co., 41 La. Ann. 31, 5 So. 728; Porter *v.* Sandidge, 32 La. Ann. 449.

Maine.— Gatchell *v.* Morse, 81 Me. 205, 16 Atl. 602; Morrill *v.* Robinson, 71 Me. 24.

Maryland.— Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821; Cassard *v.* McGlannan, 88 Md. 168, 40 Atl. 711; Reeder *v.* Machen, 57 Md. 56.

Massachusetts.— Pike *v.* McIntosh, 167 Mass. 309, 45 N. E. 749; Will M. Kinnard Co. *v.* Cutler Tower Co., 159 Mass. 391, 34 N. E. 460; Black *v.* Batchelder, 120 Mass. 171.

Michigan.— Pettyplace *v.* Groton Bridge, etc., Co., 103 Mich. 155, 61 N. W. 266; McCray Refrigerator, etc., Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599; Baker *v.* Baird, 79 Mich. 255, 44 N. W. 604.

Minnesota.— Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494, 1118; Phelps *v.* Sargent, 73 Minn. 260, 76 N. W. 25; St. Paul, etc., R. Co. *v.* St. Paul Union Depot Co., 44 Minn. 325, 46 N. W. 566.

Missouri.— Blakely *v.* Bennecke, 59 Mo. 193; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456.

Nebraska.— Latenser *v.* Misner, 56 Nebr. 340, 76 N. W. 897.

New Hampshire.— McQuesten *v.* Bowman, 17 N. H. 24.

New Jersey.— Rogers *v.* Colt, 21 N. J. L. 704.

New York.—De Remer *v.* Brown, 165 N. Y. 410, 59 N. E. 129; Snyder *v.* Lindsey, 157 N. Y. 616, 52 N. E. 592; House *v.* Walch, 144 N. Y. 418, 39 N. E. 327, 63 N. Y. St. 654; Humphreys *v.* New York, etc., R. Co., 121 N. Y. 435, 24 N. E. 695, 31 N. Y. St. 299.

Oregon.— Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127.

Rhode Island.— Dyer *v.* Cranston Print Works, (1893) 41 Atl. 1014.

Tennessee.— Nashville First Nat. Bank *v.* Nashville St. R. Co., (Ch. 1898) 46 S. W. 312.

Texas.— Curtis *v.* Kelley, 24 Tex. Civ. App. 540, 60 S. W. 265; Saunders *v.* Weeks, (Civ. App. 1900) 55 S. W. 33; Evans-Snyder-Buel Co. *v.* Stribling, (Civ. App. 1898) 45 S. W. 40.

Vermont.— Mussey *v.* Bates, 60 Vt. 271, 14 Atl. 457; Wood *v.* Shurtleff, 46 Vt. 325.

Washington.— Gurney *v.* Morrison, 12 Wash. 456, 41 Pac. 192.

West Virginia.— Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637; McGuire *v.* Wright, 18 W. Va. 507; Hurst *v.* Hurst, 7 W. Va. 289.

Wisconsin.— Johnson *v.* Pugh, 110 Wis. 167, 85 N. W. 641.

United States.— Culver *v.* Wilkinson, 145 U. S. 205, 12 S. Ct. 832, 36 L. ed. 676; Meredith *v.* Picket, 9 Wheat. 573, 6 L. ed. 163; Reid *v.* Diamond Plate Glass Co., 85 Fed. 193, 29 C. C. A. 110.

England.— Mercantile Bank *v.* Taylor, [1893] A. C. 317, 57 J. P. 741, 1 Reports 371; Cowlishaw *v.* Hardy, 25 Beav. 169; De la Warr *v.* Miles, 17 Ch. D. 535, 50 L. J. Ch. 754, 44 L. T. Rep. N. S. 487, 29 Wkly. Rep. 809; Ogilvie *v.* Foljambe, 3 Meriv. 53, 17 Rev. Rep. 13.

See also EVIDENCE.

10. *Alabama.*— Powell *v.* State, 84 Ala. 444, 4 So. 719.

Georgia.— Green *v.* Akers, 55 Ga. 159.

Illinois.— Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49.

Indiana.— Robinson Mach. Works *v.* Chandler, 56 Ind. 575.

Massachusetts.— Cahot *v.* Winsor, 1 Allen 546.

Michigan.— Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931.

New York.— Newhall *v.* Appleton, 124 N. Y. 668, 26 N. E. 1107, 36 N. Y. St. 697; Arthur *v.* Roberts, 60 Barb. 580.

Pennsylvania.— Fox *v.* Foster, 4 Pa. St. 119.

England.— Kirkland *v.* Nisbet, 3 Macq. 766.

11. *Connecticut.*— Bull *v.* Bull, 43 Conn. 455.

K. Weight and Sufficiency of Evidence. If, in an action on a contract, the evidence is conflicting, but there is enough, if standing alone, legally to support the findings of the jury, whether for the plaintiff or the defendant, the verdict as a rule will not be disturbed on the ground that it is contrary to the weight of evidence.[12] But if the plaintiff makes out a *prima facie* case, and the defendant does not introduce any evidence sufficient to raise a doubt, and the case is allowed to go to the jury, who render a verdict for the defendant, the case should be reversed on the ground that the evidence is insufficient to support the verdict.[13] Juries can neither make contracts for parties nor mold at pleasure those which they have made for themselves. They should ascertain from the evidence, fairly and honestly, what was or must have been the contract really made by the parties, and not substitute therefor any caprice or mere will of their own.[14]

L. Questions of Law and Fact[15] — **1. In General.** Where it is in dispute as to whether there was a breach of the contract in suit, it is a proper question for the jury.[16] But it is error to submit to the jury the question as to whether there was a breach, where there is uncontradicted evidence of a breach and none of the witnesses are impeached.[17] The question as to whether work has been done in accordance with the plans and specifications is for the jury.[18] Where there is evidence of defects, the question whether there has been a substantial performance of the contract is for the jury to determine from the evidence and a

Kansas.— Robinson *v.* Kindley, 36 Kan. 157, 12 Pac. 587.

Massachusetts.— Davis Sewing Mach. Co. *v.* Stone, 131 Mass. 384; Taft *v.* Dickinson, 6 Allen 553.

New York.— Rickerson *v.* Hartford F. Ins. Co., 149 N. Y. 307, 43 N. E. 856.

Wisconsin.— Milwaukee Carnival Assoc. *v.* King, etc., Co., 112 Wis. 647, 88 N. W. 598.

See *supra*, II, B, 2.

12. *Alabama.*— Collier *v.* McCall, 84 Ala. 190, 4 So. 367.

Illinois.— Bennett *v.* Teetzel, 34 Ill. App. 295.

Indiana.— Baughan *v.* Brown, 122 Ind. 115, 23 N. E. 695.

Louisiana.— Reusch *v.* American Brewing Assoc., 44 La. Ann. 1111, 11 So. 719; Johnson *v.* McLaughlin, 39 La. Ann. 89, 6 So. 18.

New York.— Pease *v.* Field, 1 Silv. Supreme 521, 5 N. Y. Suppl. 472, 24 N. Y. St. 504; Sternberger *v.* Bernheimer, 56 N. Y. Super. Ct. 323, 4 N. Y. Suppl. 546, 24 N. Y. St. 187; Walsh *v.* Campbell, 37 N. Y. Suppl. 362, 72 N. Y. St. 531; Ranscher *v.* Cronk, 3 N. Y. Suppl. 470, 21 N. Y. St. 529.

Oregon.— Elder *v.* Rourke, 27 Oreg. 363, 41 Pac. 6.

See Appeal and Error, 3 Cyc. 348.

The decision of the judge of first instance upon questions of fact always prevails unless manifestly erroneous. Giesecke *v.* Finlay, 45 La. Ann. 408, 12 So. 502. See Appeal and Error, 3 Cyc. 357.

13. Wallace *v.* Sisson, (Cal. 1893) 33 Pac. 496; Elmier *v.* Brant, 48 Minn. 258, 51 N. W. 284; Burr *v.* American Spiral Spring Butt Co., 81 N. Y. 175.

Nonsuit, dismissal, or direction of verdict. — If the plaintiff does not make out a *prima facie* case, a motion for a nonsuit or a dismissal of his complaint should be granted. Kiely *v.* McMillen, 91 Hun (N. Y.) 637, 36 N. Y. Suppl. 335, 71 N. Y. St. 119. See Dismissal and Nonsuit. And if he fails to make satisfactory proof of the contract sued on and the weight of evidence is clearly against him, the trial court should on motion direct a verdict for the defendant; or if, failing this by reason of the neglect of counsel to make the motion or otherwise, the case is allowed to go to the jury and the plaintiff recovers, the verdict should be set aside. Caldwell *v.* Willey, 16 Colo. 169, 26 Pac. 161. See Trial. And if this be not done the judgment may be reversed in the appellate court. Texas Trunk R. Co. *v.* Pannill, (Tex. App. 1891) 17 S. W. 1100. See Appeal and Error, 3 Cyc. 351. So if the plaintiff establishes his case by competent evidence and no sufficient defense is proved the court should direct a verdict for the plaintiff. Moss *v.* Witness Printing Co., 64 Ind. 125; Hathaway *v.* Sabin, 63 Vt. 527, 22 Atl. 633. See Trial. And if the plaintiff clearly proves his case and the jury find for the defendant or return a verdict for the plaintiff for a grossly insufficient amount, the trial court should promptly set the verdict aside. Slaughter *v.* Culpepper, 35 Ga. 25. See New Trial.

14. Slaughter *v.* Culpepper, 35 Ga. 25.

15. As to province of court and jury see, generally, Trial.

16. Ward *v.* St. Vincent's Hospital, 39 N. Y. App. Div. 624, 57 N. Y. Suppl. 784 [*reversing* 23 Misc. (N. Y.) 91, 50 N. Y. Suppl. 466].

17. Kenan *v.* Lindsay, 127 Ala. 270, 28 So. 570; May *v.* Crawford, 150 Mo. 504, 51 S. W. 693.

18. MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747].

consideration of the nature and object of the work.[19] Where the plaintiff sues on a special contract and a *quantum meruit* in separate counts, and the defendant admits the contract, it is error to submit the *quantum meruit* to the jury.[20] The reasonableness of a contract is a question for the jury where there is a dispute as to the facts; but where the facts and circumstances all appear in the testimony, and there is no conflict in it, the court may determine the issue.[21] In an action for the price of chattels sold and delivered to the defendant, the question of acceptance of the chattels by the defendant is of fact for the jury under instructions from the court.[22]

2. EXISTENCE OF CONTRACT. It is the duty of the court to determine and to instruct the jury whether or not a writing introduced in evidence is a contract which fixes the liability of the parties, for here the question involves the interpretation of the instrument, the determination of its validity as a matter of law, or both.[23] But where the existence and not the validity or construction of a contract is the point in issue and the evidence is conflicting, it is for the jury to determine whether the contract did in fact exist. It is not for the court to assume and instruct the jury, as a matter of law, that it did or did not exist;[24] for although it is the duty of the court to put a construction on the language of the contract when it has clearly been ascertained what the terms of it are, yet when many facts and conversations, at different times testified to by a number of witnesses, are in evidence to prove the contract, and it is a matter of controversy what the terms of it are, the question should be put to the jury as a matter for their determination, with proper instructions as to the law.[25] The question

19. Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261; West *v.* Suda, 69 Conn. 60, 36 Atl. 1015; Drew *v.* Goodhue, 74 Vt. 436, 52 Atl. 971; Pitcairn *v.* Philip Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

20. Tuffree *v.* Steward, 109 Iowa 600, 80 N. W. 681.

21. Kansas, etc., R. Co. *v.* Ayers, 63 Ark. 331, 38 S. W. 515.

22. Bass *v.* Walsh, 39 Mo. 192; Kaes *v.* St. Louis Lime Co., 71 Mo. App. 101. See SALES.

23. Eyser *v.* Weissgerber, 2 Iowa 463. See TRIAL.

Directing verdict.— Where a written instrument, clear in its terms, is introduced in evidence, and the court can see by inspection of the instrument itself that it gives no cause of action, a verdict should be directed for the defendant. Dyer *v.* Greene, 23 Me. 464. And the court should direct a verdict for the plaintiff if a binding contract is introduced in evidence, and the defendant offers no competent evidence in support of his defense. Arnoux *v.* Bogert, 57 N. Y. Super. Ct. 61, 5 N. Y. Suppl. 440, 24 N. Y. St. 173. See TRIAL.

Construction of contract see *infra*, XII, M, 11.

24. *Delaware.*—Rogers *v.* Fenimore, (1898) 41 Atl. 886.

Illinois.— Chichester *v.* Whiteleather, 51 Ill. 259.

Michigan.— Densmore *v.* Hinchman, 76 Mich. 335, 43 N. W. 430; Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152, 34 N. W. 556.

Missouri.— Whaley *v.* Peak, 49 Mo. 80; Snyder *v.* Gordon, 86 Mo. App. 317.

Nebraska.— Jones *v.* Sherman, 34 Nebr. 452, 51 N. W. 1036.

New Mexico.— Kirchner *v.* Laughlin, 4 N. M. 386, 17 Pac. 132.

New York.—Williams *v.* Bedford Bank, 63 N. Y. App. Div. 278, 71 N. Y. Suppl. 539; Morrell *v.* Long Island R. Co., 1 N. Y. Suppl. 65.

Pennsylvania.— Stokes *v.* Burrell, 3 Grant 241; Woolman *v.* Hancock Ice Co., 18 Pa. Super. Ct. 596; Hunter *v.* Trout, 8 Pa. Super. Ct. 424.

Texas.— Keesey *v.* Old, 82 Tex. 22, 17 S. W. 928; Hopson *v.* Brunwankel, 24 Tex. 607, 76 Am. Dec. 124.

Vermont.— Bruce *v.* Bishop, 43 Vt. 161.

United States.— Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934; Zachry *v.* Nolan, 66 Fed. 467, 14 C. C. A. 253. See also TRIAL.

The existence and terms of a contract, which rests if it exists at all upon actions and oral communications of the parties, are for the jury to determine. Sines *v.* Superintendents of Poor, 55 Mich. 383, 21 N. W. 428; Blount *v.* Guthrie, 99 N. C. 93, 5 S. E. 890.

Where the question was whether there was an implied contract that a sister should be paid for board, care, and services furnished her brother, it was held one of fact to be determined by the trior or referee, and not by the court. Bliss *v.* Hoyt, 70 Vt. 534, 41 Atl. 1026.

Reasonable time for accepting offer see *supra*, II, C, 6, b, (II).

25. Homans *v.* Lambard, 21 Me. 308; Gallagher *v.* Hirsh, 45 N. Y. App. Div. 467, 61 N. Y. Suppl. 609. Where the plaintiff claimed a bonus under a contract rescinding another contract, and the defendant claimed a credit for a sum paid under the prior contract, and nothing was said in the second

whether or not certain letters or telegrams or both constitute a contract is one to be determined by the court, and it is error to submit such question to the jury.[26] But where letters introduced in evidence by the plaintiff in proof of the contract sued on do not constitute in themselves a completed contract, but merely negotiations with a view to a contract, and they are supplemented by oral testimony, it is proper to submit to the jury the question whether the contract alleged was in fact completed.[27]

3. FRAUD AND DURESS. Where there is evidence that the defendant was induced to sign or enter into a contract by fraud and imposition, the question should be submitted to the jury.[28] But where the defendant introduces no evidence in support of such defense, a verdict is properly directed for the plaintiff.[29] On the other hand if the evidence shows conclusively that a representation was made as an inducement to enter into a contract, that it was false, and that it was relied on, the court should direct a verdict for the defendant.[30] Where the evidence as to duress is conflicting the question is for the jury.[31]

4. LEGALITY OF CONTRACT. Whether or not a contract, the terms of which have been ascertained, is void as in contravention of public policy is a question of law to be determined by the court.[32] But if the validity of a contract depends on the determination of some question of fact, such as the intention of the parties, the matter then becomes a mixed question of law and fact, and should be submitted to the jury, under proper instructions from the court.[33] In such case, however, the only question for the jury is the truth of the alleged facts rendering the contract illegal. They should accept the law as they receive it from the court.[34]

5. PERFORMANCE OR WAIVER OF CONDITIONS PRECEDENT. The question as to whether a condition precedent has been performed is purely one of fact to be determined by the jury under the evidence.[35] And the same has been held to

contract as to the credit, it was held that the question was one of fact, and that a peremptory instruction to allow the credit claimed by the defendant was erroneous. Quigley *v.* Shedd, 104 Tenn. 560, 58 S. W. 266.

26. Lea *v.* Henry, 56 Iowa 662, 10 N. W. 243; Short *v.* Threadgill, 3 Tex. App. Civ. Cas. § 267.

27. Harvard Pub. Co. *v.* Syndicate Pub. Co., 94 Fed. 754, 36 C. C. A. 470.

28. Thus where it appeared that the defendant could not read, and he testified that the plaintiff, in asking him to sign a written contract, told him that it correctly stated the agreement made by them, whereas the paper differed materially from the agreement, it was held error for the court to direct a verdict for the plaintiff based on such writing. Bates *v.* Harte, 124 Ala. 427, 26 So. 898, 82 Am. St. Rep. 186. And see FRAUD; TRIAL.

29. Robinson *v.* Vaughan, 49 N. Y. App. Div. 170, 63 N. Y. Suppl. 197. See FRAUD; TRIAL.

30. Sherk *v.* Holmes, 125 Mich. 118, 83 N. W. 1016, 7 Detroit Leg. N. 437. See FRAUD; TRIAL.

31. Salvador *v.* Fealey, 105 Iowa 478, 75 N. W. 476. See *supra*, VI, E.

32. Cohen *v.* Berlin, etc., Envelope Co., 166 N. Y. 292, 299, 59 N. E. 906; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262; Pierce *v.* Randolph, 12 Tex. 290; Hines *v.* Board of Education, 49 W. Va. 426, 38 S. E. 550; Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123, 3 Chandl. (Wis.) 133, 56 Am. Dec. 164. The question whether a contract is unlawful will not be submitted to the jury, where there is no dispute in regard to its terms or what has been done under it. Cummings *v.* Union Blue Stone Co., 15 N. Y. App. Div. 602, 44 N. Y. Suppl. 787 [*affirmed* in 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 655, 52 L. R. A. 262].

Public policy see *supra*, VII, B, 3, f, (I).

33. Whetstone *v.* Montgomery Bank, 9 Ala. 875; South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733; Smith *v.* Babcock, 3 N. Y. App. Div. 6, 37 N. Y. Suppl. 965, 73 N. Y. St. 14; Chesebrough *v.* Conover, 21 N. Y. Suppl. 566, 50 N. Y. St. 463; Wegner *v.* Biering, (Tex. Civ. App. 1893) 22 S. W. 258.

34. Bell *v.* Pierson, Morr. (Iowa) 21.

35. Lewis *v.* Slack, 27 Mo. App. 119; Whitney *v.* Olean, 29 N. Y. App. Div. 49, 51 N. Y. Suppl. 871; Ellis *v.* Thompson, 1 N. Y. App. Div. 606, 37 N. Y. Suppl. 468, 73 N. Y. St. 180; Ayres *v.* Quigley Furniture Co., 59 N. Y. Super. Ct. 4, 12 N. Y. Suppl. 559, 35 N. Y. St. 460; De Groff *v.* American Linen Thread Co., 24 Barb. (N. Y.) 375; Malone *v.* Dougherty, 3 Wkly. Notes Cas. (Pa.) 116. It is a question of pure fact for the jury, and not a question of law, as to when a railroad is to be considered as completed and in operation to a given point so as to entitle the company to a subscription in aid of its road, made payable when the road should be

be true of the question as to whether the performance of such condition has been waived.[36]

6. Responsibility For Breach. If, in an action on a contract in which the defendant seeks to recoup damages resulting from the plaintiff's failure to comply with his obligations, the evidence is conflicting as to whether the damages resulted from the default of the plaintiff, of the defendant, or of both, it is for the jury to determine who was responsible for the breach.[37]

M. Instructions to Jury[38] — **1. In General.** Before submitting the case to the jury, it is the duty of the court fully and clearly to state the law applicable thereto. But it is not enough for a trial judge to lay down general principles of law and leave the jury to apply them; he should go further and inform the jury what the law is as applicable to the facts in the case they are trying.[39] An instruction which is contradictory is certain to mislead or at least to confuse the jury, and is reversible error.[40] Instructions which are correct in law may properly be given to suit each party's theory of the case, if not misleading or actually contradictory.[41] An instruction which purports to tell the jury under what conditions a recovery may be had must give all the conditions essential to a right of recovery.[42] If a contract contains a proviso, a proposed instruction which ignores the proviso should be refused.[43]

completed and in operation to that point. Ogden *v.* Kirby, 79 Ill. 555.

36. Chapman *v.* Colby, 47 Mich. 46, 10 N. W. 74; Fox *v.* Powers, 65 N. Y. App. Div. 112, 72 N. Y. Suppl. 573.

Illustration.— In an action on a contract, it appeared that there was a deficiency in the amount which the defendants had agreed to pay on demand as soon as a correct statement of the receipts and expenses of the business of the year, certified by the plaintiff's treasurer, should be delivered to them; that at the proper time a written statement, not certified by such treasurer, in the form of an account, charging the defendants with certain items and crediting them with other items, was presented to them, and payment was demanded; and that on receiving the statement the defendants made no objection to its form, and the only objection was to the amount charged for coal. It was held that the question of waiver by the defendants of the treasurer's certificate was properly left to the jury. Marlborough Gas Light Co. *v.* Neal, 166 Mass. 217, 44 N. E. 139.

Conduct of architect.— The question of whether the conduct of the architect was such as to excuse a party from obtaining a certificate is one dependent upon all the facts, and for the determination of the jury. Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

Waiver of architect's order.— Where a building contract provided that alterations should be made only in pursuance of a written order from the architect, but alterations were made in fact under the personal direction of the owner of the property, the question as to whether or not the requirement as to an architect's order had been waived was held properly submitted to the jury. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449].

37. Hill *v.* Sibley, 56 Ga. 531; Hartlove *v.* Durham, 86 Md. 689, 39 Atl. 617.

In an action on a contract for personal services, plaintiff alleged part performance and willingness to perform, claiming that the defendant refused to permit him to perform the services contracted for. The defendant alleged her readiness to perform, and that the plaintiff had violated the contract by refusing to work unless partially paid in advance. It was held to present a question of fact to the jury as to which party had refused to perform. Kochmann *v.* Baumeister, 73 N. Y. App. Div. 309, 76 N. Y. Suppl. 769.

38. As to instructions generally see Trial.

39. Sisson *v.* Stonington, 73 Conn. 348, 47 Atl. 662; Morris *v.* Platt, 32 Conn. 75. If the plaintiff in one count seeks to recover upon a liability arising *ex contractu*, and in another count seeks to recover damages upon a liability imposed on the defendant by law, that is, upon a liability arising *ex lege*, the differing rules of law applicable to these claims should be clearly stated and explained to the jury. Sisson *v.* Stonington, 73 Conn. 348, 47 Atl. 662.

40. Bloomington Electric Light Co. *v.* Radbourn, 56 Ill. App. 165; Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 S. W. 18, 957, 11 Ky. L. Rep. 146. See Trial.

41. Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132.

42. Partridge *v.* Cutler, 168 Ill. 504, 1 N. E. 125; Craig *v.* Miller, 133 Ill. 300, 24 N. E. 431; Chicago *v.* Schmidt, 107 Ill. 186; Evans *v.* George, 80 Ill. 51; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

43. Thus where a construction contract required the work to be done by a specified time if the weather permitted, and there was evidence that the work had been delayed by rain, an instruction that the defendant had the right to place other parties at work on that part of the road which the plaintiffs

2. Relevancy to Issue. It is error for the court to instruct the jury upon any question which is irrelevant to the issue, if the instruction be of such a character as might mislead the jury and direct them to the consideration of an issue not raised by the pleadings and facts in evidence.[44] Thus where the existence of the alleged contract is the only point in issue, an instruction which directs the jury to determine from the evidence what the contract was is erroneous, for the double reason that there is no issue of that kind and that it is virtually allowing the jury to reform the writing.[45] Where the plaintiff alleges one contract and its breach, and the defendant denies these allegations and sets up another and wholly different contract, an instruction which authorizes a recovery for the breach of the latter contract is erroneous. The plaintiff must recover if at all upon the cause of action which he has alleged.[46]

3. Applicability to Evidence. An instruction should not be given when there is no evidence before the jury to which it is applicable, inasmuch as it might mislead the jury and provoke a verdict without evidence to support it.[47] And the same is true where the proposed instruction is contrary to the whole trend of the evidence,[48] or where it is not based on the evidence, is argumentative, is calculated

had contracted to grade, after the time limited for the completion, was properly refused, as it directed the jury to take no account of the contract provision for delays by weather, or the evidence tending to show that the work was in fact delayed by rain. Andrews *v.* Tucker, 27 Ala. 602, 29 So. 34.

44. Jowers *v.* Baker, 57 Ga. 81; Swan *v.* Chandler, 8 B. Mon. (Ky.) 97; Mayer *v.* Ver Bryck, 46 Nebr. 221, 64 N. W. 691; Downey *v.* Hatter, (Tex. Civ. App. 1898) 48 S. W. 32. See Trial.

Illustration.— Where, in an action on a contract, the petition states a cause of action for non-performance and omits the averments necessary to make it an action for rescission, it is error for the court to instruct the jury on two theories, one for damages for breach of contract, and the other for a rescission thereof and the recovery of the purchase-price, since the two remedies are inconsistent and repugnant and cannot be joined or blended. J. D. Alfree Mfg. Co. *v.* Grape, 59 Nebr. 777, 82 N. W. 11.

Harmless error.— Although an instruction given may have no foundation in the pleadings or in the evidence, it will be no ground of reversal, unless the appellate court can see that it misled the jury or was calculated to mislead them to the prejudice of the party complaining. Grier *v.* Puterbaugh, 108 Ill. 602.

45. Carey *v.* Gunnison, 65 Iowa 702, 22 N. W. 934.

46. Glass *v.* Gelvin, 80 Mo. 297; Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Whipple *v.* Peter Cooper Bldg., etc., Assoc., 55 Mo. App. 554.

Express and implied contract.— Upon this principle it is error to give a jury an instruction authorizing them to find for the plaintiff on an implied contract when he has declared on an express contract. International, etc., R. Co. *v.* Masterson, (Tex. Civ. App. 1899) 51 S. W. 644.

47. *Indiana.*— Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513.

Montana.— Wortman *v.* Montana Cent. R. Co., 22 Mont. 266, 56 Pac. 316.

Nebraska.— Hellman *v.* Oliver, 35 Nebr. 334, 53 N. W. 145.

North Carolina.—Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

Texas.— Willis *v.* Bullitt, 22 Tex. 330.

See Trial.

As to damages.— While a proposition of law relative to the measure of damages may be correct in the abstract, a refusal to charge it is not erroneous when the party requesting the charge has not given any evidence which will serve as a basis for the application of the rule. Smith *v.* Cowan, 3 N. Y. App. Div. 230, 38 N. Y. Suppl. 482, 73 N. Y. St. 638 [*affirmed* on opinion below in 157 N. Y. 714, 53 N. E. 1132].

48. Alabama Iron Works *v.* Hurley, 86 Ala. 217, 5 So. 418; McKay *v.* Evans, 48 Mich. 597, 12 N. W. 868.

When the evidence tends to show only a joint liability of parties sued jointly on a contract, it is error to instruct the jury that they may find a verdict against one or all. Sutherland *v.* Holliday, (Nebr. 1902) 90 N. W. 937.

In an action to recover on a contract to dig a well, an instruction that if the plaintiff failed to obtain the water contracted for and to bore said well to the required depth, yet if such failure was caused by the defendant's preventing the plaintiff from boring to the depth mentioned, the plaintiff could recover, was held erroneous as not justified by the evidence, where the evidence in the case showed that the digging of the well was not stopped by the defendant until after the plaintiff had abandoned the work. Schultz *v.* Tessman, 92 Tex. 488, 49 S. W. 1031 [*reversing* (Tex. Civ. App. 1898) 48 S. W. 207].

As to abandonment of contract.— An instruction that if the conduct of a contractor for the erection of a building was such as to evince an intention to abandon the contract then the owner would have the right to treat it as abandoned is erroneous, where

to mislead the jury, and unduly invades the province of the jury.[49] So also the court should not give an instruction which withdraws from the consideration of the jury any evidence material to the issue made by the pleadings.[50] An instruction as to what would be the duty of a party upon a supposed contract, such as neither party claims to exist, could not fail to be confusing to the jury and should not be given.[51]

4. As to Making of Contract. Where the evidence is conflicting as to whether any contract was in fact made, it is proper for the court to tell the jury to look to all the probabilities, including the probability as to whether such a contract as the one sued on would have been made.[52] No instruction is proper, however, which does not involve the necessity of the jury's finding a mutual agreement[53] or which prevents them from finding an agreement as warranted by the evidence.[54] Where fraud is set up in the pleadings and the evidence is conflicting, it is error to instruct the jury that the evidence is legally insufficient to establish fraud, and the contract is binding. If there is competent evidence tending to prove fraud its weight and sufficiency should be left to the jury.[55] In an action on an express contract which has been performed by the plaintiff, it is error to instruct the jury that they may consider whether the performance is beneficial to the defendant.[56] An instruction that if the writing in evidence, executed at the time of making the contract, was read over to the plaintiff, and he understood and accepted it, then the parties are bound by its terms as fixing their rights, is misleading, because the jury might infer therefrom that if the writing was not read over to the plaintiff, although understood by him, it would not have the binding force to which it would otherwise be entitled.[57] In an action to recover the price of articles manufactured for the defendant by the plaintiff, it is error to refuse an instruction, requested by the plaintiff, that a written order for the same which has been introduced in evidence is a fact tending to show the

there was evidence tending to show that the contractor had entered upon, and was engaged in, the performance of the contract at the time the owner took possession of the building and completed it. Kilgore *v.* Northwest Texas Baptist Educational Assoc., 90 Tex. 139, 37 S. W. 598 [*reversing* (Tex. Civ. App. 1896) 37 S. W. 473].

49. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41. See Trial.

50. De Jarnette *v.* Cox, 128 Ala. 518, 29 So. 618. See Trial.

51. Phillips *v.* Cornell, 133 Mass. 546; Hopper *v.* Vance, 27 Mo. App. 336.

52. Corbin *v.* Sage, 44 Mich. 142, 6 N. W. 216.

Estoppel of party requesting instruction.— A party who procures the court to give a certain instruction relative to the making of a contract cannot afterward be heard to complain of the act of the court in giving it. Sithen *v.* Murphy, (Ark. 1889) 12 S. W. 497. See Trial.

53. Walker *v.* Gilbert, 2 Daly (N. Y.) 80.

Acceptance of offer.— It is improper to instruct the jury that a written offer is not sufficient to establish a contract, unless it was accepted at the time of its execution and delivery, for it may have been accepted afterward. Waco Ice, etc., Co. *v.* Wiggins, (Tex. Civ. App. 1895) 32 S. W. 58.

On a question as to whether a transaction was a bailment or a sale, a charge that the intention with which a thing is done does not always control the legal effect is not prejudicial, when followed by an explanation that the minds of the parties must meet. Crosby *v.* Delaware, etc., Canal Co., 141 N. Y. 589, 36 N. E. 332.

54. It is improper and misleading to instruct the jury that a memorandum, signed by the defendant and put in evidence by the plaintiff, is not of itself a contract; that to make it a binding contract there must have been an acceptance by the plaintiff or by someone duly authorized by him. The vice of the instruction lies in this: The paper is evidence of a contract, although not necessarily conclusive, but to tell the jury that it is no contract is to mislead them into believing that it is not even evidence of one. Rau *v.* Trumbull, 68 Ill. App. 490.

Bill of sale as security.— An instruction that it is competent to show that a bill of sale, although conveying an absolute title on its face, may have been given by way of security, and that it is competent to show this by parol testimony, is sufficient in the absence of a request for a further instruction that the burden of proof is on the party making such claim to overcome the contrary presumption arising from the face of the paper. Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

55. Hardy *v.* Kansas Mfg. Co., (Tex. Sup. 1891) 18 S. W. 157.

56. Coskery *v.* Young, 70 Iowa 335, 30 N. W. 605.

57. Anderson *v.* Weiser, 24 Iowa 428.

articles ordered to be made, and also to show the contract entered into by the parties.[58]

5. As to Consideration. The court should instruct the jury as to the necessity for and sufficiency of the consideration.[59] If at the trial evidence is adduced tending to show that the contract in suit is founded on an illegal consideration and is therefore contrary to public policy, the court should put the question to the jury to say whether the consideration is tainted with illegality, and should instruct them that if they find it so the plaintiff cannot recover.[60] It is proper to instruct the jury that a written contract is presumed to state the true consideration, and that it devolves on the defendant to show that there was in fact no consideration.[61]

6. As to Capacity to Contract. Where the defense is mental incapacity to make a contract, it is proper to charge that it does not require a high degree of mental power to make a binding agreement, that one who has enough of mind and reason clearly and fully to understand the nature and consequences of his act in making a contract is to be considered competent to make a binding contract, but one who lacks that capacity is to be considered incompetent.[62] And if fraud and imposition are also set up, it is proper to instruct the jury that if want of capacity was only partial they may nevertheless consider whether the defendant might not be more easily deceived than a person of strong mind.[63]

7. As to Duress. Where the defendant admits the execution of a written instrument, but seeks to avoid liability thereon, on the ground that it was executed under duress, the trial court should instruct the jury as to what constitutes duress.[64]

8. As to Performance — a. In General. Where the evidence is conflicting, the question as to whether a contract has been performed should be submitted to the jury by proper instructions.[65] The question of the performance of a contract is to be determined by the jury upon a consideration of all the evidence in the case, and an instruction limiting them to a consideration of the evidence of one party only should not be given.[66]

58. Burson *v.* Choate, 20 Ind. 258.

59. See Howe *v.* Hyde, 88 Mich. 91, 50 N. W. 102. And see Trial.

60. Viser *v.* Bertrand, 14 Ark. 267. See *supra*, VII.

61. Shattuck *v.* Clark, (Tex. Civ. App. 1896) 34 S. W. 404.

62. Norman *v.* Georgia L. & T. Co., 92 Ga. 295, 18 S. E. 27. See Drunkards; Insane Persons.

Instructions that to impeach the contract sued on for want of mental capacity it must be shown that the defendant had such mental weakness, that he was unable to understand the terms and effect of the contract, and that although the defendant had insane delusions on some subjects, yet if they in no way related to the plaintiff or the subject-matter of the contract, and in making the contract the defendant was not influenced thereby, but was able to comprehend the effect of the contract, then he was mentally capable of making it are sufficient, although not explicitly stating that the defendant must have had sufficient mental capacity to protect his own interests in executing the contract. Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253.

63. Galpin *v.* Wilson, 40 Iowa 90.

64. McCormick *v.* Volsack, 4 S. D. 67, 55 N. W. 145, holding that an instruction that if the instrument was obtained by means of threats, coercion, or subjecting the defendant to fear, or obtained by force, threats of violence, or fear, the plaintiff could not recover, was defective and erroneous in not going further, and advising the jury as to the nature or character of the threats, coercion, or fear which would avoid apparent consent.

65. *Arkansas.*— Seabrook *v.* Orto, 70 Ark. 503, 68 S. W. 677.

Illinois.— Cook *v.* American Luxfer Prism Co., 93 Ill. App. 299.

Massachusetts.— Gunther *v.* Gunther, 181 Mass. 217, 63 N. E. 402.

New York.— Weeks *v.* Trinity Church, 56 N. Y. App. Div. 195, 67 N. Y. Suppl. 670; Grant *v.* Pratt, 52 N. Y. App. Div. 540, 65 N. Y. Suppl. 486.

Pennsylvania.— Harris *v.* Sharpless, 15 Pa. Super. Ct. 643.

Defective performance.— In case of defective performance of a contract, where it is in dispute as to which party is responsible for the defects, a proposed instruction that the plaintiff cannot recover if the work is worthless is properly refused. Birmingham Fire Brick Works *v.* Allen, 86 Ala. 185, 5 So. 454.

Excuse for non-performance.— On the other hand if there is nothing in the pleadings or proof tending to show that the defendant in any way interfered with the plaintiff's performance of the contract, it is error to submit that question to the jury. Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

66. Conner *v.* Mt. Vernon Co., 25 Md. 55.

b. Substantial Performance. It is proper to instruct the jury that the plaintiff is entitled to recover if they find that he has substantially performed his contract.[67] And it has been held that such an instruction is not erroneous, although it fail to define what is meant by substantial compliance with the contract.[68] But an instruction which permits the jury to regard a substantial compliance with the provisions of a contract as equivalent to complete performance, and to award a recovery thereon for the full amount of the contract price, is erroneous. The jury should be told of the defendant's right to recoup his damages for defective performance.[69] What is substantial performance of an entire contract is a question of fact for the jury, and an instruction which removes the matter from their consideration is erroneous.[70]

9. As to Conditions Precedent. If the plaintiff's right of recovery depends upon the performance of a condition, it is proper to charge the jury that if they find that the condition has not been performed, then their verdict should be for the defendant.[71] Thus the complete performance of an entire contract is a condition precedent to a recovery thereon, and if there is evidence tending to show that the contract was but partially performed a charge predicated on that hypothesis should be given,[72] and should not be refused on the ground that there is other evidence tending to show a waiver of full performance.[73] Where the obtaining of an architect's certificate is a condition precedent to the builder's right to pay-

67. Des Moines, etc., Co. *v.* Polk County Homestead, etc., Co., 82 Iowa 663, 45 N. W. 773; Logan *v.* Berkshire Apartment Assoc., 1 Misc. (N. Y.) 18, 20 N. Y. Suppl. 369, 48 N. Y. St. 36; Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174. But it is error to charge in substance that if the contract has been substantially performed by the plaintiff, and the work was found at the moment of its completion to be in good working order, the plaintiff may recover, although immediate subsequent events showed that the result was not what was contemplated by the contract. Edison General Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315.

68. Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174.

69. Keeler *v.* Herr, 157 Ill. 57, 41 N. E. 750; Estep *v.* Fenton, 66 Ill. 467; Taylor *v.* Beck, 13 Ill. 376; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

When the contractor is sued by the owner for doing defective work, it is error to instruct the jury that if the defendant has substantially performed his contract according to the plans and specifications, the plaintiff cannot recover, even though there are trivial defects. The distinction is clear. When the contractor sues the owner, substantial performance is all he need show in order to recover on the contract, and the defendant may recoup his damages for defective performance; but when the owner sues the contractor, these very damages constitute his whole cause of action, and a party is entitled to compensation for slight injuries as well as great ones. Boteler *v.* Roy, 40 Mo. App. 234.

70. Pitcairn *v.* Philip Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

In an action to recover for sinking a well on defendant's farm, which under the contract was to produce a flow of water satisfactory to the defendant, there was no error in instructing the jury to consider the condition of the parties and the surrounding circumstances, the size of the farm, its probable needs, and the ordinary uses for which it required a well, in order to determine what was in the minds of the parties and what they contemplated when the well should be put there. Richison *v.* Mead, 11 S. D. 639, 80 N. W. 131.

71. Van Vleet *v.* Hayes, 56 Ark. 128, 19 S. W. 427; Grandy *v.* Kittredge, 8 Cush. (Mass.) 562; A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Tex. Civ. App. 1898) 44 S. W. 929.

Modification of contract.— In an action for breach of a contract to deliver hay at a certain place at a certain time, where the defendant set up a subsequent modification of the contract, whereby it was agreed that the defendant should store the hay with other hay of his own and sell it together and account for the proceeds when sold, an instruction that if the jury found that at the time of the commencement of the action the defendant had not sold the hay then they should find for the defendant was held proper where there was evidence tending to support the defense, if the jury found the subsequent contract established. Greely *v.* Newcomb, 21 Wash. 357, 58 Pac. 216.

Compulsory payment as a condition precedent.— Where the defendant's liability depends on the plaintiff's being compelled to pay a sum of money to a certain party, it is not error to refuse plaintiff's request for an instruction to the effect that if the jury shall find that plaintiff did pay the money, then their verdict must be for plaintiff, since it permits a recovery if payment has been made voluntarily. P. Dougherty Co. *v.* Gring, 89 Md. 535, 43 Atl. 912.

72. Wolfe *v.* Parham, 18 Ala. 441.

73. Wolfe *v.* Parham, 18 Ala. 441.

ment, an instruction which ignores the matter of the certificate altogether is erroneous.[74] The court must instruct properly as to the necessity for such a certificate, the right to impeach a certificate, etc., according to the law and the evidence.[75]

10. As to Measure of Damages. The measure of damages is a question of law, and if the court instructs the jury on the question it must do so properly and fully.[76] In an action on a contract which has been only partly performed, in a case where the plaintiff may be excused from making full performance, the jury should be instructed that the amount recoverable is the contract price less what it would cost the defendant to complete the work according to the contract.[77]

74. Walsh *v.* Walsh, 11 Ill. App. 199.

75. Clapp *v.* Bullard, 23 Ill. App. 609; Bradner *v.* Roffsell, 57 N. J. L. 412, 31 Atl. 387; Chism *v.* Schipper, 51 N. J. L. 1, 16 Atl. 316, 14 Am. St. Rep. 668, 2 L. R. A. 544; Batchelor *v.* Kirkbride, 27 Fed. 899. And see IX, C, 5, g.

Conclusiveness of certificate.— An instruction that such certificate is conclusive on the owner in the absence of collusion with the builder is not erroneous, where the defendant charges such collusion, and no instruction based on the theory of independent fraud or gross negligence on the part of the architect is requested. Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174. But an instruction that certificates given to authorize partial payments during the progress of the work are conclusive against the owner so far as they cover the work done is erroneous where the contract expressly provides that they shall not be conclusive and that a final certificate must be obtained. In such case the contract must be taken as the law on the point as between the parties. Clapp *v.* Bullard, 23 Ill. App. 609.

Fraudulent withholding of certificate.— Where it is alleged that such certificate has been fraudulently withheld, it is proper to instruct the jury that if it was refused by the fraud of the arbiter, even without collusion with the owner, the plaintiff is entitled to recover. Chism *v.* Schipper, 51 N. J. L. 1, 16 Atl. 316, 14 Am. St. Rep. 668, 2 L. R. A. 544; Batchelor *v.* Kirkbride, 27 Fed. 899. An instruction that it would be *prima facie* evidence of fraud if the architect withheld his certificate without any substantial reason for so doing has been deemed open to objection, because the use of the word "substantial" tends to substitute the judgment of the jury for the decision of the architect. Bradner *v.* Roffsell, 57 N. J. L. 412, 31 Atl. 387.

76. Kick *v.* Doerste, 45 Mo. App. 134. See Damages.

Contract not to reëngage in business.— In an action for breach of a contract, made on the sale of a business, not to reëngage in the business for a stipulated time, an instruction permitting a recovery of the difference between the price paid and the actual value of the property at the time purchased is erroneous, as it allows the jury to make a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, which was not agreed on. Dose *v.* Tooze, 37 Oreg. 13, 60 Pac. 380.

Profits.— Where the plaintiff sought to recover damages other than profits which they would have made but for the defendant's acts in preventing completion of a contract, a charge requested by the defendant limiting plaintiff's recovery to profits only was properly refused. Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949.

In an action on a contract to erect an electric light plant, in which the defendant claims damages for failure to complete the same, an instruction that if the plaintiff was prevented from completing the contract by the defendant's failure or refusal to designate the places in which to put the remaining lights, then the jury could deduct the reasonable cost of putting up and wiring in such remaining lights; and any diminution in the price of the plant, if there was such diminution, is an instruction for a double recovery of damages and is erroneous. A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Tex. Civ. App. 1898) 44 S. W. 929.

Logging contract.—Where the plaintiffs had not fulfilled a logging contract declaring that ten cents per thousand feet should be retained until full completion as a reserve for faithful performance, a charge requiring payment of the reserve fund to the plaintiffs, although the jury should find that they had wholly abandoned the contract without justification, was held error. Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949.

Contract to furnish water to city.— In an action to recover damages sustained by a city, by failure of a contractor to furnish a stipulated number of gallons of water within a limited space of time, an instruction directing the jury, if they found for the plaintiff, to return a verdict for the sum of such payments as had been made to the contractor for supplying boilers, engine, pipeline, and machinery upon estimates as the work progressed, was erroneous where by the terms of the contract there had been recognized no such contingency as the return of such payments to the city in any event. Godfrey *v.* Beatrice, 51 Nebr. 272, 70 N. W. 914.

77. Veazie *v.* Hosmer, 11 Gray (Mass.) 396; Gleason *v.* Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Johnson *v.* Bowman, 26 Nebr. 745, 42 N. W. 754. But a refusal to give such instruction is not reversible error, when no evidence of the defendant's damages has been introduced. Smith *v.* Cowan, 3 N. Y.

11. As to Construction of Contract — a. Of Written Contract — (i) *In General.* The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances if any have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them.[78] Where a part only of a complete contract has been reduced to writing and parol evidence is introduced to prove the rest of it, the court may construe the writing and with proper instructions leave it to the jury to determine from the evidence what the additional terms of the contract are.[79] But where the whole contract is in writing, whether on one paper or many, and there is no ambiguity in its terms, its construction is a matter of law and should not be left to the jury.[80]

(ii) *Ambiguous Contract.* Where the meaning of a contract is not obvious from an inspection of the instrument itself, but its construction depends upon extrinsic facts to be found by the jury, such as technical words of art, science, or trade, and the surrounding circumstances, the facts may be found by a special verdict, and the court may then interpret the writing in the light of such find-

App. Div. 230, 38 N. Y. Suppl. 482, 73 N. Y. St. 638.

78. *Alabama.*— McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640; Taylor *v.* Kelly, 31 Ala. 59, 68 Am. Dec. 150.

Arkansas.— Estes *v.* Boothe, 20 Ark. 583.

Georgia.— McLelland *v.* Singletary, 113 Ga. 601, 38 S. E. 942; Brown *v.* Collum, 112 Ga. 68, 37 S. E. 91.

Illinois.— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890 [*affirming* 92 Ill. App. 391]; Graham *v.* Sadlier, 165 Ill. 95, 46 N. E. 221.

Indiana.— Russell *v.* Merrifield, 131 Ind. 148, 30 N. E. 957; Robbins *v.* Spencer, 121 Ind. 594, 22 N. E. 660; American Ins. Co. *v.* Butler, 70 Ind. 1.

Iowa.— Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Fairbanks *v.* Jacobs, 69 Iowa 265, 28 N. W. 602; Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604; Andrews *v.* Tedford, 37 Iowa 314.

Kansas.— Stewart *v.* Fowler, 37 Kan. 677, 15 Pac. 918.

Maryland.— Annapolis, etc., R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820; Osceola Tribe No. 11 I. O. R. M. *v.* Rost, 15 Md. 295.

Michigan.— Tompkins *v.* Gardner, etc., Co., 69 Mich. 58, 37 N. W. 43; Wagner *v.* Egleston, 49 Mich. 218, 13 N. W. 522.

Minnesota.— Van Eman *v.* Stanchfield, 8 Minn. 518.

Missouri.— Comfort *v.* Ballingal, 134 Mo. 281, 35 S. W. 609.

New Jersey.— J. C. Smith, etc., Co. *v.* Lunger, 64 N. J. L. 539, 46 Atl. 623.

New York.— Cohen *v.* Berlin, etc., Envelope Co., 166 N. Y. 292, 59 N. E. 906; Freston *v.* Lawrence Cement Co., 155 N. Y. 220, 49 N. E. 768; Brady *v.* Cassidy, 104 N. Y. 147, 10 N. E. 131; Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221.

North Carolina.— Sellars *v.* Johnson, 65 N. C. 104.

Pennsylvania.—Dunn *v.* Rothermel, 112 Pa. St. 272, 3 Atl. 800; Harvey *v.* Vandegrift, 89 Pa. St. 346; Esser *v.* Linderman, 71 Pa. St. 76; Hillman *v.* Joseph, 9 Pa. Super. Ct. 1, 43 Wkly. Notes Cas. 212.

South Carolina.— Union Bank *v.* Heyward, 15 S. C. 296.

Tennessee.— Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 549; Kendrick *v.* Cisco, 13 Lea 247.

Texas.— Long *v.* McCauley, (Sup. 1887) 3 S. W. 689; Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53; Lary *v.* Young, (Civ. App. 1894) 27 S. W. 908.

Vermont.— Wason *v.* Rowe, 16 Vt. 525.

Wisconsin.— Peterson *v.* South Shore Lumber Co., 105 Wis. 106, 81 N. W. 141; Cohn *v.* Stewart, 41 Wis. 527; Helmholz *v.* Everingham, 24 Wis. 266.

United States.— Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

England. — Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806.

Understanding of parties.— The construction of a written agreement is a question of law for the court, and therefore ordinarily it is incompetent to prove or to submit to the jury what either party to a written contract considered its meaning or its legal effect. Anderson *v.* Grand Forks First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

The question of the performance of a contract should not be left to the jury without a construction of the contract by the court. McCormick Harvesting Mach. Co. *v.* Laster, 81 Ill. App. 316.

79. Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

80. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521; Tarbox *v.* Cruzen, 68 Minn. 44, 70 N. W. 860; Birch *v.* Kavanaugh Knitting Co., 165 N. Y. 617, 59 N. E. 1119 [*affirming* 34 N. Y. App. Div. 614, 54 N. Y. Suppl. 449]; Brite *v.* Mt. Airy Mfg. Co., 129 N. C. 34, 29 S. E. 634.

ing.[81] But according to the usual practice it is considered a proper case for a hypothetical charge in which the jury should be told what would be the true construction of the instrument upon the different states of fact which might be found by them, and they are then bound to take the particular construction applicable to the state of fact which they find.[82] In some of the cases it appears to be considered that the latter practice is equivalent to the submission of the whole case to the jury as matter of fact; or as is said an admixture of parol with written evidence draws the whole to the jury.[83] But strictly speaking the interpretation of the instrument is not submitted to the jury. The court may

Whether instruction leaves construction to jury.— In an action on a contract which provided for payments in instalments as the work progressed, a charge that if by the terms of the contract defendant agreed to pay a certain sum and neglected to make such payments at the time plaintiff was entitled thereto, plaintiff was justified in abandoning the contract, was not objectionable as authorizing the jury to construe the contract. Keeler *v.* Clifford, 165 Ill. 544, 46 N. E. 248.

81. State *v.* Patterson, 68 Me. 473; Silverthorn *v.* Fowle, 49 N. C. 362.

82. *Illinois.*— Illinois Cent. R. Co. *v.* Cassell, 17 Ill. 389.

Indiana.— H. G. Olds Wagon-Works *v.* Coombs, 124 Ind. 62, 24 N. E. 589; Zenor *v.* Johnson, 107 Ind. 69, 7 N. E. 751.

Massachusetts.— Carberry *v.* Farnsworth, 177 Mass. 398, 59 N. E. 61; Cunningham *v.* Washburn, 119 Mass. 224; Smith *v.* Faulkner, 12 Gray 251; Burnham *v.* Allen, 1 Gray 496; Eaton *v.* Smith, 20 Pick. 150.

Michigan.— Curtis *v.* Martz, 14 Mich. 506.

Missouri.— Newberry *v.* Durand, 87 Mo. App. 290.

Nebraska.— Rosenthal *v.* Ogden, 50 Nebr. 218, 69 N. W. 779.

New York.— Hix *v.* Edison Electric Light Co., 163 N. Y. 573, 57 N. E. 1112 [*affirming* 27 N. Y. App. Div. 248, 50 N. Y. Suppl. 592]; McIntosh *v.* Miner, 53 N. Y. App. Div. 240, 65 N. Y. Suppl. 735.

Texas.— Long *v.* McCauley, (Sup. 1887) 3 S. W. 689.

United States.— Goddard *v.* Foster, 17 Wall. 123, 21 L. ed. 589.

England.— Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806.

In Newberry *v.* Durand, 87 Mo. App. 290, 296 [*citing* Norton *v.* Bohart, 105 Mo. 615, 16 S. W. 598; St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121; Deutmann *v.* Kilpatrick, 46 Mo. App. 624; Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23], the court said: "Where an instrument is ambiguous in any of its terms and the ambiguity cannot be solved by reference to the other parts of it, and the surrounding circumstances are controverted, as here, by the evidence, the court should charge the jury hypothetically as to the interpretation thereof. The determination by the jury of the question the one way or the other, would determine the intention of the parties, and hence the interpretation of the contract."

Joint or several contract.—Where the question whether parties to a contract bound themselves jointly or severally could be ascertained only from the parol portion of the contract it was for the jury. Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

Building and loan contract.— In an action on a written contract which defendant building and loan association claimed was a contract for an unlimited number of payments, but which plaintiff asserted was for a specified number of payments, a charge that it was for the jury to find whether defendant had induced plaintiff to believe that it was a contract for a limited number of payments, and that if they found that representations had been made which induced such belief defendant was estopped to assert that the contract was other than as represented and must be so construed, did not erroneously submit the construction of a written contract to the jury. Williamson *v.* Eastern Bldg., etc., Assoc., 62 S. C. 390, 38 S. E. 616, 1008.

83. *Alabama.*— Sewall *v.* Henry, 9 Ala. 24.

Connecticut.— Jennings *v.* Sherwood, 8 Conn. 122.

Michigan.— Ginsburg *v.* Cutler, etc., Lumber Co., 85 Mich. 439, 48 N. W. 952.

Missouri.— Wilcox *v.* Baer, 85 Mo. App. 587; Blanke *v.* Dunnermann, 67 Mo. App. 591.

Nebraska.— Meyer *v.* Shamp, 51 Nebr. 424, 71 N. W. 57; Coquillard *v.* Hovey, 23 Nebr. 622, 37 N. W. 479, 8 Am. St. Rep. 134.

New York.— Springfield First Nat. Bank *v.* Dana, 79 N. Y. 108; Gardner *v.* Clark, 17 Barb. 538.

Pennsylvania.— Philadelphia *v.* Stewart, 201 Pa. St. 526, 51 Atl. 348; Foster *v.* Berg, 104 Pa. St. 324; Sidwell *v.* Evans, 1 Penr. & W. 383, 21 Am. Dec. 387; Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Denison *v.* Wertz, 7 Serg. & R. 372; Moore *v.* Miller, 4 Serg. & R. 279; Welsh *v.* Dusar, 3 Binn. 329; Wetherill *v.* Erwin, 12 Pa. Super. Ct. 259.

Washington.— Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404.

United States.— Etting *v.* U. S. Bank, 11 Wheat. 59, 6 L. ed. 419.

Where a written contract refers to plans, specifications, drawings, and a bill of items, and it appears upon inspection that the bill of items is contradictory of the specifications and drawings, parol testimony is admissible to determine which paper was intended by the parties to govern, and the question is one of fact for the jury, and not one of construction of written terms of the contract. Kendig *v.* Roberts, 187 Pa. St. 339, 40 Atl. 1022.

first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be the more practicable course.[84] And it would seem that the submission of the case to the jury to find the facts, with proper instructions as to the various aspects in which they may present themselves, gives to the court the construction of the contract as completely as if the jury found the facts specially and the court afterward interpreted the contract in view of them as found.[85]

b. Of Oral Contract. When there is no dispute as to the terms of an oral contract, its construction is for the court, for it is as much the duty of the court to interpret oral contracts as written ones.[86] But when the terms of the contract are controverted, or it is susceptible of more than one meaning, it should be submitted to the jury to ascertain its terms and meaning with a hypothetical instruction as to the law.[87]

CONTRACTUS AD MENTEM PARTIUM VERBIS NOTATAM INTELLIGENDUS. A maxim meaning "A contract is to be understood according to the intention of the parties, expressed in words."[1]

CONTRACTUS BONÆ FIDEI. Contracts of good faith.[2] (See, generally, CONTRACTS.)

CONTRACTUS CIVILES. Civil contracts.[3] (See, generally, CONTRACTS.)

CONTRACTUS EST QUASI ACTUS CONTRA ACTUM. A maxim meaning "A contract is, as it were, act against act."[4]

CONTRACTUS EX TURPI CAUSÂ VEL CONTRA BONOS MORES, NULLUS. A maxim meaning "A contract arising out of a base consideration, or against morality, is null."[5]

CONTRACTUS INFANTIS INVALIDUS, SI IN DAMNUM SUI SPECTET. A maxim meaning "The contract of a minor is invalid, if it tend to his loss."[6]

CONTRACTUS LEGEM EX CONVENTIONE ACCIPIUNT. A maxim meaning "Contracts take their law from the agreement of the parties."[7]

84. State *v.* Patterson, 68 Me. 473; Powers *v.* Cary, 64 Me. 9; Putnam *v.* Bond, 100 Mass. 58, 1 Am. Rep. 82; Smith *v.* Faulkner, 12 Gray (Mass.) 251; Hutchison *v.* Bowker, 5 M. & W. 535. In Cohen *v.* Berlin, etc., Envelope Co., 166 N. Y. 292, 299, 59 N. E. 906, Parker, C. J., said: "It sometimes happens that in the construction of contracts it is necessary to have as aids to the court the situation of the parties at the time of the execution of the contract, and all of the facts and circumstances surrounding it, in order to enable the court to determine just what the parties intended by it; because, however, the situation is such that it becomes necessary to prove those facts and circumstances, the question of construction is not transferred from the court to the jury, but instead the question of the construction of the contract continues to be one of law for the court, the facts and circumstances proved being availed of for the purpose of ascertaining the real intent of the parties where otherwise it might be more difficult of ascertainment."

85. Cunningham *v.* Washburn, 119 Mass. 224.

86. *Massachusetts.*— Short *v.* Woodward, 13 Gray 86; Wilmarth *v.* Knight, 7 Gray 294.

Michigan.— Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

Missouri.— Belt *v.* Goode, 31 Mo. 128; Judge *v.* Leclaire, 31 Mo. 127; Davies *v.* Baldwin, 66 Mo. App. 577.

New Jersey.— Smalley *v.* Hendrickson, 29 N. J. L. 371.

New York.— De Ridder *v.* McKnight, 13 Johns. 294.

North Carolina.— Rhodes *v.* Chesson, 44 N. C. 336; Young *v.* Jeffreys, 20 N. C. 357.

Pennsylvania.— Codding *v.* Wood, 112 Pa. St. 371, 3 Atl. 455.

Wisconsin.— James *v.* Carson, 94 Wis. 632, 69 N. W. 1004; Diefenback *v.* Stark, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719.

87. Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; McKenzie *v.* Sykes, 47 Mich. 294, 11 N. W. 164; Davies *v.* Baldwin, 66 Mo. App. 577.

1. Morgan Leg. Max.

2. Black L. Dict., distinguishing such contracts from contracts *stricti juris*. And see Trayner Leg. Max.

3. Black L. Dict., distinguishing such contracts from *contractus prætorii*, the latter being contracts which could not be enforced in the courts except by the aid of the prætor, who, through his equitable powers, gave an action upon them.

4. Wharton L. Lex. [*citing* Wiseman's Case, 2 Coke 15*a*].

5. Wharton L. Lex.

6. Morgan Leg. Max.

7. Burrill L. Dict.

CONTRADICTION IN TERMS. A phrase of which the parts are expressly inconsistent.[8]

CONTRAFACERE. To counterfeit, or imitate.[9] (See, generally, COUNTERFEITING.)

CONTRAFACTION. A counterfeiting.[10] (See, generally, COUNTERFEITING.)

CONTRAFACTIO SIGILLI REGIS. Counterfeiting the king's seal.[11] (See, generally, COUNTERFEITING.)

CONTRA FICTIONEM NON ADMITTITUR PROBATIO; QUID ENIM EFFICERET PROBATIO VERITATIS, UBI FICTIO ADVERSUS VERITATEM FINGIT? NAM FICTIO NIHIL ALIUD EST, QUAM LEGIS ADVERSUS VERITATEM IN RE POSSIBILI EX JUSTA CAUSA DISPOSITIO. A maxim meaning "Proof is not admitted against fiction, for what could the evidence of truth effect, where fiction supposes against truth? For fiction is no other than an arrangement of the law against truth, in a possible matter, arising from a just cause."[12]

CONTRA FORMAM COLLATIONIS. In old English law, a writ that issued where lands given in perpetual alms to lay houses of religion, or to an abbot and convent, or to the warden or master of an hospital, and his convent, to find certain poor men with necessaries, and do divine service, etc., were alienated, to the disherison of the house and church.[13]

CONTRA FORMAM DONI. Against the form of the grant.[14]

CONTRA FORMAM FEOFFAMENTI. In old English law, a writ that lay for the heir of a tenant, enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain services and suits to this court, who was afterwards distrained for more services than were mentioned in the charter.[15]

CONTRA FORMAM STATUTI. In criminal pleading, contrary to the form of the statute; the usual conclusion of every indictment, etc., brought for an offense created by statute.[16] (See, generally, INDICTMENTS AND INFORMATIONS.)

CONTRA FORMAM STATUTI IN TALI CASU EDITO ET PROVISO. Against the form of the statute in such case made and provided.[17] (See, generally, INDICTMENTS AND INFORMATIONS.)

CONTRA HEREDITATEM JACENTEM. Against a fallen or prostrate inheritance; against the heritage to which the heir has made up no titles.[18]

CONTRA JURIS. Contrary to law, unlawful.[19]

CONTRA JUS BELLI. Against the law of war.[20]

CONTRA JUS CIVILIS REGULAS PACTA CONVENTA RATA NON HABENTUR. A maxim meaning "Agreements made contrary to the civil law are not to be construed as valid."[21]

8. Wharton L. Lex.
9. Burrill L. Dict. [*citing* Rex *v.* Ward, 2 Ld. Raym. 1461, 1469].
10. Wharton L. Lex.
11. Black L. Dict.
12. Tayler L. Gloss.
13. Black L. Dict. [*citing* Fitzherbert Nat. Brev. 210].
14. Black L. Dict.
15. Black L. Dict. [*citing* Old Nat. Brev. 162].
16. Black L. Dict. See also Blydenburgh *v.* Miles, 39 Conn. 484, 496, where it is said: "The object of the averment, 'contrary to the form of the statute,' is to show that the action is brought upon the statute, and that it is not an action at common law." And see ANIMALS, 2 Cyc. 384; BASTARDS, 5 Cyc. 653; BIGAMY, 5 Cyc. 698.

No other form of words can be devised which would be equivalent to *contra formam statuti.* Com. *v.* Stockbridge, 11 Mass. 279, 280. And see State *v.* Berry, 9 N. J. L. 374, 375. See also Cook *v.* Scott, 6 Ill. 333, 340, where it is said: "Could a plaintiff, in any case, derive his right to sue under a statute, more clearly or certainly by concluding his declaration '*contra formam statuti,*' than is done by the conclusion of the declaration in this case, to wit: 'by means of the premises and by force of the statute in such case made and provided, the said plaintiff hath become entitled to recover of the said defendant three times the value of the said property so illegally taken,' etc.? That the defendant was apprised that the plaintiff sued upon a statute is apparent from the fact, that, as the record shows, he justified under the very act under which this suit was instituted."

17. The usual conclusion of every indictment, etc., brought for an offense created by statute. Adams Gloss.
18. Adams Gloss.
19. Adams Gloss.
20. Black L. Dict. [*citing* 1 Kent Comm. 6].
21. Morgan Leg. Max.

CONTRA JUS COMMUNE. Against common right or law; contrary to the rule of the common law.[22]

CONTRA JUS, FASQUE. Against law and right, justice. In broad sense, against human and divine law.[23]

CONTRA LEGEM. Against the law.[24]

CONTRA LEGEM ET CONSUETUDINEM ANGLIÆ. Against the law and custom of England.[25]

CONTRA LEGEM FACIT, QUI ID FACIT, QUOD LEX PROHIBET; IN FRAUDEM VERO, QUI, SALVIS VERBIS LEGIS, SENTENTIAM EJUS CIRCUMVENIT. He does contrary to the law who does what the law prohibits; he acts in fraud of the law who, the letter of the law being inviolate, uses the law contrary to its intention.[26]

CONTRA LEGEM TERRÆ. Against the law of the land.[27]

CONTRA LEGES ET STATUTA ANGLIÆ. Against the laws and statutes of England.[28]

CONTRALIGATIO. In old English law, counter obligation. Literally, counter-binding.[29]

CONTRAMANDARE. In old English law, to command against; to make an order contrary to a former order; to countermand.[30]

CONTRAMANDATIO. A countermanding.[31]

CONTRA-MANDATUM. A countermand; a new or opposite direction. In practice, an order made contrary to a former one, for the purpose of avoiding or suspending it; the revocation of a thing done or directed to be done before.[32]

CONTRA MOREM ET STATUTA. Against the custom and the statute.[33]

CONTRA NEGANTEM PRINCIPIA NON EST DISPUTANDUM. A maxim meaning "There is no disputing against one who denies first principles."[34]

CONTRA NON VALENTEM AGERE NON CURRIT PRÆSCRIPTIO.[35] A maxim meaning "Prescription does not run against a party who is unable to act."[36]

22. Burrill L. Dict. [*citing* Bracton, fol. 48*b*].
23. Adams Gloss.
24. Burrill L. Dict.
25. Adams Gloss.
26. Adams Gloss; Black L. Dict.; Burrill L. Dict.
27. Burrill L. Dict. [*citing* Magna Charta, c. 55].
28. Adams Gloss.
29. Burrill L. Dict. See also Fleta, lib. 2, c. 56, § 1.
30. Burrill L. Dict.
31. Burrill L. Dict.

Contramandatio placiti, in old English law, was the respiting of a defendant, or giving him further time to answer, by countermanding the day fixed for him to plead, and appointing a new day; a sort of imparlance. Black L. Dict.

32. Adams Gloss [*citing* Forse *v.* Hembling, 4 Coke 60*b*, 61; Termes de la Ley].
33. Adams Gloss.
34. Black L. Dict. [*citing* Coke Litt. 343].
35. A maxim of the French, no less than of the civil law.— See Huber *v.* Steiner, 2 Bing. N. Cas. 202, 215, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501.
36. Broom Leg. Max.

Applied or explained in the following cases:

Kansas.— Foreman *v.* Carter, 9 Kan. 674, 679.

Louisiana.— Taylor *v.* Hill, 21 La. Ann. 626, 627; Smith *v.* Stewart, 21 La. Ann. 67, 69, 76, 99 Am. Dec. 709; Rabel *v.* Pourciau, 20 La. Ann. 131, 132; Murphy *v.* Guiterez, 17 La. Ann. 269, 270; New Orleans Canal, etc., Co. *v.* Beard, 16 La. Ann. 345, 347, 79 Am. Dec. 582; Norton *v.* Sterling, 15 La. Ann. 399; Reynolds *v.* Batson, 11 La. Ann. 729, 730; Martin *v.* Jennings, 10 La. Ann. 553; Boyle *v.* Mann, 4 La. Ann. 170, 171; Hatch *v.* Gilmore, 3 La. Ann. 508, 509; Smith *v.* Taylor, 10 Rob. 133, 135; Guilliet *v.* Erwin, 7 La. 580, 581; Landry *v.* L'Eglise, 3 La. 219, 221; Ayraud *v.* Babin, 7 Mart. N. S. 471, 481; Morgan *v.* Robinson, 12 Mart. 76, 77, 13 Am. Dec. 366; Quierry *v.* Faussier, 4 Mart. 609, 611.

Missouri.— North *v.* Walker, 2 Mo. App. 174, 182.

Texas.— Tyson *v.* Britton, 6 Tex. 222, 223.

England.—Huber *v.* Steiner, 2 Bing. N. Cas. 202, 215, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501; Rimington *v.* Cannon, 12 C. B. 18, 33, 22 L. J. C. P. 153, 1 Wkly. Rep. 291, 20 Eng. L. & Eq. 246, 74 E. C. L. 18.

Canada.— Montreal *v.* McGee, 30 Can. Supreme Ct. 582, 595; Canadian Pac. R. Co. *v.* Robinson, 19 Can. Supreme Ct. 292, 329; Marsan *v.* Poirier, 4 Quebec Q. B. 335, 337.

This maxim "has been applied to prescriptions liberandi causa in three classes of cases: 1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; a class of cases recognized by the Roman law as proper for the allowance of the *utile tempus*. . . . 2nd. The second class of cases are those where there was some condition or matter coupled with the contract or connected with the proceeding which pre-

CONTRA OFFICII SUI DEBITUM. Contrary to the duty of his office.[37]

CONTRA OMNES GENTES. Against all peoples; formal words in old covenants of warranty.[38]

CONTRA OMNES MORTALES. Against all mortals; the form in which absolute warrandice is sometimes expressed.[39]

CONTRA PACEM. Against the peace.[40] (See, generally, INDICTMENTS AND INFORMATIONS.)

CONTRA PACEM DOMINI REGIS ET CONTRA FORMAM STATUT' IN HOC CASU NUPER EDIT' ET PROVIS'. Against the king's peace, and contrary to the form of the statute in this case lately enacted and provided.[41] (See, generally, INDICTMENTS AND INFORMATIONS.)

CONTRA PIETATEM. Contrary to natural duty.[42]

CONTRAPLACITUM. In old English law, a counter plea.[43]

CONTRA PROFERENTEM. Against the party who proffers or puts forward a thing.[44]

CONTRARIENTS. Those who were opposed to the government, but were neither rebels nor traitors.[45]

CONTRARIORUM CONTRARIA EST RATIO. A maxim meaning "The reason of contrary things is contrary."[46]

CONTRAROTULATOR. A controller.[47]

CONTRAROTULATOR CUSTOMARUM. Controller of the customs.[48]

CONTRAROTULATOR HOSPITII DOMINI REGIS. Controller of the king's household.[49]

CONTRAROTULATOR PIPÆ. CONTROLLER OF THE PIPE,[50] *q. v.*

CONTRAROTULUS. In old English law, a counter roll.[51]

CONTRARY TO LAW. Contrary to the general principles of the law as applicable to the facts;[52] contrary to the instructions.[53]

CONTRA SPOLIATOREM OMNIA PRÆSUMUNTUR. A maxim meaning "All things are to be presumed in disfavor of the spoliator."[54]

vented the creditor from suing or acting. . . . 3d. The third class of cases is where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action." Reynolds *v.* Batson, 11 La. Ann. 729, 730 [*quoted* in Rabel *v.* Pourciau, 20 La. Ann. 131, 132; New Orleans Canal, etc., Co. *v.* Beard, 16 La. Ann. 345, 347, 79 Am. Dec. 582].

37. Adams Gloss.

38. Burrill L. Dict. [*citing* Fleta, lib. 3, c. 14, § 11].

39. Trayner Leg. Max.

40. A phrase used in the Latin forms of indictments, and also of actions for trespass, to signify that the offense alleged was committed against the public peace, i. e., involved a breach of the peace. The full formula was *contra pacem domini regis*, against the peace of the lord the king. In modern pleading, in this country, the phrase "against the peace of the commonwealth" or "of the people" is used. Black L. Dict. See also ARREST, 3 Cyc. 936, note 6; BARRATRY, 5 Cyc. 619.

An indictment for a positive offense must charge it to have been *contra pacem*. Reg. *v.* Lane, 2 Ld. Raym. 1034.

When necessary in an action of tort see Melwood *v.* Leech, 1 Ld. Raym. 38; Doulson *v.* Matthews, 4 T. R. 503, 2 Rev. Rep. 448. And *compare* Gardner *v.* Thomas, 14 Johns. (N. Y.) 134, 135, 7 Am. Dec. 445.

41. Tayler L. Gloss.

42. Trayner Leg. Max.

43. Burrill L. Dict. [*citing* Townsend Pl. 61].

44. Black L. Dict. In Priestley *v.* Foulds, 2 Man. & G. 175, 194, Coltman, J., said: "This is an enactment for the benefit of a particular class of persons, and ought to be construed so as to protect the public against inconvenience. The words of the act must be considered as the language of the company, which ought to be construed *fortius contra proferentem*."

45. So used in time of Edward II. Jacob L. Dict.

46. Morgan Leg. Max.

47. Burrill L. Dict.

48. Burrill L. Dict.

49. Burrill L. Dict. [*citing* Fleta, lib. 2, c. 14, § 2; Townsend Pl. 209].

50. Burrill L. Dict.

51. Burrill L. Dict.

52. Candy *v.* Hanmore, 76 Ind. 125, 128 [*citing* Bosseker *v.* Cramer, 18 Ind. 44, 45; Buskirk Pr. p. 239].

53. Valerius *v.* Richard, 57 Minn. 443, 445, 59 N. W. 534, construing Minn. Gen. Stat. (1878) c. 66, § 253, subd. 5.

54. Craig *v.* Anglesea, 17 How. St. Tr. 1139, 1430, per Baron Mounteney.

Applied or explained in the following cases:

California.— Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 415, 41 Pac. 308.

Illinois.— Cartier *v.* Troy Lumber Co., 138

CONTRA SPOLIUM. Against the spoil.[55]

CONTRAT. In French law, a contract.[56] (See, generally, CONTRACTS.)

CONTRA TABULAS. In the civil law, against the will (testament).[57]

CONTRATALLIA. In old English law, a counter-tally; a term used in the exchequer.[58]

CONTRATENERE. To hold against; to withhold.[59]

CONTRA VADIUM ET PLEGIUM. In old English law, against gage and pledge.[60]

CONTRAVENING EQUITY. A right or equity, in another person, which is inconsistent with and opposed to the equity sought to be enforced or recognized.[61]

CONTRAVENIRE. In old English law, to contravene; to go against; to violate.[62]

CONTRAVENTION. In Scotch law, the act of breaking through any restraint imposed by deed, by covenant, or by a court.[63]

CONTRA VERITATEM LEX NUMQUAM ALIQUID PERMITTIT. A maxim meaning "The law never suffers anything contrary to truth."[64]

CONTRAXISSE UNUSQUISQUE IN EO LOCO INTELLIGITUR, IN QUO SOLVERET SE OBLIGAVIT.[65] A maxim meaning "Every one is understood to have contracted in that place where he has bound himself to pay."[66]

CONTRE or **CONTER.** Against.[67]

CONTRECTARE. In the civil law, to handle; to take hold of; to meddle with.[68] In old English law, to treat.[69]

CONTRECTATÆ. Things meddled with; as by a thief, who feloniously intermeddles with the property of another.[70]

Ill. 533, 539, 28 N. E. 932, 14 L. R. A. 470 [*citing* Greenleaf Ev. § 37; Lawson Presumpt. Ev. 120]; Cothran *v.* Ellis, 125 Ill. 496, 507, 16 N. E. 646.

Massachusetts.— Simes *v.* Rockwell, 156 Mass. 372, 374, 31 N. E. 484; Joannes *v.* Bennett, 87 Mass. 169, 172, 81 Am. Dec. 738.

New York.—Armour *v.* Gaffey, 30 N. Y. App. Div. 121, 126, 51 N. Y. Suppl. 846.

Wyoming.— Hay *v.* Peterson, 6 Wyo. 419, 434, 45 Pac. 1073, 34 L. R. A. 581 [*citing* Best Ev. § 412].

England.— Simpson *v.* Clarke, 2 C. M. & R. 342, 347; Craig *v.* Anglesea, 17 How. St. Tr. 1139, 1430; Cowper *v.* Cowper, 2 P. Wms. 720, 748, 24 Eng. Reprint 930.

"The presumption contra spoliatorem also arises when a party to a suit or controversy willfully destroys or suppresses, by wrongful or dishonest means, a deed, will, or other instrument which belongs to, or would be admissible if called for by, the opposite party, and will justify a court or jury in drawing the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which they have thus been precluded from using and examining as a means for the discovery of truth." Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 416, 41 Pac. 308 [*quoting* 1 Smith Lead. Cas. 589].

55. Trayner Leg. Max.

56. In French law, contracts are of the following varieties: (1) *bilateral*, or *synallagmatique*, where each party is bound to the other to do what is just and proper; or (2) *unilateral*, where the one side only is bound; or (3) *commutatif*, where one does to the other something which is supposed to be an equivalent for what the other does to him; or (4) *aleatoire*, where the consideration for the act of the one is a mere chance; or (5) *contrat de bienfaisance*, where the one party procures to the other a purely gratuitous benefit; or (6) *contrat a titre onereux*, where each party is bound under some duty to the other. Brown L. Dict.

57. Burrill L. Dict. [*citing* Dig. 37, 4].

58. Burrill L. Dict.

59. Burrill L. Dict.

60. Black L. Dict. [*citing* Bracton, fol. 15*b*].

61. Black L. Dict.

62. Burrill L. Dict.

63. Burrill L. Dict. [*citing* 1 Kames Eq.].

64. Wharton L. Lex.

65. A maxim of the Roman law.—See London, etc., Bank *v.* Maguire, 8 Quebec Super. Ct. 358, 360; Darling *v.* Hitchcock, 28 U. C. Q. B. 439, 452.

Adopted in the civil law.— Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 321, 13 Eng. Reprint 704.

66. Tayler L. Gloss.

Applied or explained in: Allen *v.* Kemble, 13 Jur. 287, 6 Moore P. C. 314, 321, 13 Eng. Reprint 704; London, etc., Bank *v.* Maguire, 8 Quebec Super. Ct. 358, 360; Darling *v.* Hitchcock, 28 U. C. Q. B. 439, 452, where it is said: "'Where the contract is, either expressly or tacitly, to be performed in any other place' (than the place it was made) 'there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice.'"

67. Stimson L. Gloss.

68. Black L. Dict.

69. Burrill L. Dict. [*citing* Fleta, lib. 1, c. 17, § 4].

70. Trayner Leg. Max.

CONTRECTATIO. A handling or meddling with; the improper or unauthorized use of a thing. The term is employed in the civil law in the definition of theft, (*furtum*).[71]

CONTRECTATIO REI ALIENÆ, ANIMO FURANDI, EST FURTUM. A maxim meaning "The touching another's property with intent to steal is theft."[72]

CONTREFACON. In French law, the offense of printing or causing to be printed a book, the copyright of which is held by another, without authority from him.[73]

CONTREFAIRE. To imitate; to counterfeit.[74]

CONTRIBUTE. To give or grant in common with others; give to a common stock or for a common purpose; furnish as a share or constituent part of anything.[75]

CONTRIBUTIO LUCRI ET DAMNI. Distribution of, or sharing in, profit and loss.[76] (See, generally, PARTNERSHIP.)

71. Burrill L. Dict.
72. Stimson L. Gloss.
73. Black L. Dict. [*citing* Merlin Repert.].
74. Burrill L. Dict. [*citing* Kelham Norm. Dict.].
75. Century Dict.
"He who will contribute to the next rate is as much within the present tense 'contributing' as he who has contributed to the last." Reg. *v.* Kershaw, 6 E. & B. 999, 1007, 2 Jur. N. S. 1139, 26 L. J. M. C. 19, 5 Wkly. Rep. 53, 88 E. C. L. 999, construing a statute in relation to highway rates.
76. Trayner Leg. Max.

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CROSS-REFERENCES

For Matters Relating to:
Contribution Between:
Corporation Officers, see CORPORATIONS.
Cotenants, see JOINT TENANCY; TENANCY IN COMMON.
Cotrustees, see TRUSTS.
Counties on Division of Territory, see COUNTIES.
Devisees and Legatees, see WILLS.
Fraudulent Grantees of Land Taken to Pay Grantor's Debts, see FRAUDULENT CONVEYANCES.
Guarantors, see GUARANTY.
Heirs For Debts of Decedent, see DESCENT AND DISTRIBUTION.
Insurers, see INSURANCE.
Joint Purchasers of Land, see VENDOR AND PURCHASER.
Lessor and Lessee:
For Assessments, see LANDLORD AND TENANT.
For Repairs, see LANDLORD AND TENANT.
Life-Tenant and Remainder-Man, see LIFE-ESTATES.
Members of Joint-Stock Companies, see JOINT-STOCK COMPANIES.
Mortgagor and Grantee of One Parcel of Mortgaged Land, see MORTGAGES.
Parties to Arbitration, see ARBITRATION AND AWARD.
Parties to Joint Adventure, see JOINT ADVENTURES.
Partners, see PARTNERSHIP.
Part Owners of Vessel, see SHIPPING.
Purchasers of Mortgaged Land, see MORTGAGES.
Stock-Holders, see CORPORATIONS.
Subpurchasers of Land Subject to Vendor's Lien, see VENDOR AND PURCHASER.
Sureties:
And Creditors of Principal, see PRINCIPAL AND SURETY.
Generally, see PRINCIPAL AND SURETY.
Contribution by:
County to Aid Township in Erecting Bridge, see BRIDGES.
Widow to Discharge Encumbrance on Land, see DOWER.
Contribution to:
Establishment of Bridges Over Boundaries, see BRIDGES.
Expense of Maintaining Dams, see WATERS.
Fees to Fence-Viewers, see FENCES.
Express Agreements to Contribute, see CONTRACTS; SUBSCRIPTIONS.
General Average, see SHIPPING.
Subjection of Land in Case of Several Conveyances:
Encumbered by Judgment Lien, see JUDGMENTS.
Encumbered by Mortgage, see MORTGAGES.
Subrogation, see SUBROGATION.
Use of Party-Wall, see PARTY-WALLS.

I. DEFINITION.

Contribution has been defined to be a payment made by each, or by any, of several having a common interest of liability of his share in the loss suf-

fered, or in the money necessarily paid by one of the parties in behalf of the others.[1]

II. BETWEEN PERSONS LIABLE EX CONTRACTU.

A. Basis of Right and Obligation — 1. IN GENERAL. The right to contribution has its foundation in, and is controlled by, principles of equity and natural justice and does not arise from contract;[2] but, although the doctrine so originated, it is now almost universally enforced in courts of law on the theory of an implied contract of contribution existing between parties jointly liable *ex contractu*.[3]

2. COMMON LIABILITY — a. In General — (I) *NECESSITY OF.* This principle

1. Canosia Tp. *v.* Grand Lake Tp., 80 Minn. 357, 359, 83 N. W. 346.

In a popular sense it is "the act of giving to a common stock, or in common with others, that which is given to a common stock or purpose." Webster Dict. [*quoted* in Parks *v.* American Home Missionary Soc., 62 Vt. 19, 26, 20 Atl. 107].

2. *Alabama.*— Owen *v.* McGehee, 61 Ala. 440; White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283.

California.— Taylor *v.* Reynolds, 53 Cal. 686.

Illinois.— Golsen *v.* Brand, 75 Ill. 148.

Maryland.— Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Craig *v.* Ankeney, 4 Gill 225.

Massachusetts.— Mason *v.* Lord, 20 Pick. 447; Chaffee *v.* Jones, 19 Pick. 260.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379.

New Hampshire.— Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

New York.— Aspinwall *v.* Sacchi, 57 N. Y. 331; Aspinwall *v.* Torrance, 1 Lans. 381, 384 (where it is said: "The equitable doctrine of contribution rests upon the principle, that where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose"); Norton *v.* Coons, 3 Den. 130; Campbell *v.* Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570.

North Carolina.— Allen *v.* Wood, 38 N. C. 386; Moore *v.* Moore, 11 N. C. 358, 15 Am. Dec. 523.

Ohio.— Oldham *v.* Broom, 28 Ohio St. 41; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Hartwell *v.* Smith, 15 Ohio St. 200; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Pennsylvania.— Armstrong County *v.* Clarion County, 66 Pa. St. 218, 2 Am. Rep. 368; Kalbach's Estate, 2 Woodw. 415.

South Carolina.— Harris *v.* Ferguson, 2 Bailey 397; McKenna *v.* George, 2 Rich. Eq. 15.

Texas.— Glasscock *v.* Hamilton, 62 Tex. 143.

Vermont.— Miller *v.* Sawyer, 30 Vt. 412; Swain *v.* Barber, 29 Vt. 292.

See 11 Cent. Dig. tit. "Contribution," § 1.

It is based upon the equitable maxim "Equality is equity." Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196; Norton *v.* Coons, 3 Den. (N. Y.) 130; Moore *v.* Moore, 11 N. C. 358, 15 Am. Dec. 523.

"It is an admitted principle of law, that where parties stand in *æquali jure*, with reference to liabilities arising *ex contractu*, equality of burthen becomes equity." Crayton *v.* Johnson, 27 Ala. 503, 506 [*citing* 4 Kent Comm. 390, 391].

3. *California.*—Chipman *v.* Morrill, 20 Cal. 130.

Illinois.— Harvey *v.* Drew, 82 Ill. 606; Drummond *v.* Yager, 10 Ill. App. 380 (where it is said that persons acting under circumstances to which the principle applies act under the head of contract implied from the universality of the principle and that upon this ground stands the jurisdiction assumed by courts of law).

Indiana.— Norris *v.* Churchill, 20 Ind. App. 668, 51 N. E. 104.

Kentucky.— Mitchell *v.* Sproul, 5 J. J. Marsh. 264.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379; Labeaume *v.* Sweeney, 17 Mo. 153 (holding that in matters of contract a promise for contribution is raised by implication in favor of an obligor on a joint undertaking who pays the entire debt against his co-obligor); Hanna *v.* Hyatt, 67 Mo. App. 308.

New York.— Tobias *v.* Rogers, 13 N. Y. 59, to the effect that the law following equity will imply a promise to contribute in order to afford a remedy. See also the opinion of Kent, Ch., in Campbell *v.* Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570.

Compare Re Bentinck, 80 L. T. Rep. N. S. 71. In this case a father, on the marriage of his son, entered, together with his son, into a joint and several covenant with the trustees of the marriage settlement to pay a certain sum of money six months after his death, and had specifically charged some of his own property with payment of the same. The son, at the date of the marriage, was possessed of a reversionary interest only which he brought into the settlement. The father having died insolvent, the security had to be realized and the court declined to infer, in the absence of express contract, an intention on the part of the father to reserve a right to his executors to sue his son for contribution. See also Craythorne *v.* Swinburne, 14 Ves.

of equity can apply only in cases where the situations of the parties are equal; for equality among persons whose situations are not equal is not equitable.[4]

(II) *What Constitutes.* The situations of the parties are equal when the parties are under a common burden or liability,[5] or where all are bound for the same debt, whether they are jointly or severally bound, whether by the same or different instruments,[6] or whether they knew of each other's engagements or not.[7]

(III) *Effect of Discharge of One Coöbligor.* As a general rule the discharge or release of the direct liability of one coöbligor to the obligee will not avail him as a discharge from his liability for contribution to the other coöbligors unless the discharge be of a character to release the others also,[8] but this is not true of a discharge under the bankruptcy laws,[9] and, by the weight of authority, one who has been compelled by suit to pay the debt cannot obtain contribution from his coöbligor as to whom the cause of action was barred at the date of the judgment.[10]

Jr. 160, 9 Rev. Rep. 264, where Lord Eldon regretted that courts of law ever assumed jurisdiction of the subject.

4. Cundiff *v.* Hail, 3 A. K. Marsh. (Ky.) 50 (holding that where a grantor appears to be jointly bound in a deed to the whole extent, but is really bound for only half the land, and no part of the land which his warranty is intended to secure be lost, he cannot be bound to contribute anything to his co-grantee who has been obliged to pay for the breach of the warranty); Moore *v.* Moore, 11 N. C. 358, 15 Am. Dec. 523; Grubb *v.* Cottrell, 62 Pa. St. 23. See also Hartwell *v.* Smith, 15 Ohio St. 300.

5. Screven *v.* Joyner, 1 Hill Eq. (S. C.) 252, 26 Am. Dec. 199.

Relationship of partners is not necessary between two joint contractors in order to maintain an action for contribution. Finlay *v.* Stewart, 56 Pa. St. 183.

Assignees for benefit of creditors.— Where an insolvent makes two different assignments for the benefit of creditors, at one time to one assignee and at another time to another, and the first assignee pays a claim against the insolvent, he is entitled to contribution from the fund assigned to the other assignee. Downing *v.* Kintzing, 2 Serg. & R. (Pa.) 326.

Liability by contract and for tort arising therefrom.— There is no contribution between one who is liable by contract and another responsible for a tort arising out of the contract. Brannin *v.* Loving, 82 Ky. 370.

Tracts subject to mortgage successively conveyed.— Where parcels of a tract of land subject to a mortgage are successively conveyed, the vendees of such parcels are not in *æquali jure*, but the mortgage is satisfied by the different parcels of the land in the inverse order of their conveyance. Parkman *v.* Welch, 19 Pick. (Mass.) 231; Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235. See also Springer *v.* Foster, 27 Ind. App. 15, 60 N. E. 720; Jenkins *v.* Craig, 22 Ind. App. 192, 52 N. E. 423, 53 N. E. 427; Allen *v.* Clark, 17 Pick. (Mass.) 47; and, generally, MORTGAGES.

Where several persons selected a common agent to sell their notes and the agent was to return the proceeds each to the several makers, but fraudulently pledged all the notes as security for a debt of his own, and the pledgee, who was a *bona fide* holder for value without notice, collected sufficient of the notes to pay the debt, all those whose notes were so pledged stood on the same footing, and those whose notes were paid in whole or in part were held entitled to contribution from the others, regardless of the time when the several notes matured. McBride *v.* Potter-Lovell Co., 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 265.

6. Stockmeyer *v.* Oertling, 35 La. Ann. 467; Aspinwall *v.* Sacchi, 57 N. Y. 331; Armitage *v.* Pulver, 37 N. Y. 494; Durbin *v.* Kuney, 19 Oreg. 71, 23 Pac. 661; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 White & T. Lead. Cas. Eq. 114; Story Eq. Jur. § 495.

7. Durbin *v.* Kuney, 19 Oreg. 71, 23 Pac. 661 [*citing* Chaffee *v.* Jones, 19 Pick. (Mass.) 260]. See also Norton *v.* Coons, 3 Den. (N. Y.) 130, holding that it was immaterial that a person who had signed as surety was liable for contribution to another, although it had been represented to the former before he signed that the latter was primarily liable.

8. Boardman *v.* Paige, 11 N. H. 431; Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196; Penn *v.* Bahnson, 89 Va. 253, 15 S. E. 586. See also Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499, holding that a creditor cannot, by any assignment or act of his, deprive his codebtors of their right of contribution against each other.

Where one of several joint obligors is discharged under an insolvency proceeding and subsequently his coöbligors pay the judgment against them, they have a right of contribution from the insolvent. Ellsworth *v.* Caldwell, 27 How. Pr. (N. Y.) 188.

9. Dean *v.* Speakman, 7 Blackf. (Ind.) 317; Tobias *v.* Rogers, 13 N. Y. 59.

10. Spelman *v.* Talbot, 123 Mass. 489; Shelton *v.* Farmer, 9 Bush (Ky.) 314; Screven *v.* Joyner, 1 Hill Eq. (S. C.) 252, 26 Am. Dec. 199. *Contra*, Whipple *v.* Stevens, 19 N. H. 150; Peaslee *v.* Breed, 10 N. H. 489, 34 Am. Dec. 178.

b. Of Joint Debtors — (i) *In General.* Every joint debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his codebtors.[11]

(ii) *Coöbligors on Notes and Bonds.* Where one of the makers of a promissory note[12] or bond[13] pays it,[14] he may have contribution from his coöbligors, and the fact that one obligor pays a certain sum in consideration of his full discharge does not bar him from his right of contribution from each of his coöbligors for his share of the excess so paid,[15] but there is no equity of contribution where a payment was really in discharge of a valid claim of a co-promisor,[16]

11. Harvey *v.* Drew, 82 Ill. 606; Hodgson *v.* Baldwin, 65 Ill. 532; Pixley *v.* Gould, 13 Ill. App. 565; Dean *v.* Speakman, 7 Blackf. (Ind.) 317; Morrison *v.* Warner, 200 Pa. St. 315, 49 Atl. 983.

Where an award directs two persons to pay each a certain sum of money to a builder and one is obliged to pay the whole amount on account of the refusal of the other to pay a share, the person so paying can compel contribution from the other. Allen *v.* Coy, 7 U. C. Q. B. 419.

Where several persons agree to equally aid and care for a third person, a decree in equity for contribution may be warranted where one of such persons so agreeing has paid more than his share. Jacobsmeyer *v.* Jacobsmeyer, 88 Mo. App. 102; Odiorne *v.* Moulton, 64 N. H. 211, 9 Atl. 625.

12. *Illinois.*— Hoyt *v.* Lott, 41 Ill. 119, where the maker of a note for purchase-money having died certain distributees of his estate gave their joint note to the holder of the note of the deceased, payable in one year, and judgment having been rendered on the latter note, and the makers not having paid their shares of the judgment, execution was levied on the land of one, and he, having redeemed the land from sale, was held entitled to contribution from his co-promisors.

Indiana.— Judd *v.* Small, 107 Ind. 398, 8 N. E. 284; Sexton *v.* Sexton, 35 Ind. 88; Dean *v.* Speakman, 7 Blackf. 317. See also Norris *v.* Churchill, 20 Ind. App. 668, 51 N. E. 104, where it was contended that, where defendant paid his share of a joint note and the balance of the note was paid by a negotiable promissory note given by the other makers of the original note, one of the makers of the second note, who was obliged to pay the whole amount of it on account of the insolvency of his co-promisors, could not compel contribution from the defendant, but where the court held defendant liable to contribution on the implied contract which existed between the makers of the original note.

Kentucky.— Graziani *v.* Hall, 67 S. W. 9, 23 Ky. L. Rep. 2351.

Louisiana.— Durac *v.* Ferrari, 25 La. Ann. 80, holding that costs for protest and for copying the act of mortgage could also be included in the claim for contribution.

Maine.— Soule *v.* Frost, 76 Me. 119; Hardy *v.* Colby, 42 Me. 381; Goodall *v.* Wentworth, 20 Me. 322.

Maryland.— *In re* Wheeler, 1 Md. Ch. 80.

Massachusetts.— Packard *v.* Nye, 2 Metc. 47.

New Hampshire.— See Davis *v.* Stevens, 10 N. H. 186.

New York.— Kimball *v.* Williams, 51 N. Y. App. Div. 616, 65 N. Y. Suppl. 69.

Pennsylvania.— See *In re* Hoge, 188 Pa. St. 527, 41 Atl. 621.

See 11 Cent. Dig. tit. "Contribution," § 4.

An assignee for creditors who pays more than his assignor's share of a joint note may enforce contribution against the other co-promisors of the note. Goepper *v.* Heckle, 5 Ohio Dec. (Reprint) 493, 6 Am. L. Rec. 284.

Contribution between successive indorsers see Commercial Paper, 7 Cyc. 828.

Where a note signed by principal and sureties was renewed by the sureties alone, it was held that they thereupon became joint principals on the new note and upon the payment of that note by one of them he was entitled to contribution from his coöbligors without allegation or proof of the insolvency of the principal in the original note. Graziani *v.* Hall, 67 S. W. 9, 23 Ky. L. Rep. 2351.

That one of the joint and several obligors agreed to and did hold harmless one of the others in order to induce him to sign the note does not affect the right of contribution against the others, whether or not they knew of such an agreement when they signed the note. Murphy *v.* Gage, (Tex. Civ. App. 1893) 21 S. W. 396.

13. Carroll *v.* Bowie, 7 Gill (Md.) 34; Pully *v.* Pass, 123 N. C. 168, 31 S. E. 478. See also Craig *v.* Craig, 5 Rawle (Pa.) 91, holding that an obligor to whom the bond has been delivered by the obligee on a promise of payment, actual or conditional, may on payment pursuant to such promise maintain an action for contribution against his coöbligors.

14. Contribution may be had for the interest money paid on a note or bond. Simpson *v.* Gardiner, 97 Ill. 237; McCready *v.* Van Antwerp, 24 Hun (N. Y.) 322.

15. Merchants' Nat. Bank *v.* McAnulty, 89 Tex. 124, 33 S. W. 963 [*reversing* (Tex. Civ. App. 1895) 32 S. W. 376].

16. One who purchased certain lots, jointly with defendant, executing his notes with her *in solido* for the price, and who afterward paid the notes at maturity, cannot recover from the latter her proportion of the notes so paid, where the evidence shows that defendant had been seduced by plaintiff when she

or where the consideration for which the co-promisor signs the note or the bond fails.[17]

(III) *JUDGMENT DEBTORS*—(A) *For Damages.* Where one of several co-defendants has been compelled to pay the amount of a judgment or decree founded on contract, he may compel contribution from the others,[18] and the fact that judgment was taken against only one of several persons jointly liable does not affect the right of contribution.[19]

(B) *For Costs.* As the costs are incident to the debt, he may have contribution against the other judgment debtors for the payment of the costs of the judgment,[20] but this right is not extended to the expenses he incurs in defending the suit unless the parties between whom contribution is sought agreed to bear expenses jointly.[21] Where judgment is recovered against one of several coöbligors, a judgment debtor is not entitled to contribution from his coöbligors for

was his house servant, and that she was living in concubinage with him when he took up the notes at their maturity and paid her portion of the notes in reparation of the wrong he had done her. Labenelle *v.* Deconet, 2 La. Ann. 545.

17. Thus where a man bought land and persuaded his brother to execute a joint note with him, promising as a consideration to convey to the brother an undivided half interest in the land, and through various intermediate conveyances and mortgages the brother received no benefit from the deed given him, no contribution can be enforced where his brother and grantor had to pay a judgment on their joint note. Hunt *v.* Hunt, 45 N. J. Eq. 360, 13 Atl. 248, 19 Atl. 623.

18. *Kentucky.*— Mitchell *v.* Sproul, 5 J. J. Marsh. 264; Dupuy *v.* Johnson, 1 Bibb 562.

Maryland.— *In re* Wheeler, 1 Md. Ch. 80.

New Hampshire.— Boardman *v.* Paige, 11 N. H. 431.

New Jersey.— Ruckman *v.* Decker, 28 N. J. Eq. 5. *Compare* Brown *v.* White, 29 N. J. L. 307, 80 Am. Dec. 226.

New York.— Neilson *v.* Neilson, 5 Barb. 565; Scribner *v.* Hickok, 4 Johns. Ch. 530; North American F. Ins. Co. *v.* Handy, 2 Sandf. Ch. 492.

Ohio.— Gaster *v.* Waggoner, 26 Ohio St. 450.

Tennessee.— Hickman *v.* Searcy, 9 Yerg. 47, payment of judgment on a joint covenant of warranty.

Texas.— Stark *v.* Carroll, 66 Tex. 393, 1 S. W. 188, co-defendants in partition suit.

Compare Mehaffy *v.* Share, 2 Penr. & W. (Pa.) 361.

See 11 Cent. Dig. tit. "Contribution," § 3.

In Minnesota, under Gen. Stat. (1878), c. 66, § 330, one of several debtors, against whom a joint judgment is rendered, who pays more than his proportion, files notice of his payment, and claims contribution, is *ipso facto* subrogated to the right of the judgment creditor in the judgment, and he may issue execution thereon to enforce contribution on the other judgment debtors. Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320.

Satisfaction of the execution by a levy upon the lands of the debtor's grantee, to whom the debtor conveyed after the land was attached on mesne process, and before judgment, is not a satisfaction by the execution debtor, which entitles him to maintain an action of contribution against his co-defendants, for the satisfaction in such a case is from the grantee of the complainant and not from him. Mussey *v.* McLellan, 19 Me. 161.

19. Hoxie *v.* Farmers', etc., Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637.

Where the other coöbligors were not made parties, it has been held that the obligor against whom judgment was taken, who did not plead in abatement the defect of parties, cannot have contribution against the others who were jointly liable. Murray *v.* Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466. But in Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233, the court said that plaintiff in contribution who had been the only obligor sued "was under no obligation to the others to plead in abatement in the absence of any request, they having knowledge of the suit and an opportunity to join in the effort to defeat it."

20. *Maine.*— Davis *v.* Emerson, 17 Me. 64.

Massachusetts.— Newcomb *v.* Gibson, 127 Mass. 396.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379.

New Hampshire.— Hayes *v.* Morrison, 38 N. H. 90.

Canada.— Gage *v.* Mulholland, 16 Grant Ch. 145.

Where fees of arbitrators appointed by rule of court were paid by one of the parties to the suit, he is entitled to contribution for the excess of his share from the other party. Russell *v.* Page, 147 Mass. 282, 17 N. E. 536.

21. Hayes *v.* Morrison, 38 N. H. 90. *Compare* Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233, where plaintiff, defendant, and others had been jointly liable to a person whose services were rendered to them, and defendant had objected to the charge for the services of the said person as unreasonable, plaintiff properly refused to pay the charge until it had been judicially investigated, and therefore defendant was liable to contribute to the expense and cost to which plaintiff had been subjected in the suit of the creditor.

costs, for in such a case it is not considered that he has discharged a common burden.[22]

c. Of Land. Where land is charged with a burden, each part should bear no more than its due proportion of the charge, and where the owner of any part of such land is compelled to pay more than his proportion of the charge, equity will enforce contribution against the owners of the other parts.[23]

d. Of Principals. Although the doctrine of contribution is most frequently invoked for adjusting the equities between cosureties it is equally applicable between those jointly bound on their own account.[24]

3. Payment — a. Necessity of — (I) *In General.* The right to contribution is inchoate from the date of the creation of the relation between the parties,[25] but is not complete, so as to be enforceable, until there has been an actual payment in whole or in part of the common obligation or until something is done equivalent to a discharge thereof.[26]

(II) *Compulsory Payment.* To entitle one to contribution the payment

22. Boardman *v.* Paige, 11 N. H. 431; Knight *v.* Hughes, 3 C. & P. 467, M. & M. 247, 14 E. C. L. 666.

23. *Connecticut.*— Osborn *v.* Carr, 12 Conn. 195.

Illinois.— Brown *v.* Shurtleff, 24 Ill. App. 569. See also Briscoe *v.* Power, 85 Ill. 420.

Iowa.— Massie *v.* Wilson, 16 Iowa 390. See also Griffith *v.* Lovell, 26 Iowa 226.

Massachusetts.— Allen *v.* Clark, 17 Pick. 47; Taylor *v.* Porter, 7 Mass. 355.

New Hampshire.— Aiken *v.* Gale, 37 N. H. 501.

New York.— Sawyer *v.* Lyon, 10 Johns. 32; Stevens *v.* Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499.

Pennsylvania.— Fisher *v.* Clyde, 1 Watts & S. 544; Donagan *v.* McKee, 13 Phila. 48, 36 Leg. Int. 124.

Texas.— Beck *v.* Tarrant, 61 Tex. 402.

Vermont.— Danforth *v.* Smith, 23 Vt. 247, 259, where it is said: "The general rule of equity is, that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute according to their relative value at the time the contribution becomes obligatory."

See 11 Cent. Dig. tit. "Contribution," § 2.

Dower.— The principle is applicable to dower as well as to other encumbrances. Eliason *v.* Eliason, 3 Del. Ch. 260. See also U. S. Bank *v.* Delorac, Wright (Ohio) 285, where several creditors levied execution upon separate parcels of a debtor's real estate and after the debtor's death his widow's dower was set off in only one of these parcels. The proceeds of each lot, upon the sale of the land, was paid to each creditor who had levied upon it, and the creditor who had levied upon the tract out of which the dower had been set off was held entitled to contribution from the other creditors.

Inverse order of alienation.— The estates of different grantees, who have purchased different parcels of encumbered property at different times, are liable to contribute ratably, not in the inverse order of alienation, to the payment of a prior judgment which was held to be a lien upon their whole original tract. Massie *v.* Wilson, 16 Iowa 390. See also Griffith *v.* Lovell, 26 Iowa 226; Jobe *v.* O'Brien, 2 Humphr. (Tenn.) 34 [which has practically been *overruled* by Thompson *v.* Pyland, 3 Head (Tenn.) 537; Wright *v.* Atkinson, 3 Sneed (Tenn.) 585].

24. *California.*— Chipman *v.* Morrill, 20 Cal. 130.

Georgia.— Green *v.* Mann, 76 Ga. 246.

Illinois.— Ballance *v.* Frisby, 3 Ill. 63.

Indiana.— Warring *v.* Hill, 89 Ind. 497.

Maryland.— Owens *v.* Collinson, 3 Gill & J. 25.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379 [*citing* 1 Madd. Ch. 235, 236, and note 2].

New York.— Kimball *v.* Williams, 51 N. Y. App. Div. 616, 65 N. Y. Suppl. 69.

See 11 Cent. Dig. tit. "Contribution," § 2.

25. Norris *v.* Churchill, 20 Ind. App. 668, 51 N. E. 104.

26. Weidemeyer *v.* Landon, 66 Mo. App. 520; Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713. See also Norris *v.* Churchill, 20 Ind. App. 668, 51 N. E. 104.

An execution on a judgment obtained against plaintiff and defendant jointly furnishes no ground of action unless the execution is satisfied. Kirkpatrick *v.* Murphy, 3 N. J. L. 951.

The garnishing by the creditor of a debt due to one of two joint contractors against whom judgment has been rendered on the joint claim is, to all intents and purposes, a satisfaction of the creditor's judgment and gives the judgment debtor whose debt has been so garnished a right at once to sue his coöbligor for contribution. Gillilan *v.* Nixon, 26 Ill. 50.

Where a negotiable note is accepted in payment of the debt, he who executes the note has the right of contribution against his coöbligors. Owen *v.* McGehee, 61 Ala. 440; Greene *v.* Anderson, 102 Ky. 216, 43 S. W. 195; 19 Ky. L. Rep. 1187; Chandler *v.* Brainard, 14 Pick. (Mass.) 285.

Bill of exchange.— Where a vessel was captured and one of the parties interested agreed with the captors, in order to obtain

must be compulsory in the sense that the party paying was under legal obligation to pay,[27] but according to the weight of authority it is not necessary to make the payment involuntary that suit should have been instituted against the person seeking contribution[28] or that a levy should have been made on his goods.[29] It is not necessary that the payment should have been made at the request of the coöbligor,[30] but it may even be made against his protest,[31] and a payment is not voluntary because it was made before the obligation matured.[32] In the absence of agreement a premature payment does not, however, hasten the right, and contribution cannot be enforced until the debt falls due.[33]

b. Amount of. It is not necessary that the entire debt should have been paid,[34] but the payment must have been for more than the share of the person seeking contribution.[35]

B. Nature of Right and Obligation. The right of action to enforce contribution may be assigned.[36] Where an obligor has a right of contribution

the release of the vessel and cargo, to pay a sum of money as a ransom and thereupon drew a bill of exchange which they accepted and then released the vessel, it was held that an action for contribution against the other parties concerned could not be maintained until plaintiff had paid the bill or otherwise canceled it. Douglas *v.* Moody, 9 Mass. 548.

27. Gray *v.* Krah, 6 Mo. App. 595.

There was a legal obligation to pay where a clause of a contract for the sale of land provided that unless a balance of the sum due on the contract was paid within a certain time the contract should be null and void, the clause being for the protection of the vendor and not a release of the vendees from their covenants. Finlay *v.* Stewart, 56 Pa. St. 183.

Claim barred by laches.— Where a judgment was recovered against one coöbligor which was suffered to lie dormant sixteen years and was then revived and afterward paid, thirty-eight years after the note became payable, it was held that the lapse of time was a bar to a recovery by the holder of the note and that defendant in such an action having paid the judgment could not compel the coöbligor to contribute. Williamson *v.* Collins, 17 Ohio 354; Williamson *v.* Rees, 15 Ohio 572. See also Doughty *v.* Bacot, 2 Desauss. (S. C.) 546, where the obligor on a bond did not seek contribution from his coöbligors for twenty years, and contribution was not enforced, particularly as the circumstances in the case raised the presumption that the alleged coöbligor was not a principal but merely a surety. Mere passiveness in asserting his rights, unless the lapse of time works a bar, will not, however, prevent a person who has discharged a common obligation from enforcing contribution from his coöbligors. Owen *v.* McGehee, 61 Ala. 440.

Where a joint debt which has become barred by the statute of limitations is paid by one of the debtors, the general rule is that he has no right of contribution from his codebtors. Buck *v.* Spofford, 40 Me. 328; Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Wheatfield Tp. *v.* Brush Valley Tp., 25 Pa. St. 112; Turner *v.* Thom, 89 Va. 745, 17 S. E. 323. *Contra*, Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177.

28. Harvey *v.* Drew, 82 Ill. 606; Ballance *v.* Frisby, 3 Ill. 63; Pixley *v.* Gould, 13 Ill. App. 565; Shoemaker *v.* Wood, 9 Kulp (Pa.) 436. *Contra*, Stockmeyer *v.* Oertling, 35 La. Ann. 467, holding that the claim must have been enforced by suit.

29. Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320.

30. Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196. See also *infra*, II, D, 3.

31. Pine Hill Coal Co. *v.* Harris, 7 Ky. L. Rep. 519.

32. Craig *v.* Craig, 5 Rawle (Pa.) 91.

33. Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Craig *v.* Craig, 5 Rawle (Pa.) 91; Danforth *v.* Smith, 23 Vt. 247.

34. Pixley *v.* Gould, 13 Ill. App. 565, 569, where it is said: "It would be a harsh rule for a court of equity to enforce, to require of parties who had already paid more than their just proportion of a debt to compel them to pay all the residue beforo they could have relief; and it may frequently be they are unable to discharge such residue and the obligation resting upon them unless they first or concurrently get relief against the other joint contractors."

35. *Indiana.*— Dean *v.* Speakman, 7 Blackf. 317.

Maine.— Powers *v.* Gowen, 32 Me. 381.

Maryland.— Craig *v.* Ankeney, 4 Gill 225.

Minnesota.— Canosia Tp. *v.* Grand Lake Tp., (1900) 83 N. W. 346.

New Hampshire.— Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

New York.— Sawyer *v.* Lyon, 10 Johns. 32.

Oregon.— Durbin *v.* Kuney, 19 Oreg. 71, 23 Pac. 661.

Pennsylvania.—Morrison *v.* Warner, 197 Pa. St. 59, 46 Atl. 1030, 80 Am. St. Rep. 8.

Texas. — Merchants' Nat. Bank *v.* McAnulty, (Civ. App. 1895) 32 S. W. 376 [*reversed* on other grounds in 89 Tex. 124, 33 S. W. 963].

Vermont.— Garfield *v.* Foskett, 57 Vt. 290.

36. Pully *v.* Pass, 123 N. C. 168, 31 S. E. 478. See also Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Rep. 525.

against several coöbligors, their obligation to contribute is not a joint, but a several, one.[37]

C. Measure of Contribution — 1. Due to Obligor Who Has Paid. One who has discharged a common liability can recover from his coöbligors only for the excess he has paid over his share,[38] and the payment can be enforced only in the same currency as that in which the debt existed.[39]

2. Due From Coöbligors. Each coöbligor is liable to contribute in proportion to his share of the common debt or obligation,[40] but in determining the proportion which each debtor should contribute regard will be had to only the solvent

37. Falley *v.* Gribling, (Ind. 1889) 22 N. E. 723; Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196. See also *infra*, II, D, 7.

38. *Alabama.*— Owen *v.* McGehee, 61 Ala. 440, holding that, wherever persons are under a common burden so that contribution between them will be compelled, neither can speculate on the common liability, and that whatever benefits or advantages are acquired by one in dealings with the common creditor inure equally to the benefit of all.

Louisiana.— Fuselier *v.* Babineau, 14 La. Ann. 764. See also Roehl *v.* Porteous, 47 La. Ann. 1582, 18 So. 645, holding that where one of two joint mortgagors of a purchase-money mortgage buys in the land at a foreclosure sale for less than the amount of the mortgage and pays the deficiency to obtain his discharge, he can recover of his co-mortgagor only one-half the difference between the bid at the sale and the mortgage indebtedness.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379; Snyder *v.* Kirtley, 35 Mo. 423.

New Hampshire.— Currier *v.* Fellows, 27 N. H. 366 [*citing* Boardman *v.* Paige, 11 N. H. 431; Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497].

Texas.— Hanna *v.* Drennan, 2 Tex. Unrep. Cas. 536.

See 11 Cent. Dig. tit. "Contribution," § 13.

Prudence in discharging liability.—A plaintiff who sues for contribution from a person jointly liable for the cost of rebuilding a dam is entitled to recover in proportion to the amount actually expended in a prudent and diligent manner in the work of rebuilding, even though a man experienced in such work might under favorable circumstances have built the dam at a less cost. Webb *v.* Laird, 62 Vt. 448, 20 Atl. 599, 22 Am. Dec. 121.

Interest on the amount which a stockholder was compelled to pay beyond his share of a corporate debt on which another stockholder was equally liable was held to be recoverable in an action for contribution. Allen *v.* Fairbanks, 45 Fed. 445.

Where one joint obligor releases one of the others and receives from him money and other property equal in value to the other's proportion of the common liability, it will be presumed that the money and property were received in consideration of assuming the other's liability and he will be charged with a two-thirds proportion in adjusting the equities between himself and the remaining obligor. *In re* Wheeler, 1 Md. Ch. 80.

39. Thus where one of two obligors is entitled to satisfy the judgment in depreciated bank-notes he cannot recover contribution for the debt in specie from his co-defendant, even though he himself pays it in specie. Walker *v.* Municipality No. 1, 5 La. Ann. 10. Conversely where an obligor on a bond satisfied the bond in currency which was depreciated at the time, it was held that he was entitled to enforce contribution in the same currency, although in the meantime it had appreciated. Klein *v.* Mather, 7 Ill. 317.

40. *Iowa.*— Hosmer *v.* Burke, 26 Iowa 353, where by a mistake in reckoning the amount due upon a certain note the judgment was one thousand dollars less than the real amount due and a defendant, one of the joint makers, paid that amount upon correction of the mistake and the other joint maker paid the amount of the judgment, it was held, in an action by the latter for contribution from the former, that defendant was entitled to have the thousand dollars paid by him taken into consideration in determining the amount which he was to contribute.

Kentucky.— Kincaid *v.* Hocker, 7 J. J. Marsb. 333.

Maryland.— *In re* Wheeler, 1 Md. Ch. 80.

Massachusetts.— Newcomb *v.* Gibson, 127 Mass. 396.

New York.— Scribner *v.* Hickok, 4 Johns. Ch. 530, holding that contribution could be enforced against defendant only so far as the right was clearly ascertained.

North Carolina.— Pully *v.* Pass, 123 N. C. 168, 31 S. E. 478.

Texas.— Faires *v.* Cockerill, (Civ. App. 1895) 29 S. W. 669.

Virginia.—Chamberlayne *v.* Temple, 2 Rand. 284, 14 Am. Dec. 786.

See 11 Cent. Dig. tit. "Contribution," § 13.

Where a partnership and an individual are equal joint makers of a note the former is considered as one person and it and the individual are liable for one half of the note. Therefore one of the partners who pays the note has contribution for one half from the individual. Hosmer *v.* Burke, 26 Iowa 353.

Costs are apportioned among judgment debtors according to the share each is bound to contribute toward the debt. Newcomb *v.* Gibson, 127 Mass. 396; Hayes *v.* Morrison, 38 N. H. 90; Gage *v.* Mulholland, 16 Grant Ch. (U. C.) 145.

debtors[41] and to those within the jurisdiction of the court called upon to enforce contribution.[42]

D. Action to Enforce Contribution — 1. Form of Action. Although the doctrine of contribution originated in equity[43] and courts of equity still have jurisdiction,[44] especially where a multiplicity of suits can be prevented,[45] courts of law take jurisdiction of the action and enforce the right by assumpsit,[46]

41. *Connecticut.*— Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233.

Kentucky.— Kincaid *v.* Hocker, 7 J. J. Marsh. 333.

Missouri.— Van Petten *v.* Richardson, 68 Mo. 379.

New York.—Kimball *v.* Williams, 51 N. Y. App. Div. 616, 65 N. Y. Suppl. 69.

Pennsylvania.—Selinsgrove First Nat. Bank *v.* Eckbert, 3 Walk. 41; Kalbach's Estate, 2 Woodw. 415 (where the court refused to recognize the distinction made in England between the measure of contribution in a proceeding at law and one in equity and said that the equitable doctrine was adopted).

Vermont.— Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177; Marsh *v.* Harrington, 18 Vt. 150.

See also *infra*, II, D, 4, b; and 11 Cent. Dig. tit. "Contribution," § 13.

Common-law and equity rules distinguished.— The rule stated in the text was the rule of the courts of equity (see Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 White & T. Lead. Cas. Eq. 114; 1 Story Eq. Jur. § 496), but at common law contribution could be enforced only for the aliquot share of each reckoned as if all were solvent (Parker *v.* Ellis, 2 Sandf. (N. Y.) 224; Browne *v.* Lee, 6 B. & Cr. 689, 9 D. & R. 701, 5 L. J. K. B. O. S. 276, 13 E. C. L. 310; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 White & T. Lead. Cas. Eq. 114; Cowell *v.* Edwards, 2 B. & P. 268; Kemp *v.* Finden, 12 M. & W. 421, 8 Jur. 65, 13 L. J. Exch. 137; Toussiant *v.* Martinnant, 2 T. R. 100; 1 Story Eq. Jur. § 496).

Mere refusal of one defendant to pay the judgment against him is not sufficient to compel the others to contribute beyond their proportion. The remedies against a person so refusing to pay his proportion should be exhausted before the others are bound to contribute beyond their share. It is only the insolvency of such a person that will compel the others to contribute to the amount he should pay. Faires *v.* Cockerill, (Tex. Civ. App. 1895) 29 S. W. 669.

42. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Boardman *v.* Paige, 11 N. H. 431.

43. See *supra*, II, A, 1.

"The right to sue in chancery, for contribution, was an established head of chancery jurisdiction in the time of Queen Elizabeth, on the plain principles of natural justice." Couch *v.* Terry, 12 Ala. 225, 228.

44. *Alabama.*— Couch *v.* Terry, 12 Ala. 225; Thomas *v.* Hearn, 2 Port. 260.

Kentucky.— Pine Hill Coal Co. *v.* Harris, 7 Ky. L. Rep. 519.

Michigan.— McGunn *v.* Hamlin, 29 Mich. 476.

New York.— Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475; Boyer *v.* Marshall, 8 N. Y. St. 233; Williams *v.* Craig, 2 Edw. 297.

Virginia.— Wayland *v.* Tucker, 4 Gratt. 267, 50 Am. Dec. 76.

See 11 Cent. Dig. tit. "Contribution," § 16.

45. Walker *v.* Cheever, 35 N. H. 339; Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196; 1 Story Eq. Jur. (13th ed.), § 496.

The question of contribution arising upon a joint decree against several defendants may be settled in the same suit in which the decree was rendered. Hickey *v.* Dole, 66 N. H. 612, 31 Atl. 900.

Use of judgment to enforce contribution.— A joint obligor who has paid the judgment of the creditors and taken an assignment himself may use such judgment to compel contribution from his coöbligors so far as it clearly and certainly appears what his co-debtors ought to contribute. Wheeler's Estate, 1 Md. Ch. 80; Scribner *v.* Hickok, 4 Johns. Ch. (N. Y.) 530. See, generally, Subrogation.

Notice.— Cal. Code Civ. Proc. § 709, provides that where one of several persons liable on a judgment pays more than his proportion he may compel contribution from the others, and that in such case he is entitled to the benefit of the judgment to enforce contribution or repayment "if, within ten days after his payment, he file with the Clerk of the Court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the Clerk must make an entry thereof in the margin of the docket." Under this provision it has been held that, although the other defendants are entitled to notice of motion for execution upon the judgment, the provision of the code does not require that they should be served with notice within ten days; that the notice is required to be filed with the clerk merely to enable him to make the entry on the docket, for without such notice the clerk would have neither the authority nor the ability to make the proper docket entry. Clark *v.* Austin, 96 Cal. 283, 31 Pac. 293.

46. *California.*— Chipman *v.* Morril, 20 Cal. 130.

Illinois.— Golsen *v.* Brand, 75 Ill. 148; Drummond *v.* Yager, 10 Ill. App. 380.

Kentucky.— Dupuy *v.* Johnson, 1 Bibb. 562.

debt,[47] or covenant.[48] Assumpsit lies on the theory of an implied promise of each obligor to contribute to make up the common loss.

2. LIMITATIONS. The statute of limitations does not begin to run against a claim for contribution until plaintiff has discharged the common debt[49] or has paid more than his share of it,[50] and, even though the debt was paid before then, will not begin to run before the day of the maturity of the debt.[51] Where there is a question of a settlement of an account, the statute does not begin to run until the account is settled.[52] Since the right of contribution is based upon an implied contract,[53] that part of the statute which relates to unwritten contracts is applicable to it.[54]

3. DEFENSES. It is a good defense to an action for contribution that plaintiff, who has been intrusted with common funds or with the management of a suit,

Maryland.— Carroll *v.* Bowie, 7 Gill 34.

Massachusetts.— Mason *v.* Lord. 20 Pick. 447; Chaffee *v.* Jones, 19 Pick. 260.

Missouri.— Jeffries *v.* Ferguson, 87 Mo. 244; Hanna *v.* Hyatt, 67 Mo. App. 308.

New Hampshire.— Fletcher *v.* Grover, 11 N. H. 368, 35 Am. Dec. 497.

New York.— See Campbell *v.* Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570.

Ohio.— Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Texas.— See Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751.

Compare Nailer *v.* Stanley, 19 Serg. & R. (Pa.) 450, 13 Am. Dec. 691, holding that, where land subject to a judgment lien is sold in separate successive parcels, the owners of the parcels out of which the judgment had been satisfied cannot maintain assumpsit against the others, and intimating that if any action may be maintained at common law it can only be by a proceeding *in rem* and a judgment *de terris* as in the case of a legacy charged on land.

47. Hickman *v.* Searce, 9 Yerg. (Tenn.) 47, where two persons sold land and jointly covenanted to warrant and defend the title, the vendee was evicted by title paramount and recovered a joint judgment against them, and it was held that the one who had paid the whole judgment could maintain an action of debt to recover from the coöbligor his proportion of the money paid, since the sum sued for is certain by operation of law.

48. Thus where an award directs two parties to pay each a certain sum of money to a builder and one is obliged to pay the whole on account of the refusal of the other to pay his share, the one who has paid can compel contribution by suing the other in covenant for non-performance of their award. Allen *v.* Coy, 7 U. C. Q. B. 419.

49. Sherwood *v.* Dunbar, 6 Cal. 53; Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 [*reversing* (Tex. Civ. App. 1895) 29 S. W. 669]. See also McCormick *v.* Sener, 200 Pa. St. 11, 49 Atl. 311, holding that where, under the lien creditor's act, two judgment creditors purchased land of the debtor at a sheriff's sale as equal tenants in common, paying therefor by receipts on their judgments, but one paid more than half the purchase-price, the statute began to run against the right of action for contribution upon the delivery of the sheriff's deed.

50. Richter *v.* Henningsan, 110 Cal. 530, 42 Pac. 1077; Durbin *v.* Kuney, 19 Oreg. 71, 23 Pac. 661.

Where plaintiff seeks contribution for the discharge of a judgment, the statute runs from the time when the judgment was paid. Singleton *v.* Townsend, 45 Mo. 379; Singleton *v.* Moore, Rice Eq. (S. C.) 110 (where two judgments were recovered which the claimant and his ancestor paid at different times, and it was held that the statute did not begin to run until the payment of the latter judgment and that it made no difference if the person of whose estate contribution is claimed is dead and that his distributees have been in possession for more than twenty years).

51. Truss *v.* Miller, 116 Ala. 494, 22 So. 863. See also Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751, where certain members of a committee, which guaranteed the payment of a certain bonus and the granting of a free right of way to be paid for by individual subscriptions of those to be benefited by the construction of a railroad, advanced certain sums voluntarily and assumed personal liability in excess of their respective subscriptions, and it was held that the statute did not begin to run against their right of contribution from their co-guarantors until the road was constructed, the company settled with, and an opportunity had to fully adjust the equities between the guarantors.

52. Thus where one of several co-proprietors is managing property and discharging the obligation for which all are bound, the statute does not begin to run as long as his administration is unsettled. De Lallande *v.* De Lallande, 10 La. Ann. 220. See also Pendleton *v.* Lomax, Wythe (Va.) 4.

53. See *supra*, II, A, 1.

54. Sexton *v.* Sexton, 35 Ind. 88; Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110; Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 [*reversing* (Tex. Civ. App. 1895) 29 S. W. 669]. *Contra*, Murphy *v.* Gage, (Tex. Civ. App. 1893) 21 S. W. 396.

has omitted to apply the funds[55] or failed to conduct the suit[56] according to the agreement, but it is no defense that defendant did not request plaintiff to pay the common debt or that plaintiff's motive in paying was to save himself from loss,[57] that plaintiff had not paid more on the joint undertaking than he had agreed to pay,[58] or that one of the obligors had been released.[59]

4. PARTIES — a. Plaintiff. At common law the several persons who have discharged the common obligation cannot sue jointly one who has not paid his share. Each must sue separately for his portion,[60] unless they can sue on a joint promise as well as a joint consideration,[61] and each plaintiff must sue in his own name.[62] An objection to a misjoinder of parties plaintiff or causes of action taken after the judgment is too late where no prejudice has resulted from such misjoinder.[63]

b. Defendant. In a suit for contribution in equity or under the code practice brought by the obligor who has discharged the debt all the other obligors should be made defendants,[64] except such as are insolvent,[65] or are without the jurisdiction,[66] as well as any person whose claim may affect the measure of contribution;[67] but at common law he was obliged to sue his coöbligors for their proportions separately.[68] The obligee is not a necessary party.[69]

5. PLEADING. An allegation that plaintiff has "purchased" a share in the property under a common burden is sufficient to show that he owned an interest in it.[70] In an action by a joint judgment debtor for contribution against his codebtor an affidavit of defense which shows bad faith on the part of plaintiff in defending the original suit is sufficient.[71]

6. EVIDENCE. A judgment against several is *prima facie* evidence, in an action for contribution, of their joint liability,[72] is admissible to show the amount that

55. Rollins *v.* Taber, 25 Me. 144.

56. P. Dougherty Co. *v.* Gring, 89 Md. 535, 43 Atl. 912.

57. McGonnigle *v.* McGonnigle, 5 Pa. Super. Ct. 168. See also *supra*, II, A, 3, a, (II).

58. Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751.

59. Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196. See also Clapp *v.* Rice, 15 Gray (Mass.) 557, 77 Am. Dec. 387.

60. Lindell *v.* Brant, 17 Mo. 150.

61. Wright *v.* Post, 3 Conn. 142.

Where a note made by fourteen persons was taken up by four of the number by giving a new note in its place and the new note was received on the joint credit of the four, it was held that they could join in an action of contribution, although the note was a joint and several one. Chandler *v.* Brainard, 14 Pick. (Mass.) 285.

62. Abercrombie *v.* Conner, 10 Ala. 293. See also Lindell *v.* Brant, 17 Mo. 150; Hutchinson *v.* Hendrickson, 29 N. J. L. 180. *Contra*, Smith *v.* Latimer, 15 B. Mon. (Ky.) 75, under the code.

63. Wilson *v.* Lowrie, (Tex. Civ. App. 1897) 40 S. W. 854.

64. Young *v.* Lyons, 8 Gill (Md.) 162; Carr *v.* Waldron, 44 Mo. 393; Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751; Story Eq. Pl. § 169.

65. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Young *v.* Lyons, 8 Gill (Md.) 162; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250. See also *supra*, II, C, 2.

Must be insolvent when bill filed.— An allegation that certain coöbligors were insolvent at the time the debt became due is an insufficient excuse for not making them parties. It must be shown that they were insolvent at the filing of the bill. Young *v.* Lyons, 8 Gill (Md.) 162.

66. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233; Boardman *v.* Paige, 11 N. H. 431. See also *supra*, II, C, 2.

67. Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751, where plaintiff obligors sued their coöbligors for contribution on a contract to secure a right of way for a railroad company. Plaintiffs had contracted with L for a right of way through his land, the damage to be agreed upon or settled judicially, but at the time of the suit for contribution said damages had not been settled, and it was held that L was a proper party defendant, for defendants could be held to contribute to his damages when they were determined.

68. Burnham *v.* Steele, 8 N. H. 182; Parker *v.* Ellis, 2 Sandf. (N. Y.) 223.

69. Hyde *v.* Tracy, 2 Day (Conn.) 491. And see Young *v.* Lyons, 8 Gill (Md.) 162.

70. Falley *v.* Gribling, 128 Ind. 110, 26 N. E. 794. See also Falley *v.* Gribling, (Ind. 1889) 22 N. E. 723, where the complaint being questioned for the first time upon appeal was held to have sufficiently stated a cause of action.

71. Flanagan *v.* Duncan, 133 Pa. St. 373, 25 Wkly. Notes Cas. (Pa.) 491, 19 Atl. 405, 7 L. R. A. 412.

72. Dent *v.* King, 1 Ga. 200, 44 Am. Dec. 638.

plaintiff was compelled to pay,[73] and the regularity of the judgment cannot be impeached.[74] In an action by one obligor on a bond against his coöbligor for contribution, parol evidence is admissible to show for what proportion of the liability each one is bound.[75] Possession of a bond[76] or note[77] after its maturity by one of the obligors is not *prima facie* evidence that he has paid it, except where a receipt of payment is indorsed upon it by the holder.[78] One of two co-grantors who appears jointly bound in a deed may show in a suit by the other for contribution that their warranty was not joint but that each warranted for a separate portion of the land.[79]

7. JUDGMENT. A party suing for contribution against several coöbligors is not entitled to a judgment *in solido* against all.[80]

E. Loss of Right. The right to contribution may be destroyed by a subsequent contract of the parties, or by the fault of the party who causes the loss toward which he seeks contribution from his coöbligor.[81]

III. BETWEEN PERSONS LIABLE EX DELICTO.

A. The Rule Against Contribution — 1. IN GENERAL. Where one of several wrong-doers has been compelled to pay the damages for the wrong committed, the general rule is that he cannot compel contribution from the others who participated in the commission of the wrong.[82]

73. Wolters *v.* Henningsan, 114 Cal. 433, 46 Pac. 277.

74. Dupuy *v.* Johnson, 1 Bibb (Ky.) 562; Woodruff *v.* Glassford, 4 U. C. Q. B. O. S. 155. But see Wolters *v.* Henningsan, 114 Cal. 433, 46 Pac. 277, where, in an action by the stock-holders of a corporation who had had to pay a judgment of the United States for taxes due by the corporation, against other stock-holders, for contribution, the court said that the judgment was not conclusive on defendants as to the validity of the amount of taxes.

75. Paulin *v.* Kaighn, 27 N. J. L. 503. See also Harris *v.* Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254.

76. Craig *v.* Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 290.

77. Bates *v.* Cain, 70 Vt. 144, 40 Atl. 36.

78. Ingram *v.* Croft, 7 La. 82.

79. Cundiff *v.* Hail, 3 A. K. Marsh. (Ky.) 50.

80. For this would violate the rule that each coöbligor was liable to contribute his proportion. O'Brien *v.* Drexilius, 7 Ky. L. Rep. 519; Graves *v.* Smith, 4 Tex. Civ. App. 537, 23 S. W. 603. See also *supra*, II, B.

81. Crayton *v.* Johnson, 27 Ala. 503, where, subsequently to the joint contract, one of the parties contracted with his coöbligors to obtain a grant for land and failed to obtain the grant before the land reverted by law to the state.

82. *District of Columbia.*—Herr *v.* Barber, 2 Mackey 545.

Illinois.— Nelson *v.* Cook, 17 Ill. 443.

Indiana.— Silvers *v.* Nerdlinger, 30 Ind. 53.

Louisiana.— Sincer *v.* Bell, 47 La. Ann. 1548, 18 So. 755.

Maryland.— Percy *v.* Clary, 32 Md. 245.

New Hampshire.— Nashua Iron, etc., Co. *v.* Worcester, etc., Co., 62 N. H. 159.

New Jersey.— See Newman *v.* Fowler, 37 N. J. L. 89.

New York.— Andrews *v.* Murray, 33 Barb. 354; Wehle *v.* Haviland, 42 How. Pr. 399; Miller *v.* Fenton, 11 Paige 18; Peck *v.* Ellis, 2 Johns. Ch. 131; Pierson *v.* Thompson, 1 Edw. 212.

Ohio.— See Acheson *v.* Miller, 18 Ohio 1.

Pennsylvania.— Boyer *v.* Bolander, 129 Pa. St. 324, 18 Atl. 127, 15 Am. St. Rep. 723 (holding that taking an assignment of the judgment in the name of his son, the assignment being fictitious, did not aid one of a board of directors who had had to pay for the frauds of the board); Baird *v.* Midvale Steel Works, 12 Phila. 255, 34 Leg. Int. 12.

Tennessee.— Anderson *v.* Saylors, 3 Head 551; Rhea *v.* White, 3 Head 121.

Texas.— Kempner *v.* Wallis, 2 Tex. App. Civ. Cas. § 584.

Vermont.— Atkins *v.* Johnson, 43 Vt. 78, 5 Am. Rep. 260.

Virginia.— Thweatt *v.* Jones, 1 Rand. 328, 10 Am. Dec. 538.

England.— Atty.-Gen. *v.* Wilson, 2 Cr. & P. 1, 4 Jur. 1174, 10 L. J. Ch. 53, 18 Eng. Ch. 1; Atty.-Gen. *v.* Wilson, 1 Jur. 890, 7 L. J. Ch. 76, 9 Sim. 30, 16 Eng. Ch. 30; Merryweather *v.* Nixan, 8 T. R. 186, 16 Rev. Rep. 810.

See 11 Cent. Dig. tit. "Contribution," § 6.

In Scotland the rule that there is no contribution between wrong-doers has no place in the law. Palmer *v.* Wick, etc., Steam Shipping Co., [1894] A. C. 318, 71 L. T. Rep. N. S. 163, 6 Reports 245.

Where public contractors attempted to commit a fraud on the government, but being frustrated suffered loss, the court refused to entertain a bill by one of the contractors against another, for contribution for his loss. The court said "to state such a case is to decide it." The courts of justice

2. Reason of Rule. The rule exists, not because contribution in such a case is inequitable,[83] but because the law will not raise an implied promise to contribute between wrong-doers,[84] for the implied promise rests upon equitable grounds,[85] and no equities arise from a wrong to aid a participant in a wrong.[86] The court will leave a person who asks its assistance in such a case in the position where it finds him.[87]

3. To What Cases Applicable — a. In General. The principle is confined to those cases where the illegal transaction is itself the basis of the claim and does not apply where the transaction is separable and collateral to the claim.[88] It does not apply to the counsel fees which one of the wrong-doers has paid in defending the joint action for trespass *quare clausum fregit*.[89]

b. Exceptions — (1) *Active Wrong-Doers Without Wrongful Intent* — (A) *In General.* Even though a person has actually participated in the wrong, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing a wrongful act.[90]

will not lend their aid to equalize burdens or profits in such a case and leave the parties *in statu quo*. Bartle *v.* Nutt, 4 Pet. (U. S.) 184, 188, 7 L. ed. 825.

Where by statute a right of action for damages caused by an intoxicated person is given to certain persons against any one who sells the liquor from which intoxication results, and against the owner of the building where the liquor is sold, the latter, when he has paid a joint judgment recovered against the saloon-keeper and himself, is not entitled to contribution from the saloon-keeper. Zigler *v.* Rommel, 4 Ohio S. & C. Pl. Dec. 472, 30 Cinc. L. Bul. 115. See also Johnson *v.* Torpy, 35 Nebr. 604, 53 N. W. 575, 37 Am. St. Rep. 447, where a saloon-keeper was held not entitled to contribution from another saloon-keeper where both had sold liquor from which damage resulted.

83. Selz *v.* Unna, 6 Wall. (U. S.) 327, 18 L. ed. 799.

84. Nichols *v.* Nowling, 82 Ind. 488 (and if a liability can be created by express promise the promise must rest upon some other consideration than the fact of the tort and the relation of the accused parties to each other in the transaction); Avery *v.* Halsey, 14 Pick. (Mass.) 174 (and it will not enforce an express promise therefor).

But when a judgment rendered against several wrong-doers is replevied, it is thereby satisfied, and the general rule that there is no contribution between wrong-doers does not apply, for the legal responsibilities of the parties as among themselves are essentially changed, the transaction then takes upon itself the character of a contract and the usual implied promise of contribution arises for the benefit of the one who paid it. Minnis *v.* Johnson, 1 Duv. (Ky.) 171.

85. See *supra*, II, A, 1.

86. See Cooley Torts 144.

87. Bartle *v.* Nutt, 4 Pet. (U. S.) 184, 7 L. ed. 825.

Unless the wrong was joint, there could be no contribution in any event; thus where two railroads are sued by a passenger for injuries caused by a collision between the trains, neither company is entitled to judgment over against the other in any event, since plaintiff can obtain judgment against either defendant by showing that its negligence contributed to the accident, and if defendants were jointly negligent, there is no contribution between them, each being an independent agent. Missouri, etc., R. Co. *v.* Blance, (Tex. Civ. App. 1897) 41 S. W. 167.

88. Goldsborough *v.* Darst, 9 Ill. App. 205; Akers *v.* Martin, (Ky. 1901) 61 S. W. 465 (holding that, where a person furnished one-half the money to another to buy a piece of land and shared in the fruits of the purchase, although he was not present when the purchase was made and participated in no way in the false representations which were made to the vendor, he is nevertheless liable to the one who negotiated the purchase, for contribution to the amount the latter has paid for a judgment recovered against him by the vendor); Power *v.* Hoey, 19 Wkly. Rep. 916 (where the directors of a company committed the irregularity of taking promissory notes of one of their members instead of cash in payment for his shares; and, although such irregularity would render them liable to make good to the company any loss which there might be on such promissory notes, the transaction was held not to be so fraudulent or illegal as to entitle the representative of the debtor to repudiate the debt, and the directors having voluntarily made good the full price of the shares of the company were held to be entitled to be indemnified out of the assets of the debtor).

89. Percy *v.* Clary, 32 Md. 245.

90. *Alabama.*—Vandiver *v.* Pollak, 97 Ala. 467, 12 So. 473, 19 L. R. A. 628.

Connecticut.— See Bailey *v.* Bussing, 28 Conn. 455.

Massachusetts.—Jacobs *v.* Pollard, 10 Cush. 287, 57 Am. Dec. 105, where one in good faith took up another's cattle *damage feasant*, and a field-driver, at the taker-up's request, sold them at auction and received the money. The proceedings were irregular and the taker-up

(B) *Attaching Creditors.* Under this exception one of several creditors who, acting together, attached goods which in their behalf their codebtor had fraudulently transferred to a third person, enforced contribution against the others,[91] and even where the creditors did not act together but attached severally on the same day,[92] or where the creditors satisfied their debts out of the same property and assisted in defending the suit for wrongful attachment,[93] the right of contribution has been held to exist.

(C) *Innocent Agents.* A person who, while acting for another, innocently commits a wrong under circumstances where he cannot be presumed to have known that he was so doing, has therefore a right to be indemnified by his principal for damages he has been compelled to pay for the wrong.[94]

(II) *Persons Guilty of Mere Negligence.* It has also been held that a person is not deprived of contribution from another who was also originally liable, where the ground of their liability is merely negligence of both in carrying on a lawful business.[95]

and field-driver were in fact joint trespassers, but it was held that the former could recover of the latter the money received for the sale of the cattle.

Minnesota.— Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320.

Nebraska.—See Torpy *v.* Johnson, 43 Nebr. 882, 62 N. W. 253.

Ohio.— Acheson *v.* Miller, 2 Ohio St. 203, 59 Am. Dec. 663, where the court said that the rule against contribution between co-trespassers applied only to cases where the parties who claimed contribution had engaged together in knowingly or wantonly doing a wrong.

England.— Adamson *v.* Jarvis, 4 Bing. 66, 5 L. J. C. P. O. S. 68, 12 Moore C. P. 241, 29 Rev. Rep. 503, 13 E. C. L. 403.

See 11 Cent. Dig. tit. "Contribution," § 9.

91. Vandiver *v.* Pollak, 97 Ala. 467, 12 So. 473, 19 L. R. A. 628; Selz *v.* Guthman, 62 Ill. App. 624; Brewster *v.* Ganss, 37 Mo. 518.

92. Vandiver *v.* Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

93. Farwell *v.* Becker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400 [*reversing* 25 Ill. App. 432].

Due diligence in the enforcement of the title to the property attached is necessary on the part of the creditor who has satisfied the common liability to the owner of the property levied on if the paying creditor wishes to enforce contribution against the others, for otherwise the property attached may not be available for the discharge of the common liability. Vandiver *v.* Pollak, 97 Ala. 467, 12 So. 473, 19 L. R. A. 628.

Measure of liability.— The satisfaction of a judgment for damages on an indemnifying bond of one of several attaching creditors inures to the benefit of all and is the measure of all liability. Vandiver *v.* Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

94. Moore *v.* Appleton, 26 Ala. 663 (where an agent took personal property which, although claimed adversely by another, he had reasonable ground to believe belonged to his principal, and it was held that in such a case the law implied a promise which might be enforced by indemnity against the principal for such losses and damages as flowed directly or immediately from the execution of the agency); Betts *v.* Gibbins, 2 A. & E. 57, 4 L. J. K. B. 1, 4 N. & M. 64, 29 E. C. L. 47; Adamson *v.* Jarvis, 4 Bing. 66, 5 L. J. C. P. O. S. 68, 12 Moore C. P. 241, 29 Rev. Rep. 503, 13 E. C. L. 403. See also Nelson *v.* Cook, 17 Ill. 443 (where the rule is well defined); Culmer *v.* Wilson, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713 (where a naked trustee or agent obtained, at the request of his *cestui que trust*, a judgment in a court which, as it was subsequently discovered, had no jurisdiction of the action, but the circumstances showed that the trustee had no knowledge of the illegal nature of the act).

95. Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320 (where two persons who were adjoining landowners were engaged in putting up a building on their land, in the course of constructing which an injury resulted for which they were both liable, and contribution was allowed to the person who paid the damages of the injury); Armstrong County *v.* Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368 (where two adjoining counties contained a bridge and one of the counties which had paid the damages caused by the breaking of the bridge was held entitled to contribution from the other county); Horbach *v.* Elder, 18 Pa. St. 33 (where five persons were engaged in running a line of stages at different portions of the route of the stage, vehicles, horses, and drivers were by agreement provided by each at his exclusive expense and control, and through the carelessness of one of the drivers several passengers were injured. Suit was brought against all proprietors, but process served on the one only who employed the driver and one other, and the latter paid about half the liability, and it was held that he ought to recover from one of the other proprietors on whom notice had not been served his proper share of the

(III) *Technical Wrong-Doers.* Another exception, as well settled as the rule itself, is, that one who is only technically a joint wrong-doer and has not actually joined in the wrong can, upon being compelled to pay damages for the wrong, exact indemnity from the actual tort-feasor,[96] but it must clearly appear that the party seeking redress did not contribute to the injury.[97]

B. Basis of Right Where It Exists. The right of contribution between wrong-doers, so far as it is allowed, exists only where the parties have committed a joint wrong and are under a common liability;[98] but a discharge of the common liability by payment by one of the joint wrong-doers entitles him to contribution from others and a suit is not necessary to determine the liability of the amount thereof.[99]

C. Action to Enforce Contribution — 1. Form of Action. Where the action

amount so paid); Lingard *v.* Bromley, 1 Ves. & B. 114 (where a contribution was enforced among assignees in bankruptcy to reimburse one who had made a payment under an order for a loss occasioned by their joint act). See also Wooley *v.* Batte, 2 C. & P. 417, 12 E. C. L. 649; Pearson *v.* Skelton, 1 M. & W. 504, 1 Tyrw. & G. 848.

Where the officers of a corporation neglected to file certain certificates as required by statute and they all, by the provision of the statute, became liable personally to the creditor of the corporation for the debt of the corporation due him, it was held that the rule against contribution between tort-feasors did not apply as against the one who paid the debt. Nickerson *v.* Wheeler, 118 Mass. 295. *Contra,* Andrews *v.* Murray, 33 Barb. (N. Y.) 354.

96. *Connecticut.*— Bailey *v.* Bussing, 28 Conn. 455, where a suit for contribution was brought by plaintiff, who had been obliged to pay the whole of a judgment recovered against himself and others who were jointly interested in the running of a stage, for injuries caused to a traveler upon the road by the negligence of one of defendants who was driving, and the court held that the rule that there can be no contribution among wrong-doers did not apply in the absence of anything to show that plaintiff was actually connected with the wrong for which the judgment was rendered.

Indiana.—Wickwire *v.* Angora, 4 Ind. App. 253, 30 N. E. 917.

Maryland.— Chesapeake, etc., Canal Co. *v.* Allegheny County, 57 Md. 201, 40 Am. Rep. 430.

Massachusetts.— Old Colony R. Co. *v.* Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; Campbell *v.* Somerville, 114 Mass. 334; Gray *v.* Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324; Lowell *v.* Boston, etc., R. Corp., 23 Pick. 24, 34 Am. Dec. 33.

New York.— Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469.

Vermont.— Spalding *v.* Oakes, 42 Vt. 343.

England.— See Wooley *v.* Batte, 2 C. & P. 417; Pearson *v.* Skelton, 1 M. & W. 504.

See 11 Cent. Dig. tit. "Contribution," § 8.

A landowner who has had to pay damages for an injury caused by the unsafe condition of his premises may have his remedy over against the person who was actively at fault in causing the condition of the premises. Pfau *v.* Williamson, 63 Ill. 16; Westfield Gas, etc. Co. *v.* Noblesville, etc., Gravel Road Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244; Gray *v.* Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324; Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698. So where the tenant on a sewage farm owned by a city failed to use all the sewage discharged from the city, and the sewage flowed beyond the farm and damaged plaintiff's land, and the facts pleaded in the suit by plaintiff showed that the injury was caused by the active interference of the tenants in violation of their duty to refrain from such interference with arrangements made by the city for the disposition of the sewage, it was held that the city could be indemnified against the tenants. San Antonio *v.* Smith, 94 Tex. 266, 59 S. W. 1109 [*reversing* (Tex. Civ. App. 1900) 57 S. W. 881].

97. Thus where a city has been compelled to pay damages for personal injuries, or on account of the negligent construction of a cross walk and the failure to have the street lamp in the vicinity burning, and it did not clearly appear upon the trial that the failure to light the lamp was the sole cause of the injury, the city was not entitled to contribution from the gas company whose duty it was to light the lamp. Denison *v.* Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784. So a person who maintains in his sidewalk a hatchway unsafe for travelers cannot recover indemnity for the damages paid to a traveler who has been injured by the hatchway from a person who takes and leaves the cover off. Churchill *v.* Holt, 131 Mass. 67, 41 Am. Rep. 191.

98. Gulf, etc., R. Co. *v.* Galveston, etc., R. Co., 83 Tex. 509, 18 S. W. 956; International Light, etc., Co. *v.* Maxwell, (Tex. Civ. App. 1901) 65 S. W. 78; Frankenthal *v.* Lingo, 16 Tex. Civ. App. 229, 40 S. W. 815 [*distinguishing* Farwell *v.* Becker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400].

99. Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698. See also Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647.

is simply for contribution it is properly brought at law[100] and assumpsit is the proper form of action.[101]

2. DEFENSES. Where a joint judgment was recovered against a master and his servant for the negligence of the latter a servant cannot defend in an action for contribution by the master who paid the judgment, on the technical ground that a joint action could not be maintained against him and the master.[102]

3. PLEADING. In an action for contribution for the payment of a judgment for a joint wrong the complaint must aver the facts on which the judgment rests.[103]

4. EVIDENCE. Plaintiff must make out a state of facts that would hold defendant is liable in the first instance.[104] A recovery against a party in trover for a joint wrong *prima facie*, if not conclusively, places him *in pari delicto*, so that he can have no contribution unless he proves his innocence of the wrong.[105]

CONTRIBUTIONE FACIENDA. In old English law, a writ that lay where tenants in common were bound to do some act, and one of them was put to the whole burthen, to compel the rest to make contribution.[1]

CONTRIBUTIVE. Aiding a result.[2] (See CONTRIBUTORY.)

CONTRIBUTORY. CONTRIBUTIVE, *q. v.*; casually sharing in some act;[3] a person who has entered into a partnership, or quasi-partnership, for commercial purposes;[4] every member of a company, and also every other person liable to contribute to the debts and liabilities thereof;[5] a person liable to contribute to the assets of a joint-stock company;[6] every person liable to contribute to the assets of the company,[7] in the event of the same being wound

100. Thus where one of two joint owners of a steamboat paid a judgment for a marine tort of the vessel, his action for contribution is properly brought at law instead of in equity, for the action had nothing to do with the partnership business of the boat. Power *v.* Rees, 189 Pa. St. 496, 42 Atl. 26.

101. Bailey *v.* Bussing, 28 Conn. 455.

102. Assuming it to be true that a joint action could not be maintained this contention does not aid defendant in his suit if he submitted to a joint judgment in the original suit without raising the question. Since it clearly appeared that defendant's negligence caused the injury and that he was therefore legally responsible for the consequences, it was held that the form of the judgment against the parties could not vary the legal and equitable rights as between themselves. Bailey *v.* Bussing, 37 Conn. 349.

103. Bailey *v.* Bussing, 29 Conn. 1, holding that a mere statement of the existence of a judgment together with an allegation that defendant was bound to pay his share is only a statement of a legal inference which is a mere matter of law.

The complaint must show by proper averment the nature of the wrong for which the judgment was obtained, for only in this way can plaintiff avail himself of the exceptions to the general rule against contribution between joint wrong-doers. Hunt *v.* Lane, 9 Ind. 248.

104. Cathcart *v.* Foulke, 13 Mo. 561.

105. Rhea *v.* White, 3 Head (Tenn.) 121.

1. Black L. Dict.

2. English L. Dict.

3. English L. Dict.

4. *In re* Arthur Average Assoc., 2 Aspin. 570, 3 Ch. D. 522, 526, 45 L. J. Ch. 346, 34 L. T. Rep. N. S. 388, 24 Wkly. Rep. 514.

5. Carrick's Case, 15 Jur. 645, 647, 20 L. J. Ch. 670, 1 Sim. N. S. 505, 5 Eng. L. & Eq. 114, under Registration or Winding-up Acts.

6. Wharton L. Lex.

Two lists of contributors are prepared by the official liquidator, viz., one of those who are shareholders at the time of the winding-up order, and who are primarily liable to contribute, and another of those who have ceased to be shareholders, but have been shareholders within the twelve months previously, and who are liable in a secondary degree. Wharton L. Lex.

7. *In re* Anglesea Colliery Co., L. R. 2 Eq. 379, 386 (construing the Companies Act, where it is said: "The word 'contributory,' is used in the 133rd section for this reason — that the word 'member' would not have been sufficient; there being many persons 'contributories' who are not 'members.' In the 38th section of the Act, the persons liable to contribute in the event of the company being wound up, are said to be every present and past member of such company, excepting, of course, amongst other persons, those who have paid up their shares in full. Contributories therefore may comprise past as well as existing members; and some larger expression than the simple word 'member' was required in the 133rd section"); Hutton *v.* Thompson, 3 H. L. Cas. 161, 175 (construing the Joint-Stock Company's Winding-up Act); *In re* Provincial Bldg. Soc., 30 N. Brunsw. 628, 658 (construing the Dominion Winding-up Act); *In re* Canada Cent. Bank,, 15 Ont. 625, 628 (construing the Dominion Winding-up Act,

up;[8] every member of a company,[9] and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof;[10] any member of the concern;[11] any person alleged to be a contributory.[12] (Contributory: Negligence, see NEGLIGENCE. See also, generally, CORPORATIONS.)

CONTROFACERE. In old English law, to counterfeit.[13] (See, generally, COUNTERFEITING.)

CONTROFACTURA. In old English law, a counterfeiting.[14] (See, generally, COUNTERFEITING.)

CONTROL.[15] As a noun, power to check or restrain;[16] superintendence;[17]

where it is said: "This language is borrowed from an identical definition in the (English) Companies Act of 1862 (25 & 26 Vict. c. 189, § 14) . . . These definitions are *in pari materia*, and as to both it has been held that they do not include the case of a mere debtor who is a stranger to the company, but contemplates only one who is liable to contribute in the character of a partner or member. The Dominion Act by its internal evidence shews that while a contributory is regarded as a debtor, it is not every debtor that is to be classed as a contributory"); Barned's Banking Co. *v.* Reynolds, 36 U. C. Q. B. 256, 275 (construing the (English) Companies Act).

The scope of the word "contributory" appears to be no greater in the colonial Winding-up Act than in its English original. *In re* Canada Cent. Bank, 15 Ont. 625, 629 [*citing* Canadian Pac. R. Co. *v.* Robinson, 14 Can. Supreme Ct. 105, 122].

8. *In re* Anglesea Colliery Co., L. R. 2 Eq. 379, 387.

9. Hutton *v.* Thompson, 3 H. L. Cas. 161, 175 (construing the Joint-Stock Company's Winding-up Act); Norris *v.* Cottle, 2 H. L. Cas. 647, 655, 14 Jur. 703 [*citing* Matter of Wolverhampton, etc., R. Co., 2 Hall & T. 382, 48 Eng. Ch. 143, 2 Macn. & G. 185, where Lord Brougham said: "What can it mean but that such member is to contribute towards payment of debts and expenses?"]; Matter of North of England Joint-Stock Banking Co., 1 Hall & T. 580, 586, 13 Jur. 951, 19 L. J. Ch. 69, 1 Macn. & G. 307, 5 R. & Can. Cas. 624, 47 Eng. Ch. 246 (construing the Joint-Stock Companies Winding-up Act); Matter of North of England Joint-Stock Banking Co., 1 De G. M. & G. 576, 587, 16 Jur. 435, 22 L. J. Ch. 194, 10 Eng. L. & Eq. 275, 50 Eng. Ch. 444 (construing the Joint-Stock Company's Winding-up Act).

10. Matter of North of England Joint-Stock Banking Co., 1 De G. M. & G. 576, 587, 16 Jur. 435, 22 L. J. Ch. 194, 10 Eng. L. & Eq. 275, 50 Eng. Ch. 444, construing Joint-Stock Company's Winding-up Act.

"Contributory" here has a sense put upon it much larger than the word "member," for the word "member" looks certainly like a person who is legally such in the proper sense of the term. Matter of North of England Joint-Stock Banking Co., 1 De G. M. & G. 576, 587, 16 Jur. 435, 22 L. J. Ch. 194, 10 Eng. L. & Eq. 275, 50 Eng. Ch. 444.

11. *In re* Sherwood Loan Soc., 20 L. J. Ch. 177, 181, 1 Sim. N. S. 165, 3 Eng. L. & Eq. 151, construing winding-up acts.

12. *In re* Provincial Bldg. Soc., 30 N. Brunsw. 628, 658.

13. Burrill L. Dict.

14. Burrill L. Dict. [*citing* Townsend Pl. 61].

15. **The term has no legal or technical meaning** distinct from that given in its popular acceptation. Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087.

16. St. Louis *v.* Howard, 119 Mo. 41, 46, 24 S. W. 770, 41 Am. St. Rep. 630, construing a city charter.

"Control" by husband.— In Deering *v.* Tucker, 55 Me. 284, 288, a devise of property was made to granddaughters with the provision that it should "be so secured for their or her own use and benefit, as not to be subject to the control and disposition of their or either of their husbands." The court said: "The 'control' to be guarded against was legal control on the part of the husband, by virtue of his marital rights."

"Control or interference with the rights of conscience," prohibited by Pa. Const. art. 9, § 3, is not affected by a statute against labor on Sunday. Specht *v.* Com., 8 Pa. St. 312, 323, 49 Am. Dec. 518, construing the Pennsylvania act of April 22, 1794.

17. Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087, where it is said: "Webster employs the word 'superintendence' as expressive of the meaning of the word 'control,' and gives the word 'control' as one of the synonyms of the word 'superintendence.'"

"Charge and control."— In Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 527, 42 N. E. 112 [*cited* in Fairman *v.* Boston, etc., R. Co., (Mass. 1897) 47 N. E. 613, 617], it is said: "In Gibbs *v.* Great Western R. Co., 11 Q. B. D. 22, Field, J., expresses a doubt whether the words 'charge' and 'control' are intended to mean different things. But in the same case in the Court of Appeal they seem to have been regarded as meaning different things (Gibbs *v.* Great Western R. Co., 12 Q. B. D. 208, 48 J. P. 230, 53 L. J. Q. B. 543, 50 L. T. Rep. N. S. 7, 32 Wkly. Rep. 329), though the point was not decided; and in Roberts & Wallace, Employers' Liability, (3d ed.) 293, 294, that view is adopted. On the other hand, the implication of our own decisions, so far as they can be said to have given rise to one, is that they are to be regarded, not perhaps as synonymous, but as explanatory of each other, and as used to-

and sometimes used as equivalent to if not synonymous with management.[18]

gether for the purpose of describing more fully one and the same thing; . . . and we think that this is the better construction. If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employee injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him. . . . We think, therefore, that by the words 'any person . . who has the charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it." And see Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 18, 30 N. E. 169, 32 Am. St. Rep. 425. Where the statute provided that the county commissioners should "have charge and control over the property owned by the county," it was said that the words "charge and control over the public roads and bridges" convey a power as broad as that "to prevent and remove nuisances," and necessarily imposes as high an obligation. Anne Arundel County *v.* Duckett, 20 Md. 468, 478, 83 Am. Dec. 577.

18. Gray *v.* Parke, 162 Mass. 582, 583, 39 N. E. 191; Youngworth *v.* Jewell, 15 Nev. 45, 48 [*quoted* in Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087].

"Control" and "controller."— Where the will provided that the wife should "be the sole controller of all my real estate," etc., and "I make my wife sole controller just the same as if I was alive," the court said: "These latter words do not imply that the wife had control over the property of the testator during his life, but that, after his death, she should have the management of it, as he had, in his life time. Nor do the words, 'control' and 'controller' imply the power in her to make absolute disposition of the property and use and enjoy it as her own, but to have management and authority over it." Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744.

"Control and direction." as used in a will see Rock River Paper Co. *v.* Fisk, 47 Mich. 211, 219, 10 N. W. 344.

"Control" and "management."— Where a will gave to a son, when he reached the age of majority, etc., power to control and manage certain property, it was said: "The 'control and management' of the property which the will gives him, manifestly does not include power of disposal. It gives him the use, possession, superintendence and direction of the property and the power of exercising a general restraint over the same until the happening of the event that will determine who takes the property in fee simple absolute." Randall *v.* Josselyn, 59 Vt. 557, 561, 10 Atl. 577. And see Blanton *v.* Mayes, 58 Tex. 422, 429 [*quoted* in Anderson *v.* Stockdale, 62 Tex. 54, 61], where a will gave the executors power to "manage" and "control" the estate until the majority of the heirs, etc., and the court said: "The terms 'manage' and 'control,' standing alone and unaided by other considerations, could not be considered as conferring a power to sell." In Hanrahan *v.* State, 57 Ind. 527, 528, defendant was indicted under the act of March 8, 1873, in relation to keepers of billiard tables, for permitting minors to congregate there, etc. The court said: "We do not think that the words, 'having the control and management of said saloon in which were kept billiard tables,' as averred in the indictment, are equivalent to the words, 'having the care, management, or control of any billiard table,' as used in the statute."

"Control" by married woman.—The words of the statute, which provide that a married woman "shall have the sole and exclusive control" of her separate estate, are held to confer upon her power to sell her separate property without her husband joining, and without doing so in writing, as to her personal property. The court said: "To hold that she may make a simple contract of sale of her separate property seems a necessary incident to the 'control' of her property." Stiles *v.* Lord, (Ariz. 1886) 11 Pac. 314, 316.

"Control during natural life."— Where a will bequeathed real and personal property to a woman "to be at her control during her natural life," the court said: "The word, 'control,' cannot mean that she shall have an absolute fee simple, the power of sale, so as to pass a fee during her natural life." Porter *v.* Thomas, 23 Ga. 467, 472.

"Control" of insured property.— In Soli *v.* Farmers' Mut. Ins. Co., 51 Minn. 24, 26, 27, 52 N. W. 979, the provision of the statute was that "such property shall be insured only when it is under the immediate control of the insured," etc. The court said: "The word 'control,' of simple and well-understood import, is inadequate to express the condition or fact of the property insured being at, or in the immediate vicinity of, the place of residence of the assured. It might be under his immediate control, although it were situated on a part of his farm most remote from his residence and his ordinary farm buildings."

The "control" of the examination of teachers conferred by Cal. Const. art. 9, § 7, upon the county superintendents and the county boards of education, "does not necessarily imply that the legislature may not prescribe the rules by which the qualifications of teachers shall be determined, nor what shall entitle one to a certificate." Mitchell *v.* Winnek, 117 Cal. 520, 523, 49 Pac. 579. And see Board of School Trustees *v.* Sherman, 91 Tex. 188, 193, 42 S. W. 546, where it is said: "The word 'control,' as used in the various laws relating to public free schools, would clearly include the fixing of the salary of the superintendent, for it is the word used in passing them under the dominion of the cities, and seems to be used in a very comprehensive sense."

As a verb, to restrain;[19] to check;[20] to regulate;[21] to direct;[22] to govern;[23] to keep under check;[24] to hold in restraint or check;[25] to dominate;[26] to rule and direct;[27] to counteract;[28] to exercise a directing, restraining, or governing influence over;[29] to govern with reference thereto;[30] to subject to authority;[31] to have under command,[32] and authority over;[33] to have authority over the particular matter.[34]

CONTROL AS SECURITY. The control of papers as security on a debt implies such a possession thereof under a delivery to the holder, and such acceptance, as will perfect the security.[35]

CONTROLLER.[36] A COMPTROLLER,[37] *q. v.*; an AUDITOR,[38] *q. v.* In old English law, an officer who took notes of any other officer's accounts or receipts, to the

One who has authority to let a tenement and receive the rents has control of it within the meaning of the statute relating to aid in the maintaining of a nuisance. State *v.* Frazier, 79 Me. 95, 98, 8 Atl. 347.

19. Anderson *v.* Stockdale, 62 Tex. 54, 61; *In re* Laundry License Case, 22 Fed. 701, 702; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163; Webster Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

20. Anderson *v.* Stockdale, 62 Tex. 54, 61; *In re* Laundry License Case, 22 Fed. 701, 702; Webster Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

21. Century Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744]; Standard Dict. [*quoted* in Byrne *v.* Drain, 127 Cal. 663, 667, 60 Pac. 433].

"Control" is a necessary incident of "regulation." Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 164, 3 N. E. 448, construing a statute to regulate the use of streets.

The words **"regulate" and "control"** do neither necessarily nor properly imply prohibition. McConvill *v.* Jersey City, 39 N. J. L. 38, 44.

The "control" of the treasury department referred to in the appropriation act relates solely to care, custody, repair, furnishing, etc., as a custodian for the benefit of the courts and post-offices, and includes no right of dispossession. *In re* Lyman, 55 Fed. 29, 40.

22. Century Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744]; Standard Dict. [*quoted* in Byrne *v.* Drain, 127 Cal. 663, 667, 60 Pac. 433].

23. U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163; Century Dict.; Webster Dict. [*quoted in* Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

24. U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163, where it is said: "The word 'control' seems in itself to imply that the party to be controlled has power to exercise his functions, or discharge his duty, in several different ways."

25. Century Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

26. Century Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

27. *In re* Laundry License Case, 22 Fed. 701, 702.

28. Standard Dict. [*quoted* in Byrne *v.* Drain, 127 Cal. 663, 667, 60 Pac. 433].

29. Standard Dict. [*quoted* in Byrne *v.* Drain, 127 Cal. 663, 667, 60 Pac. 433, where it is said: "Neither of these terms is used to express the idea of repealing, extinguishing, or doing away with. Nothing in the context indicates such a meaning. The very idea of being subject to or controlled by a higher power or law necessarily implies the continued existence of the thing controlled or subjected so long as the control or subjection continues. That which is extinguished, repealed, or destroyed cannot be said to be afterward under control or subjection"].

30. Anderson *v.* Stockdale, 62 Tex. 54, 61.

31. Century Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

32. Webster Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

"All roads which it controls or may hereafter control," as used in a contract by a railroad corporation, means controlled by the corporation. Pullman's Palace-Car Co. *v.* Missouri Pac. R. Co., 11 Fed. 634, 636, 3 McCrary 645, where it is said: "The language does not refer to the ultimate power of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors."

33. Webster Dict. [*quoted* in Wolffe *v.* Loeb, 98 Ala. 426, 432, 13 So. 744].

34. Anderson *v.* Stockdale, 62 Tex. 54, 61.

35. Monroe Bank *v.* Gifford, 79 Iowa 300, 307, 44 N. W. 558, where it is said: "How could one 'control as security' paper unless there had been an acceptance thereof as such? Counsel's criticism, to the effect that the instruction, by the use of the word 'control,' implies that the bonds should be regarded as security, without any showing of an acceptance thereof, demands no further attention."

36. **The official name implies** recognized duties appurtenant thereto. State *v.* Doron, 5 Nev. 399, 408.

37. **The word is not derived** from *compte*, or *accompt*, an account, but from *contre*, against, and *rotulator*, or *rouleur*, an enroller; making its true signification to be the keeper of the counter-roll, that is, a roll intended as a check upon another officer's roll or account. Hence the spelling controller is preferable. Burrill L. Dict.

38. State *v.* Doron, 5 Nev. 399, 408.

intent to discover him if he dealt amiss.[39] In modern law, an officer who has the inspection, examination or controlling of the accounts of other officers; one who keeps a counter-register of accounts.[40] As used in the statute, a supervising officer of revenue, invested with many powers, among which is the examination and allowance of claims against the state.[41] In mechanics, the cylinder-shaped electric mechanism of an electric car at the left hand of the motorman, which is operated by a handle which is constantly being swung to and fro, and is the visible means by which the speed of the car is retarded or is promoted; as a whole, a device for regulating or controlling the current delivered to an electric motor, and thereby regulating the speed of the car.[42] (Controller: Of City, see MUNICIPAL CORPORATIONS. Of Currency, see BANKS AND BANKING; CONTROLLER OF THE CURRENCY. Of Hamper, see CONTROLLER OF THE HAMPER. Of Household, see CONTROLLER OF THE HOUSEHOLD. Of Mint, see CONTROLLER OF THE MINT. Of Navy, see CONTROLLER OF THE NAVY. Of Pell, see CONTROLLER OF THE PELL. Of Pipe, see CONTROLLER OF THE PIPE. Of State, see STATES. Of Treasury, see CONTROLLER OF THE TREASURY; UNITED STATES.)

CONTROLLER OF THE CURRENCY. An officer of the United States treasury having the enforcement of law relating to the national banks.[43] (See, generally, BANKS AND BANKING.)

CONTROLLER OF THE HAMPER. An officer in the chancery attending the Lord Chancellor daily in term time, and upon seal days; whose office is to take all things sealed from the clerk of the hamper, enclosed in bags of leather, and to note the just number and effect of things so received, and enter the same in a book, with all the duties appertaining to his majesty, and other officers for the same.[44]

CONTROLLER OF THE HOUSEHOLD. An officer who controls the accounts of the Green Cloth; and he sits with the Lord Steward and other officers in the counting-house, for daily taking the accounts of all expenses of the household.[45]

CONTROLLER OF THE MINT. An officer who controls the payment of wages, and accounts relating to the same.[46]

CONTROLLER OF THE NAVY. An officer who controls the payment of wages; examines and audits accounts, and inquires into rates for stores for shipping, etc.[47]

CONTROLLER OF THE PELL. A clerk of the chamberlain of the exchequer who keeps his accounts.[48]

CONTROLLER OF THE PIPE. An officer of the exchequer that writeth out summons twice every year, to the sheriffs, to levy the rents and debts of the pipe.[49]

CONTROLLER OF THE TREASURY. An officer of the United States treasury, whose duty is to examine and adjust public accounts, countersign warrants and

39. Burrill L. Dict. [*citing* Fleta, lib. 1, c. 18].

40. Burrill L. Dict.

41. State *v.* Doron, 5 Nev. 399, 408, construing the Nevada act of March 3, 1869, where it is said: "Upon review of the constitution and statutes of the different states of this Union it will be found, that in a large majority some supervising officer of revenue is provided for — among whose duties is the final auditing and settling of all claims against the state; and in all cases where such distinctive officer exists, he is called, indifferently, 'controller of public accounts,' 'auditor,' 'controller-general,' 'auditor-general,' 'auditor of state,' 'auditor of public accounts,' or 'controller.' For instance, in Alabama, Connecticut, and Texas, he is styled 'controller of public account;' in Arkansas, Indiana, Kansas, Minnesota, and Ohio, he is styled 'auditor;' in Georgia, 'controller-general;' in Michigan, 'auditor-general;' in Iowa, Missouri, and Rhode Island, 'auditor of state,' or 'state auditor;' in Illinois, Kentucky, Mississippi, Oregon, and Virginia, 'auditor of public accounts;' in California, New York, and Nevada, 'controller.' This, then, being the received use in the states of this Union of these official names, it follows that the constitutional convention of Nevada thus used the term 'controller,' unless the instrument itself negatives such presumption."

42. Electric Car Co. of America *v.* Nassau Electric R. Co., 91 Fed. 142, 33 C. C. A. 420.

43. English L. Dict.

44. Jacob L. Dict.

45. Jacob L. Dict.

46. Jacob L. Dict.

47. Jacob L. Dict.

48. English L. Dict.

49. Black L. Dict.

direct legal proceedings for the collection of debts due the government. His decision is final and binding within the scope of his authority.[50] (See, generally, UNITED STATES.)

CONTROLMENT. In old English law, the controlling or checking of another officer's account; the keeping of a counter-roll.[51] (See CONTROLLER.)

CONTROL THE EXPENDITURE. To hinder, restrain or check the expenditure, in the exercise of a free will.[52]

CONTROVER. In old English law, an inventor or deviser of false news.[53] Also to contrive.[54]

CONTROVERSIA. In English law, a dispute; a suit at law or in equity; a civil action or proceeding.[55] (See CONTROVERSY.)

CONTROVERSY. A dispute;[56] a disputed question;[57] a dispute arising between two or more persons;[58] a lawsuit;[59] a suit at law;[60] a civil action or

50. English L. Dict.

51. Burrill L. Dict.

52. Mercer County *v.* New Boston, 13 Ill. App. 274, 279, construing Ill. Rev. Stat. (1880), c. 121, § 110.

53. Black L. Dict. [*citing* 2 Inst. 227].

54. Burrill L. Dict.

55. Adams Gloss.

56. Keith *v.* Levi, 2 Fed. 743, 745, 1 McCrary 343, where the court in construing U. S. Const. art. 3, § 2, and also U. S. Rev. Stat. § 639, which provides for the removal of a cause from a state to a federal court for trial, said: "The term 'dispute,' as employed in the statute, must be held to be exactly snyonymous with the term 'controversy' in the above-mentioned clause of the constitution."

57. Standard Dict. [*quoted* in State *v.* Guinotte, 156 Mo. 513, 519, 57 S. W. 281, 50 L. R. A. 787].

58. Bouvier L. Dict. [*quoted* in Barber *v.* Kennedy, 18 Minn. 216; Matthews *v.* Noble, 25 Misc. (N. Y.) 674, 675, 55 N. Y. Suppl. 190].

Corresponds to "right of property."— In Copp *v.* Henniker, 55 N. H. 179, 187, 20 Am. Rep. 194, the court in construing the act of 1692, which required that "the fault be found by the verdict of twelve men" before any person's "right of property" should be determined "by any of the aforesaid courts," of which the quarter sessions was one, said: "'Right of property' there spoken of corresponds to 'deprived of his property' in art. 15 of the bill of rights, and 'controversies concerning property' in art. 20."

"Controversies between two or more states," "all controversies of a civil nature, where a state is a party," are broad, comprehensive terms, by no obvious meaning or necessary implication excluding those which relate to the title, boundary, jurisdiction, or sovereignty of a state. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 723, 9 L. ed. 1233 [*citing* Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257].

59. American Encycl. Dict. [*quoted* in Matthews *v.* Noble, 25 Misc. (N. Y.) 674, 675, 55 N. Y. Suppl. 190].

The construction of a will and the administration of its trusts is a "case" or "controversy" within the jurisdiction of a federal court of chancery. Woodfin *v.* Phœbus, 30 Fed. 289, 292.

60. Standard Dict. [*quoted* in State *v.* Guinotte, 156 Mo. 513, 519, 57 S. W. 281, 50 L. R. A. 787].

To constitute a controversy in an action at law there must be an allegation on one side and a denial on the other, making an issue of fact or an issue of law. Gudger *v.* Western North Carolina R. Co., 21 Fed. 81, 83.

Applied to removal of causes.— Where a statute provided that "when, in any suit, . . . there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them," etc., the court said: "It does not say an actual controversy, which would exclude merely nominal parties, nor the principal controversy, which would devolve upon the court the duty of determining between them which should be considered the main and which the subordinate controversy; but the language is 'a controversy,' which means any actual controversy in which both parties have an interest." Sheldon *v.* Keokuk Northern Line Packet Co., 1 Fed. 789, 794, 9 Biss. 307.

The term includes a contest in a probate court that may be removed from the state to the federal courts under the provisions of the act of congress of March 3, 1875. Craigie *v.* McArthur, 6 Fed. Cas. No. 3,341, 4 Dill. 474.

"A separate controversy" is not identical in signification with "a separable cause of action." Gudger *v.* Western North Carolina R. Co., 21 Fed. 81, 83 [*citing* Boyd *v.* Gill, 19 Fed. 145, 21 Blatchf. 543], construing the act of congress of March 3, 1875, relating to removal of causes.

"Controversy or disagreement."— N. Y. Laws (1862), p. 743, c. 412, authorized the justices of the supreme court to refer controversies arising between receivers and members of mutual insurance companies. The words "controversy or disagreement" as used in that act, include actions regularly commenced by summons and complaint, and in which an answer has been put in. Sands *v.* Harvey, 4 Abb. Dec. (N. Y.) 147.

A "controversy" as to the passing of an act of parliament is fairly within the meaning of that clause of the statute (3 & 4 Wm.

proceeding at law.[61] The term implies not only a suit, but a suit in which something is affirmed upon the one side and denied upon the other, in which there is a dispute, an issue to be tried.[62] (Controversy: Affirmance For Want of, see APPEAL AND ERROR. Amount in to Determine Jurisdiction, see APPEAL AND ERROR; COURTS; JUSTICES OF THE PEACE. Submission Without, see SUBMISSION OF CONTROVERSY. See also ACTIONS; CASE; CIVIL CASE; CIVIL CAUSE; CAUSE; CAUSE OF ACTION; REMOVAL OF CAUSES.)

CONTROVERT. To deny.[63]

CONTROVERTED. Denied.[64] Also a term applied in England to a contest over an election before a court or legislative body.[65]

CONTUMACY. See CONTEMPT.

CONTUSION. In medical jurisprudence, a bruise; a hurt or injury to the flesh or some part of the body by the blow of a blunt instrument, or by a fall producing no severance of tissue or apparent wound.[66]

CONUSANCE. See COGNIZANCE.

CONUSEE. A COGNIZEE, *q. v.*

CONUSOR. A COGNIZOR, *q. v.*

IV, c. 22), a "litigation or controversy arising out of the duties imposed" on the commissioners by the statutes of sewers. Reg. *v.* Norfolk County, 15 Q. B. 549, 564, 15 Jur. 121, 69 E. C. L. 549.

61. Matthews *v.* Noble, 25 Misc. (N. Y.) 674, 675, 55 N. Y. Suppl. 190.

62. Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 299, 4 S. E. 654, 7 S. E. 455.

Compared with and distinguished from "case."— In Smith *v.* Adams, 130 U. S. 167, 177, 9 S. Ct. 566, 32 L. ed. 895, 897, the court in construing the words "cases and controversies," used in the judiciary article of the constitution defining the limits of the judicial power of the United States, said: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See also Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 238, 7 Am. Rep. 183, where the court in construing U. S. Const. art. 3, § 2, said: "The use of the word 'controversies' in the latter part of the section, in the place of the term 'cases,' before used, cannot fail to attract observation. It is broader in its meaning than the term it supersedes, especially as that term is qualified, when first and last used, in the section under consideration. It is not improbable that it is used for this reason. This appears quite reasonable, when we consider that, in some controversies in which jurisdiction is conferred, 'cases' or actions could not have been prosecuted before the constitution in any forum, as controversies between States, and actions against a State by citizens of another State, or by a foreign state, citizens or subjects, of which jurisdiction has been taken away by an amendment. As no actions could then be prosecuted in such instances, it may have been thought that no power would have been conferred if the word 'cases' had been used. But, for whatever reason the word 'controversies' is used, it appears to us to be of more general and extensive import, so far as it relates to the occasion for the exercise of power, than the other word 'cases' used for the same purpose." "Controversy" differs from "case," which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 431, 432, 1 L. ed. 440; Bouvier L. Dict. [*quoted* in Mathews *v.* Noble, 25 Misc. (N. Y.) 674, 675, 55 N. Y. Suppl. 190]. And see 6 Cyc. 679, note 20.

63. Henny Buggy Co. *v.* Patt, 73 Iowa 487, 488, 35 N. W. 587. But see Swenson *v.* Kleinschmidt, 10 Mont. 473, 479, 26 Pac. 198 [*quoting* Century Dict.; Webster Dict.], where the court, in construing Mont. Code Civ. Proc. § 109, says that the word means more than to deny.

64. Century Dict.

Facts are "controverted," within the meaning of the statute, whenever they tend, either as evidentiary or subordinate facts or as the ultimate fact, to sustain the issue made by the pleading in the cause. La Salle County *v.* Milligan, 143 Ill. 321, 329, 32 N. E. 196, construing Ill. Rev. Stat. c. 110, § 89, par. 90. And see American Exch. Nat. Bank *v.* Chicago Nat. Bank, 131 Ill. 547, 550, 22 N. E. 523, where it is said: "The expressions, 'any controverted questions of fact,' and 'all matters of fact in controversy,' found in the statute, are broad enough to include, and have frequently been decided by this court to include, both evidentiary or subordinate facts and the principal or ultimate facts in issue."

Used in connection with "denial."— In Mattison *v.* Smith, 19 Abb. Pr. (N. Y.) 288, 292, it is said: "The word 'controverted,' in connection with the word 'denial,' whether the denial be general or specific, requires that the answer should, by its words, so describe the allegations of the complaint controverted, that any person of intelligence, though not a lawyer, can identify them."

65. English L. Dict.

66. Black L. Dict. And see People *v.* De Garmo, 73 N. Y. App. Div. 46, 51, 76 N. Y. Suppl. 477, distinguishing the term "contusion" from the term "abrasion."

CONVENABLE. In old English law, suitable; agreeable; CONVENIENT, *q. v.*; fitting [67]

CONVENCIO. See CONVENTIO.

CONVENE. A civil law term, signifying to sue.[68]

CONVENIENCE. A coming together; assemblage; conjunction; joinder; the state or character of being convenient; fitness; suitableness; adaptation; propriety.[69] (See CONVENIENT.)

CONVENIENT.[70] Adapted;[71] well adapted,[72] or adapted to an end;[73] affording certain facilities or accommodation;[74] appropriate;[75] becoming;[76] beneficial;[77] commodious;[78] conduc[t]ive to ease or comfort in any kind of performance;[79]

67. Black L. Dict.

68. Rapalje & L. L. Dict.

69. Century Dict. And see Sitwell *v.* Bernard, 6 Ves. Jr. 520, 529*a*, 5 Rev. Rep. 374.

"Convenience of the public."— An opportunity to purchase a thousand-mile ticket for less than the standard rate is not a "convenience," within the rule that the legislature may make regulations of the business of carriers to provide for the safety, health, and convenience of the public. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 19 S. Ct. 565, 43 L. ed. 858.

May imply a reasonable time.— In Chichester *v.* Vass, 1 Munf. (Va.) 98, 117, 4 Am. Dec. 531, a father agreed that he would do equal justice to all his daughters, as fast as it was in his power with "convenience;" the true meaning of which was, that he would do it in a reasonable time, taking into consideration the circumstances of his estate.

May include outbuildings, a well, etc.— Where trustees under a turnpike act were authorized to make turnpikes, with such suitable outbuildings and "conveniences" as they thought necessary on the intended line of road, it was held that a well sunk for the convenience of a toll-house, was within the scope and authority of the trustees. Newman *v.* Fletcher, 1 D. & R. 202, 16 E. C. L. 33.

70. Derived from *conveniens*, a coming together, a meeting. Hastings *v.* Summerfeldt, 30 Ont. 577, 580.

The prepositions "by," "to," or "for," some person or thing or purpose must be supplied in each case. Hastings *v.* Summerfeldt, 30 Ont. 577, 580; Century Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641]. Thus: "Give me neither poverty nor riches; feed me with food convenient for me." Proverbs xxx, 8 [*quoted* in Hastings *v.* Summerfeldt, 30 Ont. 577, 580].

71. Finlay *v.* Dickerson, 29 Ill. 9, 20.

72. Hastings *v.* Summerfeldt, 30 Ont. 577, 580.

73. Webster Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

"Convenient speed."— Where a charter-party, after describing the ship as "now trading," provided that she should sail with "all convenient speed" to P, the court said that the language "with all convenient speed," meant "reasonable diligence with reference to the trading voyage which the ship had already undertaken." Gill *v.* Browne, 53 Fed. 394, 396. In Olsen *v.* Hunter-Benn, 54 Fed. 530, 531, a provision in a charter-party requiring that the ship "should, with all convenient speed," proceed, was construed as equivalent to a stipulation that she should proceed without unnecessary delay. In Tarrabochia *v.* Hickie, 1 Hurl. & N. 183, 185, 26 L. J. Exch. 26, a stipulation in a charter-party that the vessel should sail with all convenient speed, was considered, and it was said that this stipulation was not a condition precedent to the charterer's obligation to load. The court said: "There can be no doubt about a particular day; but what is a 'convenient speed' or a 'reasonable time' must always be a subject of contention."

74. Century Dict.; Standard Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

75. Webster Dict. [*quoted* in Grand Island *v.* Oberschulte, 36 Nebr. 696, 699, 55 N. W. 301; Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

Convenient court-house.— A statute which empowers the boards of supervisors to acquire so much ground as may be necessary and convenient for the building and the use of the court-house, and requires the erection and keeping in repair in each county of a "good and convenient court-house," will authorize the setting of shade trees in such grounds connected with the court-house. Allgood *v.* Hill, 54 Miss. 666, 667.

76. Century Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641]; Webster Dict. [*quoted* in Grand Island *v.* Oberschult, 36 Nebr. 696, 699, 55 N. W. 301; Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

77. Webster Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

78. Hastings *v.* Summerfeldt, 30 Ont. 577, 580; Century Dict.; Standard Dict.; Webster Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

"Convenient sections."— A drain law provided that, after the drain is located, the commissioner shall "proceed to divide the route thereof into convenient sections for the letting of the work," etc. The court said: "The term 'convenient sections' includes the right to let in one section at the discretion of the commissioner." Smith *v.* Carlow, 114 Mich. 67, 71, 72 N. W. 22 [*citing* Sedgwick Stat. & Const. L. 368].

79. Standard Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

easily used;[80] fit;[81] just;[82] promotive of comfort or advantage;[83] proper;[84] rendering some act or movement easy of performance or freeing it from obstruction;[85] serviceable;[86] suitable;[87] conducive to ease or comfort in

80. Hastings *v.* Summerfeldt, 30 Ont. 577, 580; Standard Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

81. *Illinois.*— Finlay *v.* Dickerson, 29 Ill. 9, 20, its primary or ordinary meaning.

Minnesota.— McClung *v.* Bergfeld, 4 Minn. 148.

Nebraska.— Grand Island *v.* Oberschulte, 36 Nebr. 696, 699, 55 N. W. 301 [*quoting* Webster Dict.].

Ohio.— Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641 [*quoting* Century Dict.; Webster Dict.].

Canada.—Hastings *v.* Summerfeldt, 30 Ont. 577, 580.

"Convenient certainty" in pleading.— Where, in an action of ejectment, the statute requires that "the premises claimed shall be described in the declaration with convenient certainty" the court said: "The statute having prescribed everything required to be inserted in a declaration in ejectment, and having gone further and stated the manner in which the premises claimed are to be described, we are not justified, when determining what is convenient certainty, in applying the strict rules of the common law special pleading; but the certainty must be such as in the usual sense of the word is convenient." Kemble *v.* Herndon, 28 W. Va. 524, 530.

82. Black L. Dict.; Burrill L. Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

Applied to homestead act.— In Jacobs *v.* Figard, 25 Pa. St. 45, 47, the court in construing a homestead act and the duty of a settler to return thereto with due diligence, said: "If he should be compelled to quit his residence on the land by any extraordinary or occasional occurrence, he must return as early as convenient, or it will be deemed an abandonment: Pfouts *v.* Steel, 2 Watts (Pa.) 409. He must not 'substitute claim for residence, and convenience for prosecution of the title:' McDonald *v.* Mulhollan, 5 Watts (Pa.) 173. By returning 'as early as convenient,' the law means as early as he reasonably can."

"Convenient" time of payment.— Where part payment of a note was made before it was legally demandable, in consideration that the time for the payment of the balance of the note should be extended until it should be convenient for the maker to pay it, the court said: "The effect of that agreement was, to postpone the time for the payment of the balance after the note should become due by its terms, for such a period as under all the circumstances of the case should be reasonable." Newsam *v.* Finch, 25 Barb. (N. Y.) 175, 177. And see Howe *v.* Woodruff, 21 Wend. (N. Y.) 640, 642, where the court, in considering an agreement to pay a certain sum with interest, "whenever it is convenient to make a final settlement," said: "The legal effect of such a stipulation is, I think, that the act shall be done within a reasonable time. It cannot mean that the thing shall be done on the demand of the party, for then he might demand immediately, and before a proper time had elapsed. 'Convenient,' as here used, must mean such a time for doing the act, as under all the circumstances of the case should be reasonable." And see also Works *v.* Hershey, 35 Iowa 340, 343; Ramot *v.* Schotenfels, 15 Iowa 457, 83 Am. Dec. 425.

The expression "payable as convenient," cannot, in a written contract providing for the payment of a certain sum, be construed to mean not payable at all, but only as an extension of credit. Black *v.* Bachelder, 120 Mass. 171, 173 [*quoted* in Hastings *v.* Summerfeldt, 30 Ont. 577, 581].

83. Webster Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

84. Finlay *v.* Dickerson, 29 Ill. 9, 20; McClung *v.* Bergfeld, 4 Minn. 148; Hastings *v.* Summerfeldt, 30 Ont. 577, 580; Century Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641]; Black L. Dict.; Burrill L. Dict.

"Convenient times."— In Doe *v.* Bird, 6 C. & P. 195, 200, 25 E. C. L. 390, the lease contained a covenant that the landlord should be permitted to view the premises at "convenient times." The court said: "I think that he ought to give notice that he is coming; and if he does not give notice, it is not to be considered a 'convenient time.'"

85. Century Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

"Convenient privilege of passing," as used in a count in a writ for obstructing a road to a mill, may be construed to mean convenient way or road, when, from the whole declaration, such is manifestly the sense in which these words are used. Simpson *v.* Norton, 45 Me. 281, 285.

86. Hastings *v.* Summerfeldt, 30 Ont. 577, 580; Century Dict.; Standard Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

87. *Illinois.*— Finlay *v.* Dickerson, 29 Ill. 9, 20.

Minnesota.— McClung *v.* Bergfeld, 4 Minn. 148.

Nebraska.— Grand Island *v.* Oberschulte, 36 Nebr. 696, 699, 55 N. W. 301 [*quoting* Webster Dict.].

Ohio.— Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641 [*quoting* Century Dict.; Black L. Dict.; Burrill L. Dict.; Webster Dict.].

Canada.—Hastings *v.* Summerfeldt, 30 Ont. 577, 580.

Applied to a change of venue.— Construing the statute providing for change of venue in a suit by or against a corporation which concludes: "The court shall change the venue to the adjoining county most convenient for

any kind of performance; suitable for a required purpose; easily used; serviceable.[88]

CONVENIENTLY. In a convenient manner, commodiously, without difficulty;[89]

both parties," the court said: "There is no doubt that using the words in the signification of physical ease, Lebanon, the county seat of Warren county, and the residence of the plaintiff, would be most convenient for her, and no less convenient for the defendant and its counsel, than the county seats of either Butler or Clermont counties; but I find that the meaning of the word is not confined to physical ease, and it would even seem that this is its secondary rather than its primary meaning. The ideas of 'suitable,' 'becoming,' 'appropriate,' 'fit or adapted to an end,' are equally prominent in the meaning of this word. The end sought to be obtained by the enactment of this statute, is to do exact justice between the parties and place the venue of trial where it will be absolutely fair as between them." Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641.

Applied to sale by assignee.— Where a provision in a voluntary assignment directed that the assignee "shall, as soon as conveniently may be," sell, etc., the court said: "This, then, required the assignee to make sale in a fit, suitable, or proper manner. In doing so, it is required to be done at a suitable time, for a proper price, after giving a fit opportunity for competition, all adapted to the interest of the parties, the nature of the property, and to effectuate the objects of the trust. By applying the secondary meaning of the word, it might be held to apply to the mere convenience of the assignee, but the rules of construction require that the intention of the parties must be ascertained from the instrument itself." Finlay *v.* Dickerson, 29 Ill. 9, 20. And see McClung *v.* Bergfeld, 4 Minn. 148, where an assignment for the benefit of creditors, provided that the assignee "shall and do, as soon as convenient, sell and dispose of," the lands, goods, etc., and it was said: ". . . and in this sense" the word "convenient" "is used in this assignment; as directing the assignee to sell and dispose of the property in such time as it is fit, suitable, or proper for him to do, under all the circumstances, or as soon as it can be done without difficulty. In other words, as soon as he reasonably can do so."

"Convenient newspaper."— In Berkson *v.* Anderson, 115 Iowa 674, 677, 87 N. W. 402, a statute provided that a notice of incorporation must be published in some newspaper as convenient as practicable to the principal place of business of the corporation. The court said: "The requirement that the notice be published in some newspaper as 'convenient as practicable to the principal place of business' of the corporation means that it shall be published in the nearest or 'most handy' paper suitable therefor."

"Convenient place."— A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law a "convenient" place. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642 [*quoted* in Hastings *v.* Summerfeldt, 30 Ont. 577, 581]. And see Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 278, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737 [*quoting* Tipping *v.* St. Helen's Smelting Co., 4 B. & S. 608, 116 E. C. L. 608], where "proper and convenient" and "suitable and convenient" are considered and compared.

88. Standard Dict. [*quoted* in Wilson *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 640, 641].

"Convenient" in respect to bridge or ferry. — Under authority given by charter to a railroad company to cross a river by bridge or ferry as may be most convenient, the convenience of both the navigation of the river and the railroad interest is to be regarded. McMahon *v.* N. Y., etc., R. Co., 24 N. J. Eq. 49.

"Necessary or convenient" to railroad construction.— Where a statute authorized a corporation to purchase, receive, and hold such real estate as may be necessary or convenient to locate and maintain a railroad, the court said: "Such lands, therefore, as were 'necessary or convenient' for the location of the railroad and all its appurtenances they had the right by their charter to purchase or take in order to locate, construct, maintain, complete and operate a railroad between the points designated." Boston, etc., Air Line R. Co. *v.* Coffin, 50 Conn. 150, 154.

89. Hastings *v.* Summerfeldt, 30 Ont. 577, 580 [*quoting* Mark xiv, 11, where it is said: "And he sought how he might conveniently betray him"]. And see Walker *v.* Shore, 19 Ves. Jr. 387, 391, construing "conveniently" as used in a will.

Applied to electoral ballot.— Where a statute provided that when a person "has inadvertently dealt with his ballot in such a manner that it cannot conveniently be used as a ballot paper," etc., the same may be canceled, the court said: "'Conveniently' in the section means 'conveniently for the voter and for his wish, purpose, and intention in voting.'" Hastings *v.* Summerfeldt, 30 Ont. 577, 580.

Applied to railroad construction.— Where a charter authorized a railroad company "as soon as it conveniently can, to locate and construct a railroad," and "to make, construct, and erect . . . appendages necessary for the convenience of said company for the use of said railroad," the court said: "This grant of power unquestionably carries with it the right to construct turnouts, sidings, . . . and appendages usual in the convenient operation of a railroad. . . . Switches, sidings, turnouts, and buildings for fuel, . . . are essential to the operation of the road. . . . The expression 'as soon as they can conveniently locate and construct' is not a limitation upon the power to compel the company to exercise

by the exercise of reasonable diligence — so used with respect to the performance of services enjoined upon an officer by law.[90]

CONVENIENT USE. The fit, appropriate, advantageous use.[91]

CONVENIRE. In the civil and old English law, to sue; to prosecute; to covenant.[92]

CONVENIT. In civil and old English law, it is agreed; it was agreed.[93]

CONVENT or **COVENT.** The fraternity of a religious house, as an abbey or priory.[94]

CONVENTIO or **CONVENCIO.** In canon law, the act of summoning or calling together the parties by summoning the defendant.[95] In the civil law, a COMPACT, *q. v.*, AGREEMENT, *q. v.*, or CONVENTION, *q. v.*; an agreement between two or more persons respecting a legal relation between them. In contracts, an AGREEMENT, *q. v.*; a covenant.[96]

CONVENTIO DUPLICATA. An agreement executed in duplicate, or in two parts.[97]

CONVENTION. A somewhat general term, inclusive of agreements, compacts, and mutual engagements of various kinds.[98] In Roman law, an agreement

its whole authority in the very beginning, when the demands of business are few." Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103.

"**Conveniently found.**"— Where a statute provided for the appointment of a special constable "whenever no qualified constable can conveniently be found in the township," it was said that these words "must be construed to have a restricted significance" and "the convenience must be a legal one." Cunningham *v.* Bostwick, 7 Colo. App. 169, 43 Pac. 151, 153. The person having a warrant is directed by a statute "to call upon the persons so assessed, or their agents, if they can be conveniently found, and demand payment of the amount assessed to each," etc. Construing this provision, the court said: "The word 'conveniently' in the section requiring the contractor to call on the person assessed, if he can conveniently be found, and demand payment, is very unusual in such a connection, though the proper interpretation may not be doubtful. It certainly does not mean that he should call on the owner of the lot if it suits his convenience. It may, in one sense, be inconvenient for him to leave his residence, or to pass along a single block, or to enter the lot owner's place of business to demand payment; but that interpretation would make the requirement a useless and absurd one." Guerin *v.* Reese, 33 Cal. 292, 297.

90. Guerin *v.* Reese, 33 Cal. 292, 297; Hastings *v.* Summerfeldt, 30 Ont. 577, 580 [*quoting* Anderson L. Dict.].

91. Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 609, 24 N. W. 234, 55 Am. Rep. 279, construing Iowa Code, § 1241, which provides that a railway corporation "may take and hold . . . so much real estate as may be necessary for the location, construction, and convenient use of its railway," etc. The court said: "The adjective 'convenient' does not limit the name 'use' so as to make it apply to the actual running of trains upon the tracks. That is done by virtue of the meaning of the word itself. The use of a thing is not the use of an appurtenant thereto. The use of a thing may be convenient, and the use of its appurtenances may be convenient."

92. Burrill L. Dict.

93. Burrill L. Dict.

94. Burrill L. Dict. *Compare* Matter of Metcalfe, 2 De G. J. & S. 122, 10 Jur. N. S. 224, 33 L. J. N. S. 308, 10 L. T. Rep. N. S. 78, 12 Wkly. Rep. 538, 67 Eng. Ch. 96.

95. Black L. Dict.

96. Black L. Dict. The term included the two leading divisions of contracts (*contractus*) and pacts (*pacta*). Burrill L. Dict. [*citing* Heineccii El. Jur. Civ. lib. 3, tit. 14, § 784].

Conventio is a general term (*nomen generalissimum*), which comprehends all sorts, treaties, pacts, agreements. The consent of two or more persons to form with each other an engagement or to dissolve or change one which they had previously made. Adams Gloss.

Conventio was transferred from the civil law, and includes, in English law, a covenant, that is, the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either or one of the parties promises to the other that something is or shall be done. A species of express contract contained in a deed, to do a direct act or to omit one. Adams Gloss [*citing* 3 Bl. Comm. 355].

97. Burrill L. Dict.

98. Abbott L. Dict.

There are three species of conventions or agreements; for they arise either out of a public or out of a private cause; out of a private cause [that is peculiar to one's self], or from usages prescribed by law, or from the law of nations. A public convention or agreement is that which arises for peace, whenever the leaders of war make some bargain or stipulation between themselves. Adams Gloss.

The term is chiefly used, however, of those entered into between sovereign powers; as the postal conventions between the United States and foreign nations. Abbott L. Dict.

"**Treaty or convention.**"— Where a statute provided that no purchase, grant, lease,

between parties; a pact.[99] In legislation, an assembly of delegates or representatives chosen by the people for special and extraordinary legislative purposes, such as the framing or revision of a state constitution; also an assembly of delegates chosen by a political party, or by the party organization in a larger or smaller territory, to nominate candidates for an approaching election.[1] In English law, an extraordinary assembly of the Houses of Lords and Commons, without the assent or summons of the sovereign;[2] a parliament assembled, but in which no act is passed, or bill signed;[3] also the name of an old writ that lay for a breach of a covenant.[4] (Convention: To Frame, Amend, or Revise Constitution, see CONSTITUTIONAL LAW. To Nominate Candidates For Office, see ELECTIONS.)

CONVENTIONAL. That which is produced by, or depends upon the agreement or mutual arrangement of parties.[5] (Conventional: Community, see HUSBAND AND WIFE. Estate, see ESTATES. Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Subrogation, see SUBROGATION.)

CONVENTIONAL, OR CUSTOMARY INTEREST. As established by the Spanish law, that rate of interest which is the rate general, and usual by custom, at a given time, in a given place; and which may be greater or less than legal interest.[6] (See, generally, INTEREST; USURY.)

CONVENTION OF DELEGATES. A representation of some political party.[7]

CONVENTION OR PRIMARY MEETING. An organized assemblage of electors or delegates representing a political party or principle.[8] (See, generally, ELECTIONS.)

etc., of Indian lands should be valid "unless the same be made by treaty or convention entered into pursuant to the constitution," the court said: "'Treaty or convention' are the significant words in the sentence. They generally mean compacts between states and organized communities, or their representatives. This is the ordinary signification of those words,— the first meaning which is suggested by their use. This is not doubted as to the word 'treaty,' and is scarcely admissible of doubt as to the word 'convention,' when used, as here, in connection with the word 'treaty;' and that the two words are here used in that sense is made more obvious by the words which follow, 'entered into pursuant to the constitution.'" U. S. *v.* Hunter, 21 Fed. 615, 616, construing U. S. Rev. Stat. § 2116.

Conventions with foreign countries as to the extradition of fugitive offenders see EXTRADITION.

Executed treaties.— When contracts between nations are performed by a single act, and their execution is at an end at once, they are not called treaties, but agreements, conventions, or pactions. 1 Bouvier Inst. 100.

99. Black L. Dict.

A convention was a mutual engagement between two persons, possessing all the subjective requisites of a contract, but which did not give rise to an action, nor receive the sanction of the law, as bearing an "obligation," until the objective requisite of a solemn ceremonial (such as *stipulatio*) was supplied. In other words, convention was the informal agreement of the parties, which formed the basis of a contract, and which became a contract when the external formalities were superimposed. Black L. Dict. [*citing* Maine Anc. L. 313].

"The division of conventions into contracts and pacts was important in the Roman law. The former were such conventions as already, by the older civil law, founded an obligation and action; all the other conventions were termed 'pacts.' These generally did not produce an actionable obligation. Actionability was subsequently given to several pacts, whereby they received the same power and efficacy that contracts received." Mackeldey Rom. L. § 395 [*quoted* in Black L. Dict.].

1. Black L. Dict.

2. Wharton L. Lex.

Such a convention can only be justified *ex necessitate rei*, as the Parliament which restored Charles II, and that which disposed of the crown and kingdom to William and Mary. Wharton L. Lex.

3. Jacob L. Dict.

4. Abbott L. Dict.

5. Burrill L. Dict.

6. Fowler *v.* Smith, 2 Cal. 568, 571 [*citing* Herman *v.* Sprigg, 3 Mart. N. S. (La.) 190; Caisergues *v.* Dujarreau, 1 Mart. (La.) 5].

7. State *v.* Burdick, 6 Wyo. 448, 464, 46 Pac. 854, 34 L. R. A. 845, where it is said: "A convention of delegates, or even a mass convention, is, after all, but a representation of some political party; neither constitutes the party itself."

8. Mont. Pol. Code, § 1310 [*quoted* in State *v.* Hogan, 24 Mont. 383, 392, 62 Pac. 583; State *v.* Tooker, 18 Mont. 540, 543, 46 Pac. 530; Price *v.* Lush, 10 Mont. 61, 66, 24 Pac. 749, 9 L. R. A. 467]; N. Y. Laws (1890), c. 262 [*quoted* in Matter of Cowie, 11 N. Y. Suppl. 838, 839, 33 N. Y. St. 710, 25 Abb. N. Cas. (N. Y.) 455]; Wyo. Laws (1890), c. 18, § 85 [*quoted* in State *v.* Burdick, 6 Wyo. 448, 462, 46 Pac. 854, 34 L. R. A. 845]. And see State *v.* Rotwitt, 18 Mont. 502, 506, 46 Pac. 370 [*quoted* in State *v.* Hogan, 24 Mont. 383, 392, 62 Pac. 583], where it is said: "Such conventions are, however, in our judgment meant to be organized

CONVENTIO PRIVATORUM NON POTEST PUBLICO JURI DEROGARE.[9] A maxim meaning "A private agreement cannot derogate from public law."[10]

CONVENTIO VINCIT LEGEM.[11] A maxim meaning "The express agreement of parties overcomes the law."[12]

CONVENTUS MAGNATUM VEL PROCERUM. An assembly of the great men or nobles; one of the ancient names of the English parliament.[13]

CONVERSANT. See DOMICILE.

CONVERSANTES. In old English law, conversant or dwelling; commorant.[14] (See, generally, DOMICILE.)

CONVERSATION. Familiar intercourse;[15] an exchange of thoughts or sentiments.[16] The word has also been construed to mean manner of living; habits of

assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of any such convention." See also State *v.* Weir, 5 Wash. 82, 85, 31 Pac. 417 [*quoted* in State *v.* Hogan, 24 Mont. 383, 62 Pac. 583, 586], where it is said: "The plain intent of said section, when examined in the light of all the other sections upon the subject, makes it perfectly clear that the primary meeting or convention must be by or on behalf of the entire body of voters of the respective party who are to be allowed to vote at the election of the officers therein nominated."

9. A maxim of the civil law. Burrill L. Dict. And see Coke Litt. 166*a*.

10. Trayner Leg. Max. And see Jaquith *v.* Hudson, 5 Mich. 123, 133.

11. A maxim of great antiquity see Shoenberger *v.* Watts, 5 Phila. (Pa.) 56, 59, 19 Leg. Int. (Pa.) 244.

As old as the law see Baker *v.* Hoag, 7 Barb. (N. Y.) 113, 117.

And of general application see Shoenberger *v.* Watts, 5 Phila. (Pa.) 56, 59, 19 Leg. Int. (Pa.) 244; Belcher *v.* Cook, 4 U. C. Q. B. 401, 412.

12. Abbott L. Dict.

Applied or explained in the following cases:

Arkansas.— Western Union Tel. Co. *v.* Dougherty, 54 Ark. 221, 223, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102.

Massachusetts.—Winkley *v.* Salisbury Mfg. Co., 14 Gray 443, 446; Arnold *v.* Delano, 4 Cush. 33, 39, 50 Am. Dec. 754; Ashley *v.* Pease, 18 Pick. 268, 273.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290, 333; Massengale *v.* Western Union Tel. Co., 17 Mo. App. 257, 260.

New York.— Loeh *v.* Hellman, 83 N. Y. 601, 603; Baker *v.* Hoag, 7 Barb. 113, 117; Allen *v.* Jaquish, 21 Wend. 628, 631.

Pennsylvania.—Shollenberger *v.* Brinton, 52 Pa. St. 32, 96; Shoenberger *v.* Watts, 5 Phila. 51, 59, 19 Leg. Int. 244, 309.

England.— Everett *v.* Glyn, 6 Taunt. 426, 428, Holt N. P. 1, 2 Marsh. 84, 16 Rev. Rep. 640, 1 E. C. L. 685.

Canada.— Belcher *v.* Cook, 4 U. C. Q. B. 401, 412.

If a debtor can make a better bargain, or one more suited to his interest, by making his election in the contract, what is there to forbid him? He does no violence to the law, but he only makes the choice which the law gives him. It is, therefore, not in derogation of law, but simply the exercise of a privilege, and the maxim of the law itself is that *conventio vincit legem.* Shollenberger *v.* Brinton, 52 Pa. St. 10, 96.

This maxim does not apply, to prevent the application of the general rule of law. Broom Leg. Max. But see Loeh *v.* Hellman, 83 N. Y. 601, 603, where it is said: "Though the law thus declares the rule, the contract of the parties may vary it."

Waiver of a benefit.—"Nothing is more reasonable in itself, or better fortified by authority, than that any person may by contract waive a benefit to which he would otherwise be entitled. '*Conventio vincit legem*' is a maxim of great antiquity and general application. On grounds of public policy, this, in common with every other natural right, may be taken away by the legislature, unless the power to do so is forbidden by the Constitution." Shoenberger *v.* Watts, 5 Phila. (Pa.) 51, 59, 19 Leg. Int. (Pa.) 244, 309, dissenting opinion.

13. Burrill L. Dict. [*citing* 1 Bl. Comm. 148].

14. Burrill L. Dict.

15. *In re* Fenton, 97 Iowa 192, 200, 66 N. W. 99.

Between husband and wife.— Where a statute provided that a party to a libel for divorce cannot testify to private conversations between the parties while living together as husband and wife, the court said that the word "conversation" in the statute does not include all language between husband and wife. Fuller *v.* Fuller, (Mass. 1900) 58 N. E. 588, 589 [*citing* French *v.* French, 14 Gray (Mass.) 186, 188].

Restricted to spoken words.— Where a statute excluded, in an action, evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties, the court said: "The language of the act, 'any conversation with, or admission of,' refers, strictly, only to spoken words." Chadwick *v.* Cornish, 26 Minn. 28, 31, 1 N. W. 55, construing Minn. Laws (1877), c. 40.

16. *In re* Fenton, 97 Iowa 192, 200, 66 N. W. 99, where it is said: "And that is evidently the import of the word in the question."

Distinguished from "admission."—"'Conversation' when employed to denote an interchange of sentiments, or a talking together, implies mutuality; the notion ordinarily con-

life; conduct.[17] (Conversation: As Evidence, see CRIMINAL LAW; EVIDENCE. Criminal, see HUSBAND AND WIFE.)

CONVERSE. To hold intercourse, to talk familiarly.[18]

veyed by its use, is an oral discourse, or talk, in which two or more participated, while the word 'admission' is applicable to a statement or declaration made by one person alone. The two words together seem to embrace every form of oral statement contemplated by this exception, while either, alone, might not be broad enough to do so." Jackson *v.* Ely, 57 Ohio St. 450, 462, 49 N. E. 792.

17. Bradshaw *v.* People, 153 Ill. 156, 160, 38 N. E. 652, construing a statute relating to the abduction of a female of "chaste life and conversation," and holding that "chaste life and conversation" mean the same as a "chaste life and previous character."

18. Webster Dict. [*quoted* in Scott *v.* State, 7 Lea (Tenn.) 232, 233]. And see Quinn *v.* People, 71 N. Y. 561, 568, 27 Am. Rep. 87 [*quoting* 3 Coke Inst. 64; Richardson Dict.], where it is said: "'But a shop wherein any person doth converse' i. e. be employed or engaged with."

CONVERSION

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CROSS-REFERENCES

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Change of Form of Personalty as Affecting Title, see ACCESSION.
Conversion of Bank Into National Bank, see BANKS AND BANKING.
Partnership Real Estate, see PARTNERSHIP.
Severance of:
Crops From Land, see CROPS.
Oil From Land, see MINES AND MINERALS.
Trees From Land, see PROPERTY.
Wrongful Conversion of Personalty, see TROVER AND CONVERSION.

I. DEFINITION.

In equity conversion is the exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, such as to give effect to directions in a will or settlement or to stipulations in a contract, although no such change has actually taken place.[1]

1. Bouvier L. Dict. See also Clapp *v.* Tower, (N. D. 1903) 93 N. W. 862. Other definitions are: "That change in the nature of property by which, for certain

II. NATURE AND APPLICATION OF DOCTRINE IN GENERAL.

A. Basis of Doctrine. The doctrine of conversion is based on the principle that equity regards things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance.[2]

B. Application of Doctrine — 1. In General. Hence money directed to be employed in the purchase of land and land directed to be sold and converted into money are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, contract, marriage settlement, or otherwise.[3]

purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such." Haward *v.* Peavey, 128 Ill. 430, 435, 21 N. E. 503, 15 Am. St. Rep. 120; Pomeroy Eq. Jur. § 1159 [*quoted* with approval in Allen *v.* Watts, 98 Ala. 384, 11 So. 646].

"The transformation of one species of property into another, as money into land or land into money; or, more particularly, a fiction of law, by which equity assumes that such a transformation has taken place (contrary to the fact) when it is rendered necessary by the equities of the case,— as to carry into effect the directions of a will or settlement,— and by which the property so dealt with becomes invested with the properties and attributes of that into which it is supposed to have been converted." Black L. Dict.

"An equitable conversion arises where owing to the binding directions of a will it becomes proper and legal for a court to treat real estate as having been converted into personal property although there has been no actual exchange." *In re* McKay, 75 N. Y. App. Div. 78, 80, 77 N. Y. Suppl. 845 [*overruling* 37 Misc. (N. Y.) 590, 75 N. Y. Suppl. 1069].

2. *Illinois.*— Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

New York.— Moncrief *v.* Ross, 50 N. Y. 431; Arnold *v.* Gilbert, 5 Barb. 190; Lorillard *v.* Coster, 5 Paige 172.

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

Pennsylvania.—Horner's Appeal, 56 Pa. St. 405.

Virginia.— See also Com. *v.* Martin, 5 Munf. 117.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Fletcher *v.* Ashburner, 1 Bro. Ch. 497, 28 Eng. Reprint 1259.

See 11 Cent. Dig. tit. "Conversion," § 1.

3. *Georgia.*— De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211.

Illinois.— Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205; Jennings *v.* Smith, 29 Ill. 116; Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600.

Kentucky.— Smith *v.* Smith, 6 Ky. L. Rep. 217.

New Jersey.— Roy *v.* Monroe, 47 N. J. Eq. 356, 20 Atl. 481; Oberly *v.* Lerch, 18 N. J. Eq. 346; Fluke *v.* Fluke, 16 N. J. Eq. 478; Berrien *v.* Berrien, 4 N. J. Eq. 37.

New York.— Moncrief *v.* Ross, 50 N. Y. 431; Savage *v.* Burnham, 17 N. Y. 561; De Barante *v.* Gott, 6 Barb. 492; Arnold *v.* Gilbert, 5 Barb. 190; Sweezy *v.* Thayer, 1 Duer 286; Lorillard *v.* Coster, 5 Paige 172.

North Carolina.— Smith *v.* McCrary, 38 N. C. 204.

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

Pennsylvania.— Neely *v.* Grantham, 58 Pa. St. 433; Horner's Appeal, 56 Pa. St. 405; Parkinson's Appeal, 32 Pa. St. 455; Hannah *v.* Swarner, 3 Watts & S. 223, 38 Am. Dec. 754; Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48.

Tennessee.— Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

Virginia.— See also Com. *v.* Martin, 5 Munf. 117.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Hayford *v.* Benlows, Ambl. 581, 27 Eng. Reprint 375; Fletcher *v.* Ashburner, 1 Bro. Ch. 497, 28 Eng. Reprint 1259; Wheldale *v.* Partridge, 5 Ves. Jr. 388. Lord Thurlow in Fletcher *v.* Ashburner, 1 Bro. Ch. 497, 499, 28 Eng. Reprint 1259, observed "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. . . . The cases establish this rule universally."

See 11 Cent. Dig. tit. "Conversion," § 1.

"No rule is better settled, than that money directed to be employed in the purchase of land and land directed to be sold and converted into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by

2. Applicable Only in Equity. The doctrine of conversion is an equitable doctrine only and has no application in law.[4]

3. Mode of Direction — a. Must Be by Legal Instrument. A direction, however, to have the effect of an equitable conversion must be given in a legal way, as by will, deed, or judgment of a court, and the mere naked intention of a party verbally expressed is not sufficient, unless in the case of a nuncupative will.[5]

b. Instrument Must Express Unequivocal Intention. And the direction, where given by deed or will, must be positive, and may be implied as well as express; but when implied an equitable conversion is justified only when the design and purpose of the maker of the instrument is unequivocal, and the implication so strong as to leave no substantial doubt.[6]

III. BY DEED OR OTHER INSTRUMENT INTER VIVOS.

A. In General. The doctrine of equitable conversion is applicable to a disposition of property made by deed or other instrument *inter vivos*.[7]

B. Contract to Convey Land — 1. General Rule. Where the owner of real estate enters into a contract for the sale of such real estate, the nature of his estate is changed, the realty being converted into personalty.[8]

will, contract, marriage settlement, or otherwise." Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 122, 61 Am. Dec. 179; Loughborough *v.* Loughborough, 14 B. Mon. (Ky.) 549.

In distributing real and personal estate respectively, the law does not look to the funds from which it was obtained, but to its character at the time when the right to distribution accrues. If at any time a sum of money stands in the place of land, by an actual disposition to that effect not yet executed, he who would be entitled to the land shall have the money; and so conversely, where land is directed to be sold and converted into money by a disposition not executed. Emerson *v.* Cutler, 14 Pick. (Mass.) 108.

4. Lill *v.* Brant, 6 Ill. App. 366; Flagg *v.* Teneick, 29 N. J. L. 25. In Foster's Appeal, 74 Pa. St. 391, 397, 15 Am. Rep. 553, Sharswood, J., said: "Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit æquitas* has redoubled force in application to it. It follows of necessity, that it is limited to its end. . . . When the purpose of conversion is attained, conversion ends." See also Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875.

5. Where the land of a wife, in which she was entitled to a homestead, was decreed to be sold to satisfy a mortgage lien upon it, with a direction that a sale bond be taken payable to the wife for any excess of sale money above the mortgage debt, and both husband and wife died before the maturity of the bond, the wife dying first, it was held that the personal representative of the husband became entitled to the proceeds of the bond after paying debts, etc., as a part of the wife's personal estate, although the wife, just before her death, requested a gentleman to administer on her estate and reinvest the fund in a home for her infant children. Smith *v.* Smith, 6 Ky. L. Rep. 217.

6. Scholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84; Hobson *v.* Hale, 95 N. Y. 588; Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413; Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

7. *Connecticut.*— Hawley *v.* Burgess, 22 Conn. 284.

Indiana.— Henson *v.* Ott, 7 Ind. 512.

Kentucky.— Loughborough *v.* Loughborough, 14 B. Mon. 549.

New Jersey.— Wetherill *v.* Hough, 52 N. J. Eq. 683, 29 Atl. 592.

New York.— Denham *v.* Cornell, 7 Hun 662; De Barante *v.* Gott, 6 Barb. 492.

Pennsylvania.— Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— Griffith *v.* Ricketts, 7 Hare 299, 14 Jur. 166, 19 L. J. Ch. 100, 27 Eng. Ch. 299; Biggs *v.* Andrews, 5 Sim. 424, 9 Eng. Ch. 424; Thornton *v.* Hawley, 10 Ves. Jr. 129, 7 Rev. Rep. 359.

See 11 Cent. Dig. tit. "Conversion," § 19 *et seq.*

8. *Alabama.*— Masterson *v.* Pullen, 62 Ala. 145.

New Jersey.— Keep *v.* Miller, 42 N. J. Eq. 100, 6 Atl. 495; Haughwout *v.* Murphy, 22 N. J. Eq. 531; King *v.* Ruckman, 21 N. J. Eq. 599; Huffman *v.* Hummer, 17 N. J. Eq. 263; Hoagland *v.* Latourette, 2 N. J. Eq. 254; Crawford *v.* Bertholf, 1 N. J. Eq. 458.

New York.— Williams *v.* Haddock, 145 N. Y. 144, 39 N. E. 825; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; Smith *v.* Gage, 41 Barb. 60; Moore *v.* Burrows, 34 Barb. 173; De Barante *v.* Gott, 6 Barb. 492; Burank *v.* Babcock, 3 N. Y. St. 458; Johnson *v.* Corbett, 11 Paige 265.

Pennsylvania.— Bender *v.* Luckenbach, 162 Pa. St. 18, 29 Atl. 295, 296; Simmon's Estate, 140 Pa. St. 567, 21 Atl. 402; Leiper's Appeal, 35 Pa. St. 420, 78 Am. Dec. 347;

2. CONTRACT MUST BE ENFORCEABLE. In order, however, to work such a conversion, the contract must be valid and binding, free from all inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.[9]

3. WHERE CONTRACT IS RESCINDED. In some jurisdictions it is held that this conversion takes place notwithstanding that it may afterward be defeated by the non-payment of the purchase-money.[10] While in other jurisdictions it is held that there is an equitable conversion prior to the default, subject to being reconverted upon the default happening.[11]

4. SUBJECT TO CONTINGENCY. Even where the conversion is subject to the happening of a contingency, the property will be taken to be as of the nature it was intended to be upon the happening of the contingency.[12]

Siter's Appeal, 26 Pa. St. 178; Leiper *v.* Irvine, 26 Pa. St. 54; Sutter *v.* Ling, 25 Pa. St. 466; Foster *v.* Harris, 10 Pa. St. 457; Maffet's Estate, 8 Kulp 184.

Tennessee.— Reynolds *v.* Brandon, 3 Heisk. 593.

England.— Shaw *v.* Foster, L. R. 5 H. L. 321, 42 L. J. Ch. 49, 27 L. T. Rep. N. S. 281, 20 Wkly. Rep. 907; Polletfen *v.* Moore, 3 Atk. 272, 26 Eng. Reprint 959; Hardey *v.* Hawkshaw, 12 Beav. 552, 12 Jur. 707; Hadley *v.* London Bank, 3 De G. J. & S. 63, 11 Jur. N. S. 554, 12 L. T. Rep. N. S. 747, 13 Wkly. Rep. 978, 68 Eng. Ch. 49; Rose *v.* Watson, 10 H. L. Cas. 672, 10 Jur. N. S. 297, 33 L. J. Ch. 385, 10 L. T. Rep. N. S. 106, 3 New Rep. 673, 12 Wkly. Rep. 585; Baden *v.* Pembroke, 2 Vern. 213; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124; Paine *v.* Meller, 6 Ves. Jr. 349, 5 Rev. Rep. 327; Sikes *v.* Lister, 5 Vin. Abr. 541.

See 11 Cent. Dig. tit. "Conversion," § 20 *et seq.*

Agreement to purchase partnership real estate.— An agreement between two parties in the articles that at the end of three months after the death of either a valuation of all of their firm assets, including real estate, should be made according to the amount of capital invested, and that the survivor should have one year thereafter to take and pay the value of such share to the legal representative of decedent, constitutes an equitable conversion of the realty. Maddock *v.* Astbury, 32 N. J. Eq. 181.

Condition precedent.— Provisions in a contract for the sale of real estate making performance on the part of the vendee of his contract to pay a portion of the purchase-money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule. Williams *v.* Haddock, 145 N. Y. 144, 39 N. E. 825.

Upon the decease of the vendor, his interest in the contract is personal property and goes to his personal representatives. It will pass by assignment, with or without seal, like a bond and mortgage, and it may be sold as personal property by his executor or administrator. Moore *v.* Burrows, 34 Barb. (N. Y.) 173. Where an administrator, under a decree of court, conveys property contracted to be sold by his intestate, the price of the land which is received by the administrator is personalty of the decedent. *In re* Drenkle, 3 Pa. St. 377.

9. Keep *v.* Miller, 42 N. J. Eq. 100, 6 Atl. 495; Garnett *v.* Acton, 28 Beav. 333; *In re* Thomas, 34 Ch. D. 166; Lysaght *v.* Edwards, 2 Ch. D. 499, 45 L. J. Ch. 554, 34 L. T. Rep. N. S. 787, 24 Wkly. Rep. 778; Rose *v.* Cunynghame, 11 Ves. Jr. 550; Buckmaster *v.* Harrop, 7 Ves. Jr. 341; Atty.-Gen. *v.* Day, 1 Ves. 218, 27 Eng. Reprint 992. See also *In re* Harrison, 34 Ch. D. 214, 56 L. J. Ch. 341, 56 L. T. Rep. N. S. 159, 35 Wkly. Rep. 196; Gaskarth *v.* Lowther, 12 Ves. Jr. 107, 8 Rev. Rep. 310.

An oral agreement to sell land, coupled with the receipt of part of the purchase-money, and the occupancy of the land by the vendee, is not an actual conversion of the land, as the contract of sale could not be enforced. Mills *v.* Harris, 104 N. C. 626, 10 S. E. 704.

10. Leiper's Appeal, 35 Pa. St. 420, 78 Am. Dec. 347; Longwell *v.* Bentley, 23 Pa. St. 99; Rose *v.* Jessup, 19 Pa. St. 280; Maffet's Estate, 8 Kulp (Pa.) 184.

Extent of this rule.— This rule has been applied even where the court has refused to compel the vendee to carry out the contract because of laches on the part of the heir whereby its execution had become inequitable (Keep *v.* Miller, 42 N. J. Eq. 100, 6 Atl. 495); and also where the contract was valid at the date of the death of the vendor, but the vendee lost his right to a specific performance by subsequent laches (Curre *v.* Bowyer, 5 Beav. 6).

11. Williams *v.* Haddock, 145 N. Y. 144, 39 N. E. 825; Wells *v.* Smith, 2 Edw. (N. Y.) 78; Leiper *v.* Irvine, 26 Pa. St. 54.

12. Longwell *v.* Bentley, 23 Pa. St. 99; Lawes *v.* Bennett, 1 Cox Ch. 167, 1 Rev. Rep. 10, 29 Eng. Reprint 1111.

Where it was stipulated in an antenuptial contract that, in case of the death of the wife without leaving children, her husband surviving, the real estate of which she should die possessed should be immediately sold and the proceeds remitted to her husband, it was held that the provision operated as a grant to the husband, contingent upon the death of the wife, to which effect was to be given upon the principle of equitable conversion. De Barante *v.* Gott, 6 Barb. (N. Y.) 492.

5. Subject to Election of Vendee. Where real estate is contracted to be sold, equity considers it as converted into personalty, even though the election to purchase rests merely with the purchaser.[13]

6. Effect on Antecedent Will. A contract by a testator, made after his will, for the sale of lands thereby devised, is a revocation of such devise in equity, and thereby converts such realty into personalty.[14]

7. Effect on Subsequent Will. Where, however, a testator devises land, legal title to which is in him but which he has sold, giving to the purchaser a bond for a deed therefor, the purchase-money when paid by the purchaser will belong to the devisee.[15]

C. Lease With Option to Purchase. Upon exercising the option, the equitable doctrine of constructive conversion of real into personal property is applicable to leases in which an option to purchase the demised premises is granted to the lessee.[16]

D. Deed of Trust — 1. In General. Whenever the language of a deed of trust expresses the intention of its author, that real estate shall be sold and converted into money, the estate thus conveyed and impressed with the character of personalty will, as to the claimant after the death of the maker of the deed, retain that character and be regarded as personal estate.[17]

2. Direction Must Be Mandatory. In order, however, to effect a conversion by a deed of trust with power to sell, the direction to the trustee must be mandatory and not discretionary.[18]

13. Corson *v.* Mulvaney, 49 Pa. St. 88, 88 Am. Dec. 485; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; McKay *v.* Carrington, 1 McLean (U. S.) 50, 16 Fed. Cas. No. 8,841; Lawes *v.* Bennett, 1 Cox Ch. 167, 1 Rev. Rep. 10, 29 Eng. Reprint 1111; Daniels *v.* Davison, 16 Ves. Jr. 249, 10 Rev. Rep. 171; Townley *v.* Bedwell, 14 Ves. Jr. 591; Ripley *v.* Waterworth, 7 Ves. Jr. 425.

As to lease with option to purchase see *infra*, III, C.

14. *Massachusetts.*— Loring *v.* Cunningham, 9 Cush. 87.

New Jersey.— Flagg *v.* Teneick, 29 N. J. L. 25.

New York.— Walton *v.* Walton, 7 Johns. Ch. 258, 1 Am. Dec. 456.

Pennsylvania.— Sutter *v.* Ling, 25 Pa. St. 466; Rose *v.* Jessup, 19 Pa. St. 280.

Tennessee.— Blair *v.* Snodgrass, 1 Sneed 1; Donohoo *v.* Lea, 1 Swan 119, 55 Am. Dec. 725.

England.— Mayer *v.* Gowland, 2 Dick. 563.

See 11 Cent. Dig. tit. "Conversion," § 19 *et seq.*

Extent of rule.— This rule applies even where the purchase is not completed until after the death of the testator. Rose *v.* Jessup, 19 Pa. St. 280; Farrar *v.* Winterton, 5 Beav. 1, 6 Jur. 204.

15. Wright *v.* Minshall, 72 Ill. 584, Woods *v.* Moore, 4 Sandf. (N. Y.) 579.

16. Smith *v.* Loewenstein, 50 Ohio St. 346, 34 N. E. 159; Gilbert *v.* Port, 28 Ohio St. 276; Buckwalter *v.* Klein, 5 Ohio Dec. (Reprint) 55, 2 Am. L. Rec. 347; Pegg *v.* Wisden, 16 Beav. 239, 16 Jur. 1105, 1 Wkly. Rep. 43; *In re* Isaacs, [1894] 3 Ch. 506, 63 L. J. Ch. 815, 71 L. T. Rep. N. S. 386, 8 Reports 660, 42 Wkly. Rep. 685; Edwards *v.* West, 7 Ch. D. 858, 47 L. J. Ch. 463, 38 L. T. Rep. N. S. 481, 26 Wkly. Rep. 507; Lawes *v.* Bennett, 1 Cox Ch. 167, 1 Rev. Rep. 10, 29 Eng. Reprint 1111; Weeding *v.* Weeding, 1 Johns. & H. 424; Collingwood *v.* Row, 3 Jur. N. S. 785, 26 L. J. Ch. 649, 5 Wkly. Rep. 484; Townley *v.* Bedwell, 14 Ves. Jr. 591; *In re* Crofton, Ir. R. 1 Eq. 204.

Purchase after death of lessor.— Where a lessee of real estate, with an option to purchase at the expiration of a term of years, makes the purchase after the death of the lessor, such realty is thereby converted into personalty as between those claiming under the will of the lessor. Collingwood *v.* Row, 3 Jur. N. S. 785, 26 L. J. Ch. 649, 5 Wkly. Rep. 484.

17. *Arkansas.*— Turner *v.* Davis, 41 Ark. 270.

Kentucky.— Rawlings *v.* Landes, 2 Bush 158; Loughborough *v.* Loughborough, 14 B. Mon. 549; Arnold *v.* Arnold, 11 B. Mon. 81; Brown Banking Co. *v.* Stockton, 54 S. W. 854, 21 Ky. L. Rep. 1212; Duff *v.* Duff, 54 S. W. 711, 21 Ky. L. Rep. 1211; Smith *v.* Smith, 6 Ky. L. Rep. 217.

New York.— Coster *v.* Clarke, 3 Edw. 428. See also Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299 [*affirming* 6 N. Y. App. Div. 28, 39 N. Y. Suppl. 527].

Pennsylvania.— Sweeney *v.* Horn, 190 Pa. St. 237, 42 Atl. 709; Hunter *v.* Anderson, 152 Pa. St. 386, 25 Atl. 538; Dobson's Estate, 11 Phila. 81, 32 Leg. Int. 218.

Virginia.— Washington *v.* Abraham, 6 Gratt. 66; Siter *v.* McClanachan, 2 Gratt. 280.

West Virginia.—Zane *v.* Sawtell, 11 W. Va. 43.

England.— Griffith *v.* Ricketts, 7 Hare 299, 14 Jur. 166, 19 L. J. Ch. 100, 27 Eng. Ch. 299; Biggs *v.* Andrews, 5 Sim. 424, 9 Eng. Ch. 424.

See 11 Cent. Dig. tit. "Conversion," § 23.

18. Janes *v.* Throckmorton, 57 Cal. 368; Bleight *v.* Manufacturers', etc., Bank, 10 Pa.

3. WHERE CONVERSION DEPENDS ON CONTINGENCY. Where land is not converted out and out, and at all events, by a deed of trust, into personal estate, but on the contrary, its conversion depends on a condition, it will not be considered in equity as personal estate.[19]

E. Time of Conversion — 1. CONTRACT AND DEED OF TRUST. As a general rule an estate under contract of sale is regarded as converted into personalty from the date of the execution of the contract,[20] and an estate conveyed by a deed of trust with absolute directions for its sale is regarded as converted into personalty from the date of the delivery of the deed;[21] but this rule as to when conversion under a power of sale takes effect does not apply where such power is postponed to the death of the grantor.[22]

2. LEASE WITH OPTION TO PURCHASE. In the United States it seems that where the lessee of an estate with the option of purchasing the estate exercises such option after the death of the lessor, who is the owner in fee, the conversion of the realty into personalty will take place at the time of exercising the option and will not relate back to the time of the execution of the lease.[23] In England, however, it has been held that in such a case the option when exercised after the death of the owner of the estate will, at any rate as between the real and personal representatives, have a retroactive operation, and the conversion will be deemed to have taken place at the time when the agreement granting the option was entered into.[24]

F. Personalty Into Realty — 1. CONTRACTED TO BE INVESTED IN LAND. If one covenants to lay out a sum of money in the purchase of land generally and devises his real estate before he has made the purchase, the money agreed to be laid out will pass to the devisee as representing land.[25] Or in such a case if he should die

St. 131; Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595. To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be the duty of and obligatory upon the trustees to sell in any event. White *v.* Howard, 46 N. Y. 144.

19. Lynn *v.* Gephart, 27 Md. 547; Neely *v.* Grantham, 58 Pa. St. 433; Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779. The fact that a deed of trust contemplates that the beneficiaries shall at some time give the trustees direction to sell the land does not constitute them trustees or make the obligation of the real trustees to sell imperative. Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

20. Keep *v.* Miller, 42 N. J. Eq. 100, 6 Atl. 495; Miller *v.* Miller, 25 N. J. Eq. 354; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526.

Unless the conversion is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, the conversion takes place, in deeds and other instruments *inter vivos*, as from the date of their execution. Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

21. Thornton *v.* Hawley, 10 Ves. Jr. 129, 7 Rev. Rep. 359.

The application of the doctrine of equitable conversion differs in the case of a deed from that of a will in this particular: The will speaks from the death, the deed from the delivery. If the maker of the deed impress upon his real estate the character of personalty, that for the purposes of distribution after his death makes it personal and not real estate from the delivery of the deed, the property is converted in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator. Loughborough *v.* Loughborough, 14 B. Mon. (Ky.) 549.

Where a deed of trust directs that land shall be sold on a certain condition, it is not thereby converted into personal estate, but only after a valid sale is made are the surplus proceeds treated as personalty. Evans *v.* Kingsberry, 2 Rand. (Va.) 120, 14 Am. Dec. 779.

22. Paisley *v.* Holzshu, 83 Md. 325, 34 Atl. 832; Byrne *v.* Gunning, 75 Md. 30, 23 Atl. 1.

23. Smith *v.* Loewenstein, 50 Ohio St. 346, 34 N. E. 159; Gilbert *v.* Port, 28 Ohio St. 276.

24. Lawes *v.* Bennett, 1 Cox Ch. 167, 1 Rev. Rep. 10, 29 Eng. Reprint 1111; Collingwood *v.* Row, 3 Jur. N. S. 785, 26 L. J. Ch. 649, 5 Wkly. Rep. 484; Townley *v.* Bedwell, 14 Ves. Jr. 591. But see Edwards *v.* West, 7 Ch. D. 858, 47 L. J. Ch. 463, 38 L. T. Rep. N. S. 481, 26 Wkly. Rep. 507.

25. Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Hudson *v.* Cook, L. R. 13 Eq. 417, 41 L. J. Ch. 306, 26 L. T. Rep. N. S. 180, 20 Wkly. Rep. 407; Pollexfen *v.* Moore, 3 Atk. 272, 26 Eng. Reprint 959; Green *v.* Smith, 1 Atk. 572, 26 Eng. Reprint 360; Whittaker *v.* Whittaker, 4 Bro. Ch. 31, 29 Eng. Reprint 762; Warwick *v.* Edwards, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687; Davie *v.* Beardsham, 1 Ch. Cas. 39; Lysaght *v.* Edwards, 2 Ch. D. 499, 45 L. J. Ch. 554, 34 L. T. Rep. N. S. 787, 24 Wkly. Rep. 778; Broome *v.* Monck, 10 Ves.

intestate before the purchase was complete, and the vendor should rescind the contract under a power reserved by him, the money agreed to be laid out in real estate would pass to his real instead of his personal representative.[26]

2. INVESTED BY ADMINISTRATOR. An interest in real estate, bought by an administrator to save a debt due the estate, is to be treated as personalty and not as real estate in making distribution of the estate.[27]

3. UNDER MARRIAGE SETTLEMENT — a. In General. When money is agreed and directed in marriage articles to be laid out in lands, such money will in equity be treated as realty from the date of the execution of such instrument.[28]

b. Dependent on Option of Beneficiary. Where, however, the conversion depends on the option or request of the beneficiary, no conversion takes place.[29]

IV. BY WILL.

A. Realty Into Personalty — 1. RULE STATED. It is a well settled rule in chancery, in the construction of wills as well as of other instruments, that when land is directed to be sold and turned into money, courts of equity in dealing with the subject will consider it as personalty.[30]

Jr. 597, 8 Rev. Rep. 48; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124. See also Holt *v.* Holt, 1 Ch. Cas. 190, 2 Vern. 322.

Partnership property.— Where partnership real estate, which in law is regarded as personalty (see, generally, PARTNERSHIP), is conveyed by a deed of trust to one of the partners in trust for all the partners, specifying the proportion of said real estate belonging to each partner, by such conveyance the beneficiaries are invested with an equitable estate of inheritance, and the estate is thereby changed from its character as personalty to that of realty. Nicoll *v.* Mason, 49 Ill. 358; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311.

26. An intestate was, at the time of his death, under a contract to purchase realty, which the vendor might have specifically enforced, but which he afterward rescinded under a power thereby reserved to him. It was held that the heir at law of the intestate was entitled to receive the purchase-money out of the intestate's personal estate. Hudson *v.* Cook, L. R. 13 Eq. 417, 41 L. J. Ch. 306, 26 L. T. Rep. N. S. 180, 20 Wkly. Rep. 407. See also Garnett *v.* Acton, 28 Beav. 333.

27. Where an heir was indebted to the estate, and in order to save the debt the estate bought in his interest in realty, which he failed to redeem, it was held that the amount so invested thereon should be distributed as personal assets. Rogers *v.* Rogers, 101 Tenn. 428, 47 S. W. 701.

28. Guidot *v.* Guidot, 3 Atk. 254, 26 Eng. Reprint 948; *In re* Cleveland, [1893] 3 Ch. 244, 62 L. J. Ch. 955, 69 L. T. Rep. N. S. 735, 13 Reports 235 note; Lingen *v.* Sowray, Gilb. Exch. 91, 10 Mod. 39, Prec. Ch. 400, 1 P. Wms. 172, 24 Eng. Reprint 343; Symonds *v.* Rutter, Prec. Ch. 23, 2 Vern. 227, 24 Eng. Reprint 12; Lechmere *v.* Carlisle, 3 P. Wms. 211, 24 Eng. Reprint 1033; Bristow *v.* Warde, 2 Ves. Jr. 336, 2 Rev. Rep. 185. See also *dictum* to same effect in Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179.

29. Russell *v.* Smythies, 1 Cox Ch. 215, 29 Eng. Reprint 1135; Matter of Taylor, 9 Hare 596, 41 Eng. Ch. 596; Davies *v.* Goodhew, 6 Sim. 585, 9 Eng. Ch. 585; Wheldale *v.* Partridge, 5 Ves. Jr. 388. See also Thornton *v.* Hawley, 10 Ves. Jr. 129, 7 Rev. Rep. 359, where, under the peculiar circumstances of the case and the whole wording of the settlement, it was held that a conversion from personalty to realty took place, as the direction in the settlement was for an investment in land "with all convenient speed, after request, to lay it out," etc., although no request was made.

30. *Connecticut.*—Ritch *v.* Talbot, 74 Conn. 137, 50 Atl. 42.

Illinois.— Greenwood *v.* Greenwood, 178 Ill. 387, 53 N. E. 101; Nevitt *v.* Woodburn, 175 Ill. 376, 51 N. E. 593.

Kentucky.— Rawlings *v.* Landes, 2 Bush 158; Hocker *v.* Gentry, 3 Metc. 463; Field *v.* Hallowell, 12 B. Mon. 517; Arnold *v.* Arnold, 11 B. Mon. 81; Duff *v.* Duff, 54 S. W. 711, 21 Ky. L. Rep. 1,211.

Maryland.— Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362; Reiff *v.* Strite, 54 Md. 298; Smithers *v.* Hooper, 23 Md. 273; Leadenham *v.* Nicholson, 1 Harr. & G. 267; Hurtt *v.* Fisher, 1 Harr. & G. 88; Carr *v.* Ireland, 4 Md. Ch. 251; Thomas *v.* Wood, 1 Md. Ch. 296.

Massachusetts.— Hammond *v.* Putnam, 110 Mass. 232.

Michigan.— Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486.

New Jersey.— Askew *v.* Douglass, (1886) 3 Atl. 263; Snyder *v.* Warbasse, 11 N. J. Eq. 463; Berrien *v.* Berrien, 4 N. J. Eq. 37.

New York.— *In re* McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387; Finley *v.* Bent, 95 N. Y. 364; Wells *v.* Wells, 88 N. Y. 323; Hood *v.* Hood, 85 N. Y. 561; Horton *v.* McCoy, 47 N. Y. 21; Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550; Baker *v.* Baker, 18 N. Y. App. Div. 189, 45 N. Y. Suppl. 870; Matter of Mitchell, 61 Hun 372, 16 N. Y. Suppl. 180, 41 N. Y. St. 131; Kessler *v.* Friede, 29 Misc. 187, 60 N. Y. Suppl. 891; Bogert *v.* Hertell, 4 Hill 492; Kane *v.* Gott, 24 Wend. 641, 35 Am. Dec.

2. Intention of Testator — a. In General. As in the construction of wills the intention of the testator is the main guide. In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. There must be an expression in some form of an absolute intention that the land shall be sold and turned into money.[31]

641; Lorillard *v.* Coster, 5 Paige 172; Drake *v.* Pell, 3 Edw. 251.

North Carolina.— Conly *v.* Kincaid, 60 N. C. 594; Powell *v.* Powell, 41 N. C. 50; Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34; McCabe *v.* Spruil, 16 N. C. 189.

Ohio.— Collier *v.* Collier, 3 Ohio St. 369; Furguson *v.* Stuart, 14 Ohio 140.

Pennsylvania.— Jones *v.* Caldwell, 97 Pa. St. 42; Silverthorn *v.* McKinster, 12 Pa. St. 67; Simpson *v.* Kelso, 8 Watts 247; Allison *v.* Wilson, 13 Serg. & R. 330.

South Carolina.— Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887; Colton *v.* Galbraith, 35 S. C. 531, 14 S. E. 957; Wood *v.* Reeves, 23 S. C. 382; Wilkins *v.* Taylor, 8 Rich. Eq. 291; Mathis *v.* Guffin, 8 Rich. Eq. 79; Postell *v.* Postell, 1 Desauss. 173.

Tennessee.— McCormick *v.* Cantrell, 7 Yerg. 615.

West Virginia.— Brown *v.* Miller, 45 W. Va. 211, 31 S. E. 956.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Fletcher *v.* Ashburner, 1 Bro. Ch. 497, 28 Eng. Reprint 1259; Ward *v.* Arch, 10 Jur. 977, 15 Sim. 389, 38 Eng. Ch. 389; Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320; Doughty *v.* Bull, 2 P. Wms. 320, 24 Eng. Reprint 748; Yates *v.* Compton, 2 P. Wms. 308, 24 Eng. Reprint 743.

See 11 Cent. Dig. tit. "Conversion," § 28 *et seq.*

Lands devised to be sold and turned into money must in equity be looked upon as if the testator had sold it in his lifetime and turned it into money. Hayford *v.* Benlows, Ambl. 581, 27 Eng. Reprint 375.

Directions held to work conversion.—A testator in one item of his will devised his real estate to his children in fee, and in another he empowered his executors to sell the whole or any part of the real estate to pay debts, to secure a fund for the support and education of his children by the investment of the proceeds, and to divide them among his children as they became of age. It was held that the direction worked a conversion. Smith's Estate, 4 Phila. (Pa.) 181, 17 Leg. Int. (Pa.) 174.

31. *Illinois.*— Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Mississippi.— Montgomery *v.* Milliken, Sm. & M. Ch. 495.

Nebraska.— Chick *v.* Ives, (1902) 90 N. W. 751.

New York.— Scholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84, 23 N. Y. St. 171; Hobson *v.* Hale, 95 N. Y. 588; Gourley *v.* Campbell, 66 N. Y. 169; White *v.* Howard, 46 N. Y. 144; Harris *v.* Clark, 7 N. Y. 242; Schlereth *v.* Schlereth, 73 N. Y. App. Div. 283, 76 N. Y. Suppl. 676; Lee *v.* Tower, 58 Hun 606, 12 N. Y. Suppl. 240, 34 N. Y. St. 829; Snell *v.* Tuttle, 44 Hun 324; Newell *v.* Nichols, 12 Hun 604 [*affirmed* in 75 N. Y. 78]; McCarty *v.* Deming, 4 Lans. 440; Fowler *v.* Depau, 26 Barb. 224; Reed *v.* Underhill, 12 Barb. 113; Wyeth *v.* Sorchan, 38 Misc. 173, 77 N. Y. Suppl. 263; Sage *v.* Lockman, 53 How. Pr. 276; Wright *v.* New York M. E. Church, Hoffm. 202; Graham *v.* De Witt, 3 Bradf. Surr. 186.

North Carolina.— Mills *v.* Harris, 104 N. C. 626, 10 S. E. 704.

North Dakota.— Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

Ohio.— Brewster *v.* Benedict, 14 Ohio 368.

Pennsylvania.— Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. Rep. 623; Hunt's Appeal, 105 Pa. St. 128; Perot's Appeal, 102 Pa. St. 235; Peterson's Appeal, 88 Pa. St. 397; McClure's Appeal, 72 Pa. St. 414; Neely *v.* Grantham, 58 Pa. St. 433; Chew *v.* Nicklin, 45 Pa. St. 84; Anewalt's Appeal, 42 Pa. St. 414; Stoner *v.* Zimmerman, 21 Pa. St. 394; Com. *v.* Gordon, (1886) 7 Atl. 229; Henry *v.* McClosky, 9 Watts 145; Twaddell *v.* Hamilton Land, etc., Co., 30 Leg. Int. 225. See also *In re* Twaddell, 9 Phila. 316, 30 Leg. Int. 12.

Tennessee.— Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

West Virginia.— Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

United States.— Rinehart *v.* Harrison, 20 Fed. Cas. No. 11,840, Baldw. 177.

England.— Guidot *v.* Guidot, 3 Atk. 254, 26 Eng. Reprint 948; Fletcher *v.* Ashburner, 1 Bro. Ch. 497, 28 Eng. Reprint 1259; Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320, Symonds *v.* Rutter, Prec. Ch. 23, 2 Vern. 227, 24 Eng. Reprint 12.

See 11 Cent. Dig. tit. "Conversion," § 39.

The whole theory of conversion rests upon the intention of the testator, and can only be invoked to aid, and never to thwart, such intention. Clements *v.* Babcock, 38 N. Y. App. Div. 149, 56 N. Y. Suppl. 527. "The basis of all the decisions is, that the intent of the testator, is the great guide in determining the question, whether there has been an equitable conversion of the realty into personalty." Orrick *v.* Boehm, 49 Md. 72, 104. In Anewalt's Appeal, 42 Pa. St. 414, 416, the court lays down the rule, in language quoted from the standard authorities, as follows: "To establish a conversion, the will must direct it absolutely or out and out, irrespective of all contingencies. The direction to convert must be positive and explicit, and the will, if it be by will, or the deed, if it be by contract, must decisively fix upon the land the quality of

b. Where Intention Is Expressed. This intention may be expressed, as by the use of mandatory words directing the sale, or giving the power of sale in imperative terms.[32]

c. Intention Implied — (I) *From General Scope and Tenor of Will.* On the other hand the intention to convert may be implied, as where a testator authorizes his executors to sell his real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, although the power of sale is not in terms imperative.[33]

money. It must be an imperative direction to sell."

Where testator devised all his property in trust, authorizing the trustees to lease it, sell it, and distribute it as directed by him, it was held to work an equitable conversion of the realty into personalty. Russell *v.* Hilton, 37 Misc. (N. Y.) 642, 76 N. Y. Suppl. 233.

Where a testator directs his executors to sell all the residue of his real and personal property without limiting the power to a sale for certain purposes only, an absolute conversion of the realty into personalty results. Clark *v.* Denton, 36 N. J. Eq. 419.

32. Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269; Lawrence *v.* Elliott, 3 Redf. Surr. (N. Y.) 235; Hood *v.* Dorer, 107 Wis. 149, 82 N. W. 546.

Phrases held to be mandatory.— Where a provision of a will directed certain real estate set out in a schedule attached thereto to be "converted" into certain other property "at schedule prices, or as much better as may be," it was held that this was an imperative direction to sell and convey the lands, the direction as to price being merely advisory. Ford *v.* Ford, 80 Mich. 42, 44 N. W. 1057; Ford *v.* Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117. In Green *v.* Johnson, 4 Bush (Ky.) 164, the language of the will was "I authorize and request my executors . . . to sell and convey all my lands, except," etc. The word "request" was considered as synonymous with "require, or direct, or order," the latter words being regarded as mandatory. Testator provided in his will as follows: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages, etc.," it was held that the words, "I desire," are the equivalent of "I will," and that the words, "as soon after my decease as practicable," left no discretion to his executors, excepting as to the matter of time, and the will worked a conversion of testator's real estate. Philadelphia's Appeal, 112 Pa. St. 470, 474, 4 Atl. 4.

Directions in will held imperative.— Where a will devised all the testator's property to certain parties, provided that it should be sold and the proceeds paid over as indicated, and nominated a certain person executor with full power to sell either personal or real estate, this was held to be an imperative direction to reduce the property to money so as to work an equitable conversion of realty into personalty, although the legal title and beneficial interest passed to the same persons. Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471.

33. *Kentucky.*— Green *v.* Johnson, 4 Bush 164.

Massachusetts.— Perkins *v.* Coughlan, 148 Mass. 30, 18 N. E. 600; Hammond *v.* Putnam, 110 Mass. 232.

Nebraska.— Chick *v.* Ives, (1902) 90 N. W. 751.

New York.— Clift *v.* Moses, 116 N. Y. 144, 22 N. E. 393, 26 N. Y. St. 205; Delafield *v.* Barlow, 107 N. Y. 535, 14 N. E. 498; Hobson *v.* Hale, 95 N. Y. 588; Power *v.* Cassidy, 79 N. Y. 602, 35 Am. Dec. 550; Dodge *v.* Pond, 23 N. Y. 69; Savage *v.* Burnham, 17 N. Y. 561; Kelly *v.* Hoey, 35 N. Y. App. Div. 273, 55 N. Y. Suppl. 94; McGowan *v.* Tifft, 35 Misc. 603, 72 N. Y. Suppl. 132; Wright *v.* Mercein, 34 Misc. 414, 69 N. Y. Suppl. 936; Power *v.* Cassidy, 54 How. Pr. 4.

North Carolina.— Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34.

Pennsylvania.— Marshall's Estate, 147 Pa. St. 77, 23 Atl. 391; Paist's Appeal, (1889) 17 Atl. 6; Edwards's Appeal, 47 Pa. St. 144; Chew *v.* Nicklin, 45 Pa. St. 84; Burr *v.* Sein, 1 Whart. 252, 29 Am. Dec. 48.

Tennessee.— Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471.

Virginia.— Ropp *v.* Minor, 33 Gratt. 97.

Wisconsin.— Gould *v.* Taylor Orphan Asylum, 46 Wis. 106, 50 N. W. 422; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Chandler's Appeal, 34 Wis. 505.

United States.— Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320.

See 11 Cent. Dig. tit. "Conversion," § 39.

An implied direction to sell land, charged by implication, for the payment of unequal legacies bequeathed to the testator's children, works an equitable conversion of such land into money. An immediate and inevitable effect of such a direction is to break the descent by vesting the estate in the executors or trustees, clothed with the power to sell, and to confer on the legatees, not an interest in the land, but simply a right to the proceeds of sale, in the proportions designated by the will. Beatty *v.* Byers, 18 Pa. St. 105.

The mere absence of words of express command or direction should not be held to render the exercise of the power discretionary, when to so hold would defeat the intention of the testator as it appears from the whole will. Greenwood *v.* Greenwood, 178 Ill. 387, 53 N. E. 101. Thus where a will contains a

(II) *From Necessity of Sale to Effectuate Expressed Purpose.* The necessity of a conversion of realty into personalty to accomplish the purposes expressed in a will is equivalent to an imperative direction to convert and effects an equitable conversion.[34]

(III) *Blended Realty and Personalty.* Where by the provisions of a will an intent, express or plainly implied, is manifest to create from blended realty and personalty a fund in money for the purpose of distribution, this has been recognized as equivalent to an express direction to sell.[35]

d. Doubt as to Intention. The intention may only be implied, however, when the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt.[36] For equity will never presume such a conversion, unless it is demanded to accomplish the lawful purposes expressed in the will of the testator.[37] And where there is a doubt as to the intention of

power of sale, not mandatory in terms, but it is apparent from the general scope and tenor of the will that the testator intended all his realty to be sold, the power of sale will be held imperative and the doctrine of equitable conversion applied. Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 192, 50 N. W. 1103.

Intention gathered from will itself.— Whether a will contains by implication a direction to convert property from one form into another is to be determined from the will itself by the ordinary rules for the judicial construction of such instruments. Becker *v.* Chester, (Wis. 1902) 91 N. W. 87.

34. *Connecticut.*—Duffield *v.* Pike, 71 Conn. 521, 42 Atl. 641.

New Jersey.— Roy *v.* Monroe, 47 N. J. Eq. 356, 20 Atl. 481; Dutton *v.* Pugh, 45 N. J. Eq. 426, 18 Atl. 207; Cook *v.* Cook, 20 N. J. Eq. 375; Wurt *v.* Page, 19 N. J. Eq. 365.

New York.—Fraser *v.* United Presb. Church, 124 N. Y. 479, 26 N. E. 1034, 36 N. Y. St. 471 [*reversing* 58 Hun 30, 11 N. Y. Suppl. 384, 33 N. Y. St. 347]; Asche *v.* Asche, 113 N. Y. 232, 21 N. E. 70, 22 N. Y. St. 799; Chamberlain *v.* Taylor, 105 N. Y. 185, 11 N. E. 625; Hobson *v.* Hale, 95 N. Y. 588; Power *v.* Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Dodge *v.* Pond, 23 N. Y. 69; Merritt *v.* Merritt, 32 N. Y. App. Div. 442, 53 N. Y. Suppl. 127; Meehan *v.* Brennan, 16 N. Y. App. Div. 395, 45 N. Y. Suppl. 57; Wood *v.* Neshitt, 62 Hun 445, 16 N. Y. Suppl. 918, 42 N. Y. St. 778; Parker *v.* Linden, 44 Hun 518; *In re* Mahan, 32 Hun 73; Phelps *v.* Phelps, 28 Barb. 121; McGowan *v.* Tifft, 35 Misc. 603, 72 N. Y. Suppl. 132; Allen *v.* Stevens, 22 Misc. 158, 49 N. Y. Suppl. 431; Lee *v.* Tower, 12 N. Y. Suppl. 240, 34 N. Y. St. 829; Haxtun *v.* Corse, 2 Barb. Ch. 506; Spencer *v.* See, 5 Redf. Surr. 442.

Pennsylvania.— *In re* Keim, 201 Pa. St. 609, 51 Atl. 337; Fahnestock *v.* Fahnestock, 152 Pa. St. 56, 31 Wkly. Notes Cas. 194, 25 Atl. 313, 34 Am. St. Rep. 623; Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48; Stallman's Estate, 2 Pa. Dist. 265, 13 Pa. Co. Ct. 111; Carey's Estate, 9 Kulp 336; Hodges's Estate, 5 Pa. Co. Ct. 283; Scheetz's Estate, 13 Montg. Co. Rep. 78. See also Curry's Estate, 5 Pa. Co. Ct. 598.

South Carolina.—Clarke *v.* Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675.

Wisconsin.— Becker *v.* Chester, (1902) 91 N. W. 87; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724; Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

United States.—Ramsey *v.* Hanlon, 33 Fed. 425.

England.— Polley *v.* Seymour, 1 Jur. 958, 7 L. J. Exch. Eq. 12, 2 Y. & C. Exch. 708.

See 11 Cent. Dig. tit. "Conversion," § 40.

Where, to carry out the mandate of the will, both the real and personal property must be converted into cash, and the will can be made operative in no other way, a case is presented coming within the rules applicable to equitable conversion of lands, and the power to sell and convey is therefore necessarily implied. Davenport *v.* Kirkland, 156 Ill. 169, 40 N. E. 304.

35. Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362; Mustin's Estate, 194 Pa. St. 437, 45 Atl. 313, 75 Am. St. Rep. 702 [*affirming* 8 Pa. Dist. 264]; Marshall's Estate, 147 Pa. St. 77, 23 Atl. 391; Hunt's Appeal, 105 Pa. St. 128; Perot's Appeal, 102 Pa. St. 235; Page's Estate, 75 Pa. St. 87; Dundas' Appeal, 64 Pa. St. 325; Becker *v.* Chester, (Wis. 1902) 91 N. W. 87; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

Where a will provided that realty on Penn and Court streets should not be sold for five years after testator's death, and then only if his executrix deemed it advisable, and that as soon after his death as his executrix deemed practicable, she should sell all his other realty and his personalty, and that immediately after conversion of any part of his estate into money it should be divided between certain persons, it was held that these directions in the will did not blend the realty on Penn and Court streets with the personalty for distribution so as to work an implied conversion. Sauerbier's Estate, 202 Pa. St. 187, 51 Atl. 751.

36. Scholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84; Asch *v.* Asch, 18 Abb. N. Cas. (N. Y.) 82.

37. Thompson *v.* Hart, 169 N. Y. 571, 61 N. E. 1135; Matthews *v.* Studley, 161 N. Y. 633, 57 N. E. 1117; Chamberlain *v.* Taylor,

the testator in an order or direction for the conversion of land into money the original character of the property will be retained.[38]

e. Where Intention Does Not Require Sale. Where, however, only a power of sale is given, without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty.[39]

3. Sale For Distribution. Where real estate is devised, with explicit directions in the will that it be sold and the proceeds distributed, such directions operate as an equitable conversion of such realty into personalty.[40]

105 N. Y. 194, 11 N. E. 625; Curry's Estate, 5 Pa. Co. Ct. 598.

38. *Connecticut.*— Clarke's Appeal, 70 Conn. 195, 39 Atl. 155.

Maryland.— Keller *v.* Harper, 64 Md. 74, 1 Atl. 65.

New York.— *In re* Yates, 99 N. Y. 94, 1 N. E. 248; Gourley *v.* Campbell, 66 N. Y. 169; Bijur *v.* Bijur, 49 Hun 235, 1 N. Y. Suppl. 630, 16 N. Y. St. 930; Miller *v.* Gilbert, 3 Misc. 43, 22 N. Y. Suppl. 355, 51 N. Y. St. 132; Lee *v.* Tower, 12 N. Y. Suppl. 240, 34 N. Y. St. 829 [*modified* in 124 N. Y. 370, 26 N. E. 943, 36 N. Y. St. 344].

Rhode Island.— King *v.* King, 13 R. I. 501.

Wisconsin.— Ford *v.* Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117.

A clause of a will should be construed as directing an equitable conversion of real estate into personalty, only when its language, in view of the circumstances surrounding the testator, leaves no doubt of his intention to direct such conversion. Hobson *v.* Hale, 95 N. Y. 588.

The heir at law must be effectually displaced, not by inference or implication, but there must be a clear, substantive, and undeniable intent on the part of the testator to exclude him. Amphlett *v.* Parke, 2 Russ. & M. 221, 11 Eng. Ch. 221 [*cited* in Ackroyd *v.* Smithson, 1 White & T. Lead. Cas. 1027, 1044].

39. Scholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84; Penfield *v.* Tower, 1 N. D. 216, 46 N. W. 413.

40. *Arkansas.*— Loftis *v.* Glass, 15 Ark. 680.

Illinois.— Jennings *v.* Smith, 29 Ill. 116; Baker *v.* Copenharger, 15 Ill. 103, 58 Am. Dec. 600.

Indiana.— Rumsey *v.* Durham, 5 Ind. 71.

Kentucky.— Swan *v.* Goodwin, 2 Duv. 298.

Maryland.— Smithers *v.* Hopper, 23 Md. 273.

New Jersey.— Forsyth *v.* Forsyth, 46 N. J. Eq. 400, 19 Atl. 119; Vanness *v.* Jacohus, 17 N. J. Eq. 153; Fluke *v.* Fluke, 16 N. J. Eq. 478; Scudder *v.* Vanarsdale, 13 N. J. Eq. 109.

New York.—Bowditch *v.* Ayrault, 138 N. Y. 222, 33 N. E. 1067, 52 N. Y. St. 330; Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 26 N. Y. St. 667, 15 Am. St. Rep. 400; Hatch *v.* Bassett, 52 N. Y. 359; Everitt *v.* Everitt, 29 N. Y. 39; Stagg *v.* Jackson, 1 N. Y. 206; *In re* Tillman's Estate, 86 Hun 47, 33 N. Y. Suppl. 194, 66 N. Y. St. 823; Prentice *v.* Janssen, 14 Hun 548; Hays *v.* Gourley, 1 Hun 38; Johnson *v.* Bennett, 39 Barb. 237; Arnold *v.* Gilbert, 5 Barb. 190; Kessler *v.* Friede, 29 Misc. 187, 60 N. Y. Suppl. 891; Matter of Buchanan, 5 N. Y. St. 351; Flanagan *v.* Flanagan, 8 Abb. N. Cas. 413; Drake *v.* Pell, 3 Edw. 251; King *v.* Woodhull, 3 Edw. 79; Martin *v.* Sherman, 2 Sandf. Ch. 341; Shotwell *v.* Mott, 2 Sandf. Ch. 46; Brink *v.* Masterson, 4 Dem. Surr. 524. See also *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055, 38 N. Y. St. 765, holding that where a testator gave the residue of his estate to his "heirs and next of kin in the same portions in which" it "would be divided or distributed" in case of his death intestate, and directed it to be distributed and paid in cash in five years from his decease, and for that purpose gave to the executors power of sale, the power of sale was given solely for the purpose of the execution of the provisions of this clause of the will, and that on failure to execute the power the persons in view capable of doing so would retain as heirs the realty, as such, so given them.

North Carolina.— Smith *v.* McCrary, 38 N. C. 204.

Ohio.— Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110; *In re* Davis, 12 Ohio Cir. Dec. 29.

Pennsylvania.— Klotz's Estate, 190 Pa. St. 152, 44 Wkly. Notes Cas. 7, 42 Atl. 477; Williamson's Estate, 153 Pa. St. 508, 26 Atl. 246; Miller *v.* Com., 111 Pa. St. 321, 2 Atl. 492; Dundas' Appeal, 64 Pa. St. 325; Leiper *v.* Thomson, 60 Pa. St. 177; Willing *v.* Peters, 7 Pa. St. 287; Stuck *v.* Mackey, 4 Watts & S. 196; Gray *v.* Smith, 3 Watts 289; Morrow *v.* Brenizer, 2 Rawle 185; Scheidt's Estate, 2 Woodw. 355; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516, 3 Pa. L. J. 203.

Tennessee.— Williams *v.* Bradley, 7 Heisk. 54.

Virginia.— Ropp *v.* Minor, 33 Gratt. 97.

See 11 Cent. Dig. tit. "Conversion," § 30.

Growing-rent crops.—A direction in a will to executors to sell land and distribute the proceeds does not change its nature to personalty, so as to prevent growing-rent crops passing to the purchaser as an incident to land. Hudson *v.* Fuller, (Tenn. Ch. 1895) 35 S. W. 575.

Legacy to religious corporation.— Where a will directs that the whole estate, real and personal, shall be converted into money to constitute a blended fund for the purpose of paying debts and legacies, and the whole sur-

4. Sale After Termination of Particular Estate. Where by a will a particular estate is created for life or a term of years, with directions that it shall be sold upon the termination of such particular estate and the proceeds distributed among certain designated beneficiaries, there is an equitable conversion of the remainder from realty into personalty.[41] A provision, however, for the conversion of the remainder only cannot operate to work a conversion of the intermediate term also.[42]

5. Where Option Is Left to Trustee or Beneficiary — a. General Rule. If the act of converting is left to the option, discretion, or choice of the trustees or beneficiaries, then no equitable conversion will take place, because no duty to make the change rests upon them. Where there is a mere naked power to sell, the property remains in its original condition until that power is exercised.[43]

plus is disposed of as money, a pecuniary legacy to a foreign religious corporation is not a devisee of real estate, but of personalty, and therefore valid. Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362.

What ought to be done is considered in equity as done. Every person therefore claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it. Where therefore land is directed to be sold and its proceeds divided among certain persons named in the will this is to be considered as a bequest of money. Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

41. *Alabama.*— Allen *v.* Watts, 98 Ala. 384, 11 So. 646; Massey *v.* Modawell, 73 Ala. 421; Hemphill *v.* Moody, 64 Ala. 468.

Illinois.— Heslet *v.* Heslet, 8 Ill. App. 22.

Kentucky.— Goldsmith *v.* Cone, 7 Ky. L. Rep. 520.

Maryland.— Carr *v.* Ireland, 4 Md. Ch. 251.

New Jersey.— Fairly *v.* Kline, 3 N. J. L. 322, 4 Am. Dec. 414.

New York.— Meakings *v.* Cromwell, 5 N. Y. 136; Eisner *v.* Curiel, 2 N. Y. App. Div. 522, 37 N. Y. Suppl. 1119, 74 N. Y. St. 415; Harris *v.* Slaght, 46 Barb. 470; Lydon *v.* Metropolitan El. R. Co., 7 Misc. 25, 27 N. Y. Suppl. 311, 57 N. Y. St. 74; Wetmore *v.* Peck, 66 How. Pr. 54; Freeman *v.* Smith, 60 How. Pr. 311; Bunce *v.* Vander Grift, 8 Paige 37. See also Asche *v.* Asche, 113 N. Y. 232, 21 N. E. 70, 22 N. Y. St. 799.

Ohio.— Collier *v.* Grimesey, 36 Ohio St. 17.

Pennsylvania.— Mellon *v.* Reed, 123 Pa. St. 1, 15 Atl. 906; McClure's Appeal, 72 Pa. St. 414; Evans' Appeal, 63 Pa. St. 183; Leiper *v.* Thomson, 60 Pa. St. 177; Horner's Appeal, 56 Pa. St. 405; Brolasky *v.* Gally, 51 Pa. St. 509; Chew *v.* Nicklin, 45 Pa. St. 84; Anewalt's Appeal, 42 Pa. St. 414; Parkinson's Appeal, 32 Pa. St. 455; Bleight *v.* Manufacturers', etc., Bank, 10 Pa. St. 131; Willing *v.* Peters, 7 Pa. St. 287; Patterson's Appeal, (1886) 6 Atl. 759; Allison *v.* Wilson, 13 Serg. & R. 330; Rankin's Estate, 13 Pa. Co. Ct. 617; Hodges' Estate, 5 Pa. Co. Ct. 283; Reeser's Estate, 4 Pa. Co. Ct. 417; Sebastian's Estate, 4 Phila. 236, 17 Leg. Int. 388; Fister's Estate, 2 Woodw. 323.

South Carolina.— Dunlap *v.* Garlington, 17 S. C. 567; Byrne *v.* Stewart, 3 Desauss. 135.

Tennessee.— Green *v.* Davidson, 4 Baxt. 488; Hardin *v.* Young, (Ch. 1896) 41 S. W. 1080.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

United States.— Ramsey *v.* Hanlon, 33 Fed. 425; Rinehart *v.* Harrison, Baldw. 177, 20 Fed. Cas. No. 11,840.

See 11 Cent. Dig. tit. "Conversion," § 32.

Vested legacy.— Where a testator directed that all his land be sold after his wife's death and the proceeds of the sale divided among his children, and one of the children died before the widow, it was held that the portion of such child was a vested legacy and went to her husband as her administrator. Fairly *v.* Kline, 3 N. J. L. 754, 4 Am. Dec. 414.

42. Allen *v.* Watts, 98 Ala. 384, 11 So. 646; Massey *v.* Modawell, 73 Ala. 421; Savage *v.* Burnham, 17 N. Y. 561.

Doctrine not applicable to particular estate. —"There is no incompatibility in the existence at the same time of a particular legal estate in land over which a court of equity can exercise no control whatever, and an independent right to have the remainder interest in the same land converted into money, so that a court of equity may treat that interest as money. In such case the holder of the particular estate must be treated everywhere and for all purposes as the owner of a legal interest in land as such. The equitable doctrine of conversion is to be invoked merely to determine the character of the interest in that estate in the land which is to be converted." Allen *v.* Watts, 98 Ala. 384, 392, 11 So. 646.

43. *Illinois.*— Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Kentucky.— Samuel *v.* Samuel, 4 B. Mon. 245.

Mississippi.— Montgomery *v.* Milliken, Sm. & M. Ch. 495.

New Jersey.— Parker *v.* Glover, 42 N. J. Eq. 559, 9 Atl. 217.

New York.— *In re* Tatum, 169 N. Y. 514, 62 N. E. 580; Seholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84, 23 N. Y. St. 171; Carberry *v.* Ennis, 72 N. Y. App. Div. 489, 76 N. Y. Suppl. 537; Thompson *v.* Hart, 58 N. Y. App. Div. 439, 69 N. Y. Suppl. 223; Matter of Thomas, 1 Hun 473, 4 Thomps. & C. 410; Dominick *v.* Michael, 4 Sandf. 374; Koezly *v.* Koezly, 31 Misc. 397, 65 N. Y. Suppl. 613;

b. Upon Exercise of Option. Where a testator directs his executor or trustee to sell real estate at his discretion, and such sale is actually made before the death of the beneficiary, the proceeds of such sale will pass as the personal estate of such beneficiary upon his death;[44] but until the exercise of such discretionary power, there is no conversion of the realty, and upon the death of the beneficiary prior to the sale his interest would pass to his heirs as realty.[45]

Matter of Hardenbrook, 23 Misc. 538, 52 N. Y. Suppl. 845; Matter of Cobb, 14 Misc. 409, 36 N. Y. Suppl. 448, 71 N. Y. St. 506; Matter of Vandervoort, 7 N. Y. Leg. Obs. 25.

North Carolina.— Mills *v.* Harris, 104 N. C. 626, 10 S. E. 704; Taylor *v.* Maris, 90 N. C. 619.

Pennsylvania.— *In re* Sauerbier, 202 Pa. St. 187, 51 Atl. 751; Reid *v.* Clendenning, 193 Pa. St. 406, 44 Atl. 500; Taylor *v.* Haskell, 178 Pa. St. 106, 35 Atl. 732; Solliday's Estate, 175 Pa. St. 114, 34 Atl. 548; Machemer's Estate, 140 Pa. St. 544, 21 Atl. 441; Greenough *v.* Small, 137 Pa. St. 128, 20 Atl. 396; Hunt's Appeal, 105 Pa. St. 128; Peterson's Appeal, 88 Pa. St. 397; Miller's Appeal, 60 Pa. St. 404; Anewalt's Appeal, 42 Pa. St. 414; Bleight *v.* Manufacturers', etc., Bank, 10 Pa. St. 131; Ingersoll's Estate, 3 Pa. Dist. 399; Carey's Estate, 9 Kulp 336; Schwab's Estate, 22 Pa. Co. Ct. 218.

Rhode Island.— King *v.* King, 13 R. I. 501.

Virginia.— Meade *v.* Campbell, (1899) 34 S. E. 30; Pratt *v.* Taliaferro, 3 Leigh 419.

England.— *In re* Wintle, [1896] 2 Ch. 711, 65 L. J. Ch. 863, 75 L. T. Rep. N. S. 207, 45 Wkly. Rep. 91; Greenway *v.* Greenway, 2 De G. F. & J. 128, 29 L. J. Ch. 601, 63 Eng. Ch. 100; Walter *v.* Maunde, 19 Ves. Jr. 424, 13 Rev. Rep. 230.

See 11 Cent. Dig. tit. "Conversion," § 42.

Dependent on choice of beneficiary.—Where a testator made the sale of his real estate depend on the choice or option of his widow and children, and the will contained no positive direction to sell, it was held that no conversion resulted. Stoner *v.* Zimmerman, 21 Pa. St. 394.

Discretion of executor or trustee.—No equitable conversion is worked of real estate into personalty by a power of sale given to an executor or trustee, where the direction for the sale is not obligatory; a merely discretionary power of sale produces no such result. *In re* McComb, 117 N. Y. 378, 22 N. E. 1070; *In re* Rochester, 110 N. Y. 159, 17 N. E. 740. A provision in a will authorizing the executors to sell and convey "for the purposes of a division or distribution, or for any other purpose, that they in their best judgment might think proper" any or all of testator's real estate, which by a previous clause of the will had been devised to certain persons, does not convert such realty into personalty, and therefore does not bar an action for partition among the devisees, where the estate owes no debts. Mellen *v.* Banning, 72 Hun (N. Y.) 176, 25 N. Y. Suppl. 542.

Naked power of sale.— Where there is a trust in a will merely to sell real estate without any other power over the same, it is well settled that such trust is valid as a power only, and that the real estate itself passes to the persons otherwise entitled thereto, subject only to the execution of the trust as a power. Janssen *v.* Wemple, 3 Redf. Surr. (N. Y.) 229 [*citing* Downing *v.* Marshall, 23 N. Y. 366]. See also Chew *v.* Nicklin, 45 Pa. St. 84, where it was held that the act of Feb. 24, 1834, was not intended to break descents or work a conversion of real estate over which a naked power of sale had been given to executors, but only to enable them to preserve and dispose of the estate as though an interest had been devised to them instead, leaving the question of intention to convert to depend upon the will of the testator.

The fact that partition proceedings might, or a sale by the executor under the discretion given him by the will would, change such realty into personalty should not be considered in construing the will to determine whether it required a conversion of real property into personalty. *In re* Tatum, 169 N. Y. 514, 62 N. E. 580 [*affirming* 61 N. Y. App. Div. 513, 70 N. Y. Suppl. 634].

44. *Kentucky.*—Haggard *v.* Rout, 6 B. Mon. 247.

Maryland.— See also Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717.

New York.— Bolton *v.* Myers, 83 Hun 259, 31 N. Y. Suppl. 588.

North Carolina.— Powell *v.* Powell, 41 N. C. 50.

Pennsylvania.— Ingersoll's Estate, 167 Pa. St. 536, 31 Atl. 858, 859, 860; Pyott's Estate 160 Pa. St. 441, 28 Atl. 915, 921; Philadelphia's Appeal, 112 Pa. St. 470, 4 Atl. 4; Pennell's Appeal, 20 Pa. St. 515; Wharton *v.* Shaw, 3 Watts & S. 124; Rose's Estate, 6 Pa. Co. Ct. 109; Macer's Appeal, 3 Walk. 107. See also Lackey's Estate, 149 Pa. St. 7, 24 Atl. 78.

West Virginia.— Woodward *v.* Woodward, 28 W. Va. 200.

See 11 Cent. Dig. tit. "Conversion," § 42.

Discretionary power of sale.— Where real estate was devised to an infant with a discretionary power of sale in the executors, it was held that the proceeds of such sale belonging to the infant were personal property, passing on her death to her administrator and not to her heirs, under the power of the will, and not by the doctrine of equitable conversion. Matter of McKay, 75 N. Y. App. Div. 78, 77 N. Y. Suppl. 845 [*overruling* 37 Misc. (N. Y.) 590, 75 N. Y. Suppl. 1069].

45. Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Read *v.* Underhill, 12 Barb. (N. Y.) 113.

Where the power to sell is only discretionary until the power is exercised the property remains and is considered as realty. Graham *v.* De Witt, 3 Bradf. Surr. (N. Y.) 186.

6. Discretion as to Time, Manner, or Terms of Sale. The doctrine of equitable conversion is none the less applicable, where a testator directs his realty to be sold, because the executors or trustees are given a discretion as to the time, manner, or terms of sale.[46]

7. Sale Subject to Qualifications or Contingencies. Where the direction in a will to sell real estate is not absolute but qualified, depending upon a contingency, the principle of equitable conversion does not apply.[47]

8. Land Charged With Payment of Debts Merely. Where the executors are given the mere power of sale, and the realty is charged only with the payment of debts, no conversion results, and it retains the character of realty until actually converted.[48]

9. Time of Conversion — a. In General. Where there is an imperative direction to sell, unless the conversion is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, the conversion takes place as from the death of the testator.[49]

Where the will provided that a sale of real estate was only to be made in the event the life-tenant should deem it to be to her advantage, and on her petition, it was held that there could be no conversion of such realty into personalty until a sale was made in accordance with the directions of the will. Pyott's Estate, 160 Pa. St. 441, 28 Atl. 915, 921.

46. *New York.*— Phelps *v.* Pond, 23 N. Y. 69; Stagg *v.* Jackson, 1 N. Y. 206; Hancox *v.* Wall, 28 Hun 214; Power *v.* Cassidy, 16 Hun 294; Graham *v.* Livingston, 7 Hun 11; Matter of Hunter, 3 Redf. Surr. 175.

Ohio.— Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

Pennsylvania.— Philadelphia's Appeal, 112 Pa. St. 470, 4 Atl. 4; Churchman *v.* Wright, 3 Pennyp. 149. See also Brolaskey's Appeal, 23 Leg. Int. 189.

South Carolina.— Bell *v.* Bell, 25 S. C. 149.

Virginia.— Carr *v.* Branch, 85 Va. 597, 8 S. E. 476.

Wisconsin.— See Ford *v.* Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117.

England.— Doughty *v.* Bull, 2 P. Wms. 320, 24 Eng. Reprint 748.

See 11 Cent. Dig. tit. "Conversion," § 43.

47. Pascalis *v.* Canfield, 1 Edw. (N. Y.) 201; Irvin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436; Sill *v.* Blaney, 159 Pa. St. 264, 28 Atl. 251; McClure's Appeal, 72 Pa. St. 414; Anewalt's Appeal, 42 Pa. St. 414; Nagle's Appeal, 13 Pa. St. 260; Com. *v.* Gordon, (1886) 7 Atl. 229; Boshart *v.* Evans, 5 Whart. 551; Henry *v.* McCloskey, 9 Watts 145; Wood's Estate, 9 Pa. Co. Ct. 429; Davis *v.* Reeves, 2 Pa. L. J. Rep. 314, 4 Pa. L. J. 93; Ford *v.* Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; Peter *v.* Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522.

Where the sale of realty is directed by a will to be made on a given event, the conversion depends upon the occurrence of such event. Wright *v.* New York City M. E. Church, Hoffm. (N. Y.) 202.

48. *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirming* 63 Barb. (N. Y.) 157]; Savage *v.* Burnham, 17 N. Y. 561; Harris *v.* Clark, 7 N. Y. 242; Stagg *v.* Jackson, 1 N. Y. 206; Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Clark *v.* Riddle, 11 Serg. & R. (Pa.) 311; Farmer *v.* Spell, 11 Rich. Eq. (S. C.) 541; Bourne *v.* Bourne, 2 Hare 35, 6 Jur. 775, 11 L. J. Ch. 416, 24 Eng. Ch. 35.

Surplus after paying debts.— Under a power in a will to sell land to pay debts, where the proceeds of such sale are in excess of the need for paying debts, they remain real estate for purposes of distribution. Straw's Estate, 10 Kulp (Pa.) 163.

49. *Arkansas.*— Loftis *v.* Glass, 15 Ark. 680.

Indiana.— Rumsey *v.* Durham, 5 Ind. 71.

Kentucky.— Loughborough *v.* Loughborough, 14 B. Mon. 549; Gedges *v.* Western Baptist Theological Institute, 13 B. Mon. 530; Arnold *v.* Arnold, 11 B. Mon. 81.

Maryland.— Reiff *v.* Strite, 54 Md. 298.

Massachusetts.— Perkins *v.* Coughlan, 148 Mass. 30, 18 N. E. 600; Hammond *v.* Putnam, 110 Mass. 232.

Missouri.— Compton *v.* McMahan, 19 Mo. App. 494.

New Jersey.— Snover *v.* Squire, (1892) 24 Atl. 365.

New York.— Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 26 N. Y. St. 667, 15 Am. St. Rep. 400; Fisher *v.* Banta, 66 N. Y. 468; Everitt *v.* Everitt, 29 N. Y. 39; Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Stagg *v.* Jackson, 1 N. Y. 206; Trask *v.* Sturges, 56 N. Y. App. Div. 625, 68 N. Y. Suppl. 1149; Mutual L. Ins. Co. *v.* Bailey, 19 N. Y. App. Div. 204, 45 N. Y. Suppl. 1069; Gourley *v.* Campbell, 6 Hun 218; Irish *v.* Huested, 39 Barb. 411; Forsyth *v.* Rathbone, 34 Barb. 388; Kearney *v.* St. Paul Apostle Missionary Soc., 10 Abb. N. Cas. 274; New York Mut. L. Ins. Co. *v.* Woods, 4 N. Y. Suppl. 133; Gallup *v.* Wright, 61 How. Pr. 286; Kane *v.* Gott, 24 Wend. 641, 35 Am. Dec. 641; De Peyster *v.* Clendining, 8 Paige 295; Tickel *v.* Quinn, 1 Dem. Surr. 425; Brink *v.* Layton, 2 Redf. Surr. 79; Graham *v.* De Witt, 3 Bradf. Surr. 186.

North Carolina.— Benbow *v.* Moore, 114 N. C. 263, 19 S. E. 156; *Ex p.* McBee, 63 N. C. 332.

b. Where Date of Sale Is Remote. By the preponderance of authority it is no exception to the rule that land directed to be sold and turned into money is considered as money from the death of the testator, because the period of sale is remote, and the actual conversion cannot be made until the time arrives.[50] Some courts, however, have held that the doctrine of equitable conversion must be taken with the qualification that the change does not take place until the period arrives or event occurs when the conversion ought to be made. When that period arrives the estate will be deemed to undergo the change directed by the will, whether actually sold or not.[51]

Pennsylvania.— Howell *v.* Mellon, 189 Pa. St. 169, 43 Wkly. Notes Cas. 361, 42 Atl. 6; Leiper *v.* Thomson, 60 Pa. St. 177; Brolasky *v.* Gally, 51 Pa. St. 509; Chew *v.* Nicklin, 45 Pa. St. 84.

Rhode Island.— Holder's Petition, 21 R. I. 48, 41 Atl. 576.

Tennessee.—Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471; Wheless *v.* Wheless, 92 Tenn. 293, 21 S. W. 595.

Virginia.— Tazewell *v.* Smith, 1 Rand. 313, 10 Am. Dec. 533.

Wisconsin.— Becker *v.* Chester, 115 Wis. 90, 91 N. W. 87; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

England.— Beauclerk *v.* Mead, 2 Atk. 167, 26 Eng. Reprint 505; Robinson *v.* Robinson, 19 Beav. 494; Carr *v.* Collins, 7 Jur. 165; Fitzgerald *v.* Jervoise, 5 Madd. 25, 21 Rev. Rep. 268. See also Hutcheon *v.* Mannington, 1 Ves. Jr. 366, 2 Rev. Rep. 115.

See 11 Cent. Dig. tit. "Conversion," § 45.

"The rule is too well settled, to need the citation of authorities, that an express and explicit direction by the will, to sell the real estate of the testator and divide the proceeds, works a conversion of it into personalty on his death." Laird's Appeal, 85 Pa. St. 339, 343.

In construing a will where there was an imperative discretion to sell the real estate, Andrews, J., in Fisher *v.* Banta, 66 N. Y. 468, 476, says: "It became the duty of the executor to sell the land and divide the proceeds. . . . From the moment of the testator's death, the conversion took place, and the land became money for all purposes of administration."

"Whether the conversion shall be deemed to take place on the death of a testator or at some later period, depends on his intention as manifested by the provisions of the will. If it provides in terms that a sale shall be made at some specified future time, or creates a trust with direction to sell only on the happening of a designated event, which might or might not happen, then the conversion would only take place on its occurrence, otherwise the general rule is that real estate will be deemed converted into personalty as of the date of the death of a testator." Underwood *v.* Curtis, 127 N. Y. 523, 533, 28 N. E. 585, 40 N. Y. St. 255.

Where the testator gave one third of all his money and property to his wife, and the balance to his children, to be equally divided among them, and the will further directed that a portion of the estate given to the children should be invested in unencumbered real-estate security, and as each one of the children arrived at the age of twenty-four years he should receive his share, it was held that the will worked an equitable conversion of the estate into money at the death of the testator. Chick *v.* Ives, (Nebr. 1902) 90 N. W. 751.

50. *Alabama.*— High *v.* Worley, 33 Ala. 196.

Delaware.— Stevenson's Estate, 2 Del. Ch. 197.

District of Columbia.— Cropley *v.* Cooper, 7 D. C. 226 [*affirmed* in 19 Wall. (U. S.) 167, 22 L. ed. 226].

Indiana.— Rumsey *v.* Durham, 5 Ind. 71.

Kentucky.— Hocker *v.* Gentry, 3 Metc. 463.

New Jersey.— Fairly *v.* Kline, 3 N. J. L. 754, 4 Am. Dec. 414.

New York.— Underwood *v.* Curtis, 127 N. Y. 523, 28 N. E. 585, 40 N. Y. St. 255; Snell *v.* Tuttle, 44 Hun 324; Smith *v.* Kearney, 2 Barb. Ch. 533. But see Savage *v.* Burnham, 17 N. Y. 561.

Pennsylvania.— Thomman's Estate, 161 Pa. St. 444, 29 Atl. 84; Roland *v.* Miller, 100 Pa. St. 47; McClure's Appeal, 72 Pa. St. 414; Leiper *v.* Thomson, 60 Pa. St. 177; Parkinson's Appeal, 32 Pa. St. 455; *In re* Heberton's Estate, 3 Phila. 436, 16 Leg. Int. 212; Pyle's Estate, 1 Del. Co. 243.

United States.— Rinehart *v.* Harrison, Baldw. 177, 20 Fed. Cas. No. 11,840; Reading *v.* Blackwell, Baldw. 166, 20 Fed. Cas. No. 11,612.

England.— Elliott *v.* Fisher, 12 Sim. 505, 35 Eng. Ch. 427.

See 11 Cent. Dig. tit. "Conversion," § 46.

After termination of particular estate.— Where there is a positive direction to sell testator's real estate after the widow's death and divide the proceeds among his daughters, conversion takes place at testator's death, when *eo instanti* the shares of the legatee pass to them as personalty, although there is a life-interest in the land to expire before the sale. Ramsey *v.* Hanlon, 33 Fed. 425.

Sale after twenty years.— It was held in Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100, that a direction to executors in a will to sell all of testator's real estate at the end of twenty years works a conversion of the testator's real estate, wherever situated, into personalty, as of the date of the testator's death.

51. Shipman *v.* Rollins, 98 N. Y. 311; Tillman *v.* Davis, 95 N. Y. 17, 47 Am. Rep. 1;

c. Discretion as to Time or Manner of Sale. The rule is well settled that if the will requires the real estate to be converted into money at all events, notwithstanding the executors may have a discretion as to the time, it must be considered as converted into money from the death of the testator,[52] although the courts of several states have held to the contrary.[53]

d. Upon Actual Sale. Where a discretionary power of sale is given by will to trustees, or such discretion rests with the beneficiary, no conversion of realty into personalty will take place until a sale is actually made.[54] So where lands are devised to be sold only upon the happening of a contingency, such lands are not converted into money until the happening of such contingency.[55]

10. Extent of Conversion — a. In General. Upon the principles involved in the doctrine of equitable conversion, the conversion of real into personal property under a power in a will takes place only for the purposes for which, and to the extent to which, it is authorized by the terms of the will.[56] Where the purpose

Vincent *v.* Newhouse, 83 N. Y. 505; Savage *v.* Burnham, 17 N. Y. 561; Williams *v.* Conrad, 30 Barb. (N. Y.) 524; Shumway *v.* Harmon, 6 Thomps. & C. (N. Y.) 626; *In re* Ransom, 10 N. Y. Suppl. 16, 30 N. Y. St. 737; Shipman *v.* Fanshaw, 15 Abb. N. Cas. (N. Y.) 288; Gano *v.* McCunn, 56 How. Pr. (N. Y.) 337. See also Ross *v.* Roberts, 2 Hun (N. Y.) 90; Brothers *v.* Cartwright, 55 N. C. 113, 64 Am. Dec. 563; Richey *v.* Johnson, 30 Ohio St. 288.

Where a life-estate in a house and lot was devised by a will which authorized the executors to sell all the property excepting the house and lot during the lifetime of the life-tenant, it was held that an equitable conversion of the house and lot into personalty on the sale thereof, dated from the time of the sale and not from the death of the testatrix. Matter of Hammond, 74 N. Y. App. Div. 547, 77 N. Y. Suppl. 783.

52. *Maryland.*— Keller *v.* Harper, 64 Md. 74, 1 Atl. 65.

New Jersey.— Crane *v.* Bolles, 49 N. J. Eq. 373, 24 Atl. 237; Cook *v.* Cook, 20 N. J. Eq. 375; Wurts *v.* Page, 19 N. J. Eq. 365.

New York.— Robert *v.* Corning, 89 N. Y. 225; Stagg *v.* Jackson, 1 N. Y. 206; Graham *v.* Livingston, 7 Hun 11; Betts *v.* Betts, 4 Abb. N. Cas. 317; Ingrem *v.* Mackey, 5 Redf. Surr. 357.

Pennsylvania.— Hoover *v.* Landis, 76 Pa. St. 354.

Virginia.— Tazewell *v.* Smith, 1 Rand. 313, 10 Am. Dec. 533.

See 11 Cent. Dig. tit. "Conversion," § 47.

53. Eneberg *v.* Carter, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664; Compton *v.* McMahan, 19 Mo. App. 494. Real estate is converted into personalty immediately on the death of the devisor, only where the direction to sell is positive, without limitation as to time, and without discretion on the part of those to whom the power to sell is delegated. If discretion is given the conversion does not take place until the sale is made. Christler *v.* Meddis, 6 B. Mon. (Ky.) 35.

54. *Illinois.*— Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Kentucky.— Burgin *v.* Chenault, 9 B. Mon. 285; Haggard *v.* Rout, 6 B. Mon. 247.

Maryland.— Cronise *v.* Hardt, 47 Md. 433.

Minnesota.— Looby *v.* Davidson, 49 Minn. 481, 52 N. W. 48; Ness *v.* Davidson, 49 Minn. 469, 52 N. W. 46.

New Jersey.— Kouvalinka *v.* Geibel, 40 N. J. Eq. 443, 3 Atl. 260; Gest *v.* Flock, 2 N. J. Eq. 108. See also Guarantee Trust, etc., Co. *v.* Maxwell, (1894) 30 Atl. 339.

New York.— Clift *v.* Moses, 44 Hun 312 [*affirmed* in 116 N. Y. 144, 22 N. E. 393, 26 N. Y. St. 405].

Pennsylvania.— *In re* Pyott, 160 Pa. St. 441, 28 Atl. 915, 921; Darlington *v.* Darlington, 160 Pa. St. 65, 34 Wkly. Notes Cas. 85, 28 Atl. 503; Sheridan *v.* Sheridan, 136 Pa. St. 14, 19 Atl. 1068; Peterson's Appeal, 88 Pa. St. 397; *In re* Page, 75 Pa. St. 87; Nagle's Appeal, 13 Pa. St. 260; Macer's Appeal, 3 Walk. 107.

England.— *In re* Ibbitson, L. R. 7 Eq. 226, 21 L. T. Rep. N. S. 163; Ward *v.* Arch, 10 Jur. 977, 12 Sim. 472, 35 Eng. Ch. 399; Polley *v.* Seymour, 1 Jur. 958, 7 L. J. Exch. Eq. 12, 2 Y. & C. Exch. 708; Walker *v.* Shore, 19 Ves. Jr. 387.

See 11 Cent. Dig. tit. "Conversion," § 48 *et seq.*

55. Boshart *v.* Evans, 5 Whart. (Pa.) 551; Henry *v.* McCloskey, 9 Watts (Pa.) 145; Harcum *v.* Hudnall, 14 Gratt. (Va.) 369.

56. *Maryland.*— Orrick *v.* Boehm, 49 Md. 72; Cronise *v.* Hardt, 47 Md. 433.

New Jersey.— Roy *v.* Monroe, 47 N. J. Eq. 356, 20 Atl. 481; Stevens *v.* Stevens, 23 N. J. Eq. 296; Cook *v.* Cook, 20 N. J. Eq. 375; Winants *v.* Terhune, 15 N. J. Eq. 185.

New York.— *In re* Schauffert, 74 Hun 352, 26 N. Y. Suppl. 302, 56 N. Y. St. 365; Bogert *v* Hertell, 4 Hill 492; Hawley *v.* James, 16 Wend. 61; Wood *v.* Keyes, 8 Paige 365; Gott *v.* Cook, 7 Paige 521; Wood *v.* Cone, 7 Paige 471; Hertell *v.* Van Buren, 3 Edw. 20; Marsh *v.* Wheeler, 2 Edw. 156. See also Wadsworth *v.* Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265.

Pennsylvania.— Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48; Wilson *v.* Hamilton, 9 Serg. & R. 424.

England.— Maugham *v.* Mason, 1 Ves. & B. 410, 12 Rev. Rep. 251.

of conversion is attained, conversion thereupon ends or a reconversion takes place.[57]

b. For Benefit of Devisees. A conversion of land into money, directed for the benefit of the devisees, creates no charge upon the land for the payment of debts, and does not make the proceeds either legal or equitable assets in the hands of an executor. He holds these proceeds simply as a trustee of the devisees.[58]

11. Jurisdiction. The question as to the conversion of realty into personalty by will is to be determined by the courts of the state in which the property is situated, even though the will has been made and probated at the domicile of the testator in another state, where it has been construed to work such conversion.[59]

B. Personalty Into Realty — 1. In General. Following the principle already enunciated, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, money directed by will to be employed in the purchase of land is to be considered as land.[60]

2. Intention of Testator. As in the case of real estate, the quality of personal property for purposes of transmission by will is not changed from the character in which the testator left it, unless there is some clear act or intention by which he has impressed upon it definitely the character of realty.[61]

See 11 Cent. Dig. tit. "Conversion," § 44.

In case there is a direction to sell the real estate for the purpose of paying particular legacies it is not a conversion of the real property into personalty, except for that purpose and extent. Hilton *v.* Hilton, 2 MacArthur (D. C.) 70.

57. Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

As to reconversion see *infra*, IX.

58. Newby *v.* Skinner, 21 N. C. 488, 31 Am. Dec. 397; Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320; Gibbs *v.* Ougier, 12 Ves. Jr. 413, 8 Rev. Rep. 348.

Liability for debts.— Where by a will real estate is directed to be sold and the proceeds paid over to legatees, the fund so created is liable to the discharge of debts only upon the exhaustion of the other personalty. *Ex p.* McBee, 63 N. C. 332.

59. Holcomb *v.* Wright, 5 App. Cas. (D. C.) 76; Clarke *v.* Clarke, 178 U. S. 186, 20 S. Ct. 873, 44 L. ed. 1028 [*affirming* 70 Conn. 483, 40 Atl. 111].

60. *Arkansas.*— Loftis *v.* Glass, 15 Ark. 680.

Illinois.— Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

Kentucky.— Collins *v.* Champ, 15 B. Mon. 118, 61 Am. Dec. 179; Haggard *v.* Rout, 6 B. Mon. 247.

New York.— Kane *v.* Gott, 24 Wend. 641, 35 Am. Dec. 641; Lorillard *v.* Coster, 5 Paige 172.

Ohio.— Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52.

Pennsylvania.— Becker's Estate, 150 Pa. St. 524, 24 Atl. 687; Hannah *v.* Swarner, 3 Watts & S. 223, 38 Am. Dec. 754.

United States.— Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522; Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— De Lancey *v.* Reg., L. R. 7 Exch. 140, 41 L. J. Exch. 64, 26 L. T. Rep. N. S. 400, 20 Wkly. Rep. 441; Earlom *v.* Saunders, Ambl. 241, 27 Eng. Reprint 161; Guidot *v.* Guidot, 3 Atk. 254, 26 Eng. Reprint 948; Hickman *v.* Bacon, 4 Bro. Ch. 333, 29 Eng. Reprint 920; Rashleigh *v.* Master, 3 Bro. Ch. 99, 1 Ves. Jr. 201, 29 Eng. Reprint 432; Hinton *v.* Pinke, 1 P. Wms. 539, 24 Eng. Reprint 506; Noys *v.* Mordaunt, 2 Vern. 581; Biddulph *v.* Biddulph, 12 Ves. Jr. 161.

See 11 Cent. Dig. tit. "Conversion," § 52.

Conversion of mortgage.— As between real and personal representatives, a mortgagee may, by a manifest declaration of his intent to treat the mortgage as real estate and not as personal property in his will, convert the mortgage as well as any other part of his personal estate into realty and make it pass accordingly. Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277.

Land articled to be purchased.—A articled to purchase lands in trust for B, and, before any conveyance made, B, by will, directed all his freehold estate to be settled on C, and his son, etc. It was held that the lands articled for would pass by the will. Greenhill *v.* Greenhill, Prec. Ch. 320, 2 Vern. 679, 24 Eng. Reprint 151. See also Warwick *v.* Edwards, 1 Bro. C. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687, to the same effect.

Where money arising from the sale of land is directed by a testator to be invested in land it will be regarded as land. Thorn *v.* Coles, 3 Edw. (N. Y.) 330.

Where there is an unqualified direction in a will to convert money into land, it will be regarded as land, even in case of devolution before such character has in fact been assumed. Graham *v.* De Witt, 3 Bradf. Surr. (N. Y.) 186.

61. Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; Becker's Estate, 150 Pa. St. 524, 24 Atl. 687.

Must contribute pro rata with other personalty.— Where a certain sum was given by

3. Time of Conversion. The same rules are applicable as to the time conversion takes place in the case of personalty turned into realty as have been stated hitherto in the case of realty turned into personalty, and where there is a positive direction in a will for a conversion of personalty into realty, such conversion takes place immediately on the death of the testator;[62] and where the direction for the conversion is made to depend upon a contingency, then the conversion will not be deemed to take place until the happening of such contingency.[63]

V. Failure of Purpose of Conversion — Resulting Trust.

A. Instruments Inter Vivos. Where real estate is settled by deed upon trust to sell for certain specified purposes, and such purposes fail wholly or partially, in such a case, whether the trust for sale is to arise in the lifetime of the grantor or not until after his decease, the property to the extent of such failure results to the grantor and his personal representative as personalty from the moment the deed is executed.[64]

B. Wills — 1. Total Failure. The general rule is that the conversion is limited to the purposes of the testator as expressed in the will, and in the event of a total failure of the purpose, there is a resulting trust in favor of the heir or the personal representative, and the property passes according to its original character.[65]

will to A to be invested by the executors in land, no particular parcel being specified, it was held that this provision would be regarded for some purposes as a devise of real estate under the general rule of equitable conversion, but not so as to dispense with the necessity of the executor's assent or to relieve it from contributing *pro rata* with other legacies of personalty to the payment of debts. McFadden *v.* Hefley, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675. In Hinton *v.* Pinke, 1 P. Wms. 539, 24 Eng. Reprint 506, a money legacy was given to be laid out in land, and upon a deficiency of assets it was held that this legacy should be regarded as land, only for the amount which should remain after it had contributed its proportion toward making up the deficiency in the assets.

Specific legacies first applicable to debts.— A plain intention, gathered from a will, that certain personal property shall be treated as real must be regarded as effecting a conversion thereof, and specific legacies must be resorted to before chattels so converted are applied. Downing *v.* Marshall, 1 Abb. Dec. (N. Y.) 525.

Where, for the security of the fund, money is converted into land by a judicial decree, the land is substituted for the fund and goes to the person who would have taken the fund had it remained specifically personal estate. Vandewalker *v.* Rollins, 63 N. H. 460, 3 Atl. 625. See also Holland *v.* Cruft, 3 Gray (Mass.) 162.

62. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211; Becker *v.* Chester, 115 Wis. 90, 91 N. W. 87.

63. Tayloe *v.* Johnson, 63 N. C. 381; Ross *v.* Drake, 37 Pa. St. 373.

64. Wilson *v.* Coles, 28 Beav. 215, 6 Jur. 1003, 8 Wkly. Rep. 383; Hewitt *v.* Wright, 1 Bro. Ch. 86, 28 Eng. Reprint 1001; Anonymous, Comyns 345; Clarke *v.* Franklin, 4 Kay & J. 257, 27 L. J. Ch. 567, 6 Wkly. Rep. 836; Knights *v.* Atkyns, 2 Vern. 20.

The only exception to the rule that the property would pass as personalty is where the purposes for which conversion is directed fail from the moment of the delivery of the deed, in which case the court regards the grantor as not having directed the conversion. Clarke *v.* Franklin, 4 Kay & J. 257, 27 L. J. Ch. 567, 6 Wkly. Rep. 836; Wilson *v.* Coles, 28 Beav. 215, 6 Jur. 1003, 8 Wkly. Rep. 383. See also Ripley *v.* Waterworth, 7 Ves. Jr. 425.

65. *Delaware.*— State *v.* West, 2 Harr. 151; State *v.* Bates, 2 Harr. 18.

Maryland.— Rizer *v.* Perry, 58 Md. 112; Cronise *v.* Hardt, 47 Md. 433; Trippe *v.* Frazier, 4 Harr. & J. 446.

New Jersey.— Moore *v.* Robbins, 53 N. J. Eq. 137, 32 Atl. 379; Roy *v.* Monroe, 47 N. J. Eq. 356, 20 Atl. 481; Hand *v.* Marcy, 28 N. J. Eq. 59; Brearly *v.* Brearly, 9 N. J. Eq. 21. See also Lerch *v.* Oberly, 18 N. J. Eq. 575.

New York.— Read *v.* Williams, 125 N. Y. 560, 26 N. E. 730, 35 N. Y. St. 909, 21 Am. St. Rep. 748 [partly *reversing* and partly *affirming* 8 N. Y. Suppl. 24, 27 N. Y. St. 505]; McCarty *v.* Terry, 7 Lans. 236; McCarty *v.* Deming, 4 Lans. 440; Giraud *v.* Giraud, 58 How. Pr. 175; Wood *v.* Keyes, 8 Paige 365; De Peyster *v.* Clendining, 8 Paige 295; Gott *v.* Cook, 7 Paige 521; Hawley *v.* James, 5 Paige 318; Slocum *v.* Slocum, 4 Edw. 613; Wright *v.* New York City M. E. Church, 1 Hoffm. 201.

North Carolina.— Lindsay *v.* Pleasants, 39 N. C. 320.

Pennsylvania.— Luffberry's Appeal, 125 Pa. St. 513, 17 Atl. 447; Nagle's Appeal, 13 Pa. St. 260.

South Carolina.— North *v.* Valk, Dudley Eq. 212.

2. PARTIAL FAILURE. Where by a will real estate is directed to be converted into personal estate, for a purpose expressed, which purpose partially fails, although the estate has been actually converted, as far as the purpose fails, so far there is a resulting trust in favor of the heir and not in favor of the personal representative;[66] and where it is necessary to sell the real estate to carry out the

England.— Bagster *v.* Fackerell, 26 Beav. 469; Hereford *v.* Ravenhill, 5 Beav. 51, 11 L. J. Ch. 173; Ackroyd *v.* Smithson, 1 Bro. Ch. 503, 28 Eng. Reprint 1262, 3 P. Wms. 22, note 1, 24 Eng. Reprint 953; Curteis *v.* Wormald, 10 Ch. D. 172, 40 L. T. Rep. N. S. 108, 27 Wkly. Rep. 419; Hatfield *v.* Pryme, 2 Coll. 204, 9 Jur. 838, 32 Eng. Ch. 204; Tregonwell *v.* Sydenham, 3 Dow. 194, 3 Eng. Reprint 1035; Bective *v.* Hodgson, 10 H. L. Cas. 656, 10 Jur. N. S. 373, 10 L. T. Rep. N. S. 202, 12 Wkly. Rep. 625; Eyre *v.* Marsden, 2 Jur. 583, 2 Keen 564, 7 L. J. Ch. 220, 15 Eng. Ch. 564; Clarke *v.* Franklin, 4 Kay & J. 257, 27 L. J. Ch. 567, 6 Wkly. Rep. 836; Jessopp *v.* Watson, 2 L. J. Ch. 197, 1 Myl. & K. 665, 7 Eng. Ch. 665; Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320; Scudamore *v.* Scudamore, Prec. Ch. 543, 24 Eng. Reprint 244; Digby *v.* Legard, 3 P. Wms. 22, note 1, 24 Eng. Reprint 953; Cruse *v.* Barley, 3 P. Wms. 19, 24 Eng. Reprint 952; Sharpe *v.* Roahde, 2 Rose 192; Hill *v.* Cock, 1 Rose 323, 1 Ves. & B. 173; Amphlett *v.* Parke, 2 Russ. & M. 221, 11 Eng. Ch. 221; Arnold *v.* Chapman, 1 Ves. 108, 27 Eng. Reprint 922; Chambers *v.* Brailsford, 18 Ves. Jr. 368; Nash *v.* Smith, 17 Ves. Jr. 29; Ripley *v.* Waterworth, 7 Ves. Jr. 425.

The principle on which this doctrine rests is thus expressed in Amphlett *v.* Parke, 2 Russ. & M. 221, 227, 11 Eng. Ch. 221, "that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but there must appear a clear, substantive and undeniable intent on the part of the devisor or testator to exclude him." Mr. Cox, in a note to Cruse *v.* Barley, 3 P. Wms. 19, note 1, 24 Eng. Reprint 952, thus states the rule: "The several cases upon this subject seems to depend upon this question, whether the testator meant to give to the produce of real estate the quality of personalty to all intents, or only as far as respected the particular purposes of the will."

Conversion presumed for purposes of will merely.— Where a testator orders his land to be sold, the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will, and consequently if those purposes fail or do not require it, it will in equity be considered land and given to the heir. Moore *v.* Robbins, 53 N. J. Eq. 137, 32 Atl. 379. In Roy *v.* Monroe, 47 N. J. Eq. 356, 362, 20 Atl. 481, the court said: "It is an obvious dictate of justice, as well as of common sense, that the direction to convert shall be held to have terminated whenever it becomes impossible to carry out the purpose for which the conversion was ordered, and that when the property, in its changed form, cannot pass by the will which directs its conversion, but must be transmitted by the law, it should go to the person who would have taken it if it had not been converted, but still remained in its original position." The general rule is that where a person dealing with his own property only has directed a conversion for a particular purpose, or out and out, but its produce to be applied to a particular purpose, when the purpose fails, the intention fails, and a court of equity will regard him as not having directed the conversion. Ripley *v.* Waterworth, 7 Ves. Jr. 425.

Resulting trust pro tanto.— Where the object for which a conversion of real estate into personalty failed either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the will of the testator, there is a resulting trust in favor of the heir at law *pro tanto*. Hawley *v.* James, 7 Paige (N. Y.) 213, 32 Am. Dec. 623.

Extreme English doctrine.— In England there has always been a strong tendency to favor the heir, and in one case this doctrine was carried to the extent of holding that the right of the heir was not defeated by an express declaration in the will that the fund should be considered personal and should in no case lapse or result for his benefit. Fitch *v.* Weber, 6 Hare 145, 12 Jur. 645, 17 L. J. Ch. 361, 31 Eng. Ch. 145. See also De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, 16 Jur. 1147, as illustrating the same point.

66. *District of Columbia.*— Hilton *v.* Hilton, 2 MacArthur 70.

New Jersey.— Canfield *v.* Canfield, 62 N. J. Eq. 578, 50 Atl. 471; Roy *v.* Monroe, 47 N. J. Eq. 356, 20 Atl. 481.

New York.— Jones *v.* Kelly, 63 N. Y. App. Div. 614, 72 N. Y. Suppl. 24 [*affirmed* in 170 N. Y. 401, 63 N. E. 443]; Giraud *v.* Giraud, 58 How. Pr. 175; Bogert *v.* Hertell, 4 Hill 492; *In re* Vandervoort, 1 Redf. Surr. 270, 7 N. Y. Leg. Obs. 25. See also Marsh *v.* Wheeler, 2 Edw. 156.

North Carolina.— Lindsay *v.* Pleasants, 39 N. C. 320.

Pennsylvania.— *In re* Rudy, 185 Pa. St. 359, 39 Atl. 968, 64 Am. St. Rep. 654; Wilson *v.* Hamilton, 9 Serg. & R. 424; Worsley's Estate, 4 Pa. Dist. 177, 36 Wkly. Notes Cas. 247.

South Carolina.— North *v.* Valk, Dudley Eq. 212.

United States.— Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Gravenor *v.* Hallum, Ambl. 643, 27 Eng. Reprint 417; Hereford *v.* Ravenhill, 1 Beav. 481, 17 Eng. Ch. 481; Hutcheson *v.* Hammond, 3 Bro. Ch. 128, 29 Eng. Reprint 449; Hewitt *v.* Wright, 1 Bro. Ch. 86, 28 Eng. Reprint 1001; Tregonwell *v.* Sydenham, 3 Dow. 194, 3 Eng. Reprint 1035; Jones *v.* Mitchell, 1 L. J. Ch. O. S. 163, 1 Sim. & St. 290, 1 Eng. Ch. 290; Digby *v.* Legard, 3

purposes of the will which may be effectuated, the surplus will go to the heir as money and not as land, and will pass to his personal representative in case of his death before actual sale.[67] The rule just stated also applies to personalty directed to be laid out in real estate, and upon a partial failure of the purposes of the will the surplus undisposed of will pass to the personal representative;[68] and where, in order to effectuate the purposes of the will, such personalty is laid out in real estate, upon a partial failure of the purposes of the will, the surplus undisposed of will go to the personal representative as land and not as money.[69]

VI. CONVERSION OUT AND OUT.

Where the intent of the testator appears to have been to stamp upon the proceeds of land directed to be sold the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.[70]

P. Wms. 22, note 1, 24 Eng. Reprint 952, 953; Cruse *v.* Barley, 3 P. Wms. 19, 24 Eng. Reprint 952; Amphlett *v.* Parke, 2 Russ. & M. 221, 11 Eng. Ch. 221; Arnold *v.* Chapman, 1 Ves. 108, 27 Eng. Reprint 922; Gibbs *v.* Rumsey, 2 Ves. & B. 294, 13 Rev. Rep. 88; Collins *v.* Wakeman, 2 Ves. Jr. 683.

In the leading case of Ackroyd *v.* Smithson, 1 Bro. Ch. 503, 28 Eng. Reprint 1262, 3 P. Wms. 22, note 1, 24 Eng. Reprint 953, in which the testator directed his real estate to be sold and the proceeds paid to certain legatees, two of the legatees died before the testator. Lord Chancellor Thurlow held that the legacies to them lapsed, and that their shares, so far as they were constituted of real estate at the testator's death, descended to the heirs at law. Mr. Scott, afterward Lord Eldon, in his famous argument in this case, admitted that in favor of his legatees the testator intended to convert the whole property into personalty in case all his legatees should eventually take the whole, and that as to the legatees the law would regard it as converted out and out, but he argued that no intention was shown as to that part of the proceeds as to which his disposition, in the event which happened, failed of effect.

If one of the legacies fails, whether it be void or lapsed, where there is a qualified conversion of real estate into personalty by will, the portion of the fund does not pass with the residue, but goes to the party who would have been entitled to the real estate unsold. Harker *v.* Reilly, 4 Del. Ch. 72.

The fact that the heir is also a legatee under the will does not impair his right to a resulting trust in his own favor. Kellet *v.* Kellet, 1 Ball & B. 533, 12 Rev. Rep. 54.

Where real estate is directed to be converted in order to subserve a purpose it will be treated as personalty for that purpose, but will remain unchanged as to all beyond what that purpose requires. *In re* Rudy, 185 Pa. St. 359, 39 Atl. 968, 64 Am. St. Rep. 654.

67. Bagster *v.* Fackerell, 26 Beav. 469; Smith *v.* Claxton, 4 Madd. 484, 20 Rev. Rep. 320.

Surplus passes to heir as personalty.— Where an executor sells real estate of his testator to pay his debts, under a power in the will, the conversion of the realty into personalty is complete to all intents and purposes only to the extent to which purchase-money is required for the particular objects for which the sale takes place, and the excess, although in the form of money, remains impressed with the character of real estate for the purpose of determining who is entitled to receive it, but for that purpose only. Cronise *v.* Hardt, 47 Md. 433.

68. Cogan *v.* Stevens, 1 Beav. 482, note c, 5 L. J. Ch. 17, 17 Eng. Ch. 482; Hereford *v.* Ravenhill, 1 Beav. 481, 17 Eng. Ch. 481; Head *v.* Godlee, Johns. 536, 6 Jur. N. S. 495, 29 L. J. Ch. 633, 8 Wkly. Rep. 141. See also Mogg *v.* Hodges, 2 Ves. 52, 28 Eng. Reprint 35.

69. Curteis *v.* Wormald, 10 Ch. D. 172, 40 L. T. Rep. N. S. 108, 27 Wkly. Rep. 419. See, however, Head *v.* Godlee, Johns. 536, 6 Jur. N. S. 495, 29 L. J. Ch. 633, 8 Wkly. Rep. 141 [expressly *overruled* in Curteis *v.* Wormald, 10 Ch. D. 172, 40 L. T. Rep. N. S. 108, 27 Wkly. Rep. 419], where it was held that in such case the surplus undisposed of would pass to the personal representative in its original form as personalty, the reason given for this being that in the case of personalty the surplus reverts to the executor, and whatever he gets *in qua* executor he must hold as personalty.

70. *Michigan.*— Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486.

New Jersey.— Hand *v.* Marcy, 28 N. J. Eq. 59; Smith *v.* Bloomsbury First Presb. Church, 26 N. J. Eq. 132.

New York.— Gourley *v.* Campbell, 6 Hun 218; Kearney *v.* St. Paul Missionary Soc., 10 Abb. N. Cas. 274. See also *In re* McKay, 75 N. Y. App. Div. 78, 77 N. Y. Suppl. 845 [*overruling* 37 Misc. 590, 75 N. Y. Suppl. 1069].

North Carolina.— Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34.

Pennsylvania.— Evans' Appeal, 63 Pa. St. 183; Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

United States.— Craig *v.* Leslie, 3 Wheat.

VII. CONVERSION BY PARAMOUNT AUTHORITY.

A. Under Statute or by Order of Court — 1. GENERAL RULE. The question now presented is whether property, although *de facto* converted, is to be treated to any extent as not converted. The general rule is that if land be sold for a specific purpose, the surplus money shall, as between the heir and next of kin, be considered as land, so far as to vest in the persons who would have been entitled to it had it remained unconverted. But after it has so vested in the person entitled it is to be treated as money in his hands, and in the case of his subsequent death goes to his personal representatives as personal estate.[71] Where, however, the sale is by order of court, if the sale is not completed by confirmation of the court, no conversion from realty to personalty takes place.[72]

2. SALE OF LAND TO PAY DEBTS. So where real estate of the decedent is sold to pay his debts, any surplus remaining after such object is effectuated continues in its original character of realty.[73] The Pennsylvania courts have subscribed to this

563, 4 L. ed. 460; Rinehart *v.* Harrison, Baldw. 177, 20 Fed. Cas. No. 11,840; Reading *v.* Blackwell, Baldw. 166, 20 Fed. Cas. No. 11,612.

England.— Simmons *v.* Pitt, L. R. 8 Ch. 978, 29 L. T. Rep. N. S. 32; Singleton *v.* Tomlinson, 3 App. Cas. 404, 38 L. T. Rep. N. S. 653, 26 Wkly. Rep. 722; Wilson *v.* Goles, 28 Beav. 215, 6 Jur. 1003, 8 Wkly. Rep. 383; Johnson *v.* Woods, 2 Beav. 409, 9 L. J. Ch. 244, 17 Eng. Ch. 409; Mallabar *v.* Mallabar, Cas. t. Talb. 78; Barber *v.* Barber, 1 Jur. 915, 2 Jur. 1029, 7 L. J. Ch. 70, 8 L. J. Ch. 36, 3 Myl. & C. 688, 14 Eng. Ch. 688; Ashby *v.* Palmer, 1 Meriv. 296, 15 Rev. Rep. 116; Green *v.* Jackson, 2 Russ. & M. 238, 11 Eng. Ch. 238; Durour *v.* Motteux, 1 Ves. 320, 27 Eng. Reprint 1057; Brown *v.* Bigg, 7 Ves. Jr. 279. See, however, Robinson *v.* London Hospital, 10 Hare 19, 22 L. J. Ch. 754, 44 Eng. Ch. 19.

Conversion for all intents.— Where, although the particular purposes of the will might only require a partial conversion of the realty into personalty, yet the general object and scope render it evident that sales of the whole real estate were intended, this amounts to a conversion of the same into personalty to all intents, and the beneficiaries will take the same as personal property. Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190 [*overruling* 3 Sandf. Ch. (N. Y.) 531].

71. *Kentucky.*— Smith *v.* Smith, 6 Ky. L. Rep. 217.

Maryland.— Cronise *v.* Hardt, 47 Md. 433; Jones *v.* Jones, 1 Bland 443, 18 Am. Dec. 327.

Massachusetts.— Emerson *v.* Cutler, 14 Pick. 108.

Pennsylvania.— Sayer's Appeal, 79 Pa. St. 428; Large's Appeal, 54 Pa. St. 383; Pennell's Appeal, 20 Pa. St. 515; Dyer *v.* Cornell, 4 Pa. St. 359; Clepper *v.* Livegood, 5 Watts 113; Grider *v.* Maclay, 11 Serg. & R. 224. In Com. *v.* Mateer, 16 Serg. & R. 416, it is held that on the sale of real estate, the residue after payment of debts goes to the same persons who would take the land; but that the fund is to be considered personal property for every purpose.

Tennessee.— Cowden *v.* Pitts, 2 Baxt. 59.

See 11 Cent. Dig. tit. "Conversion," § 6 *et seq.*

A judicial sale of the real estate of a decedent, it has been held in New York, does not convert it into personalty. Hoey *v.* Kinney, 10 Abb. Pr. (N. Y.) 400.

The fact that the legal title is retained as a security for the price, or that a lien is reserved, does not prevent the mutation, which is wrought by the sale. Jones *v.* Walkup, 5 Sneed (Tenn.) 135.

Where land had been sold under a judgment, the surplus proceeds should be treated as real estate, in favor of trustees to whom all the real estate of the judgment debtor had been previously assigned. Pierson *v.* Thompson, 1 Edw. (N. Y.) 212.

72. Greenough *v.* Small, 137 Pa. St. 128, 20 Atl. 396; Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875; Overdeer *v.* Updegraff, 69 Pa. St. 110; Biggert's Estate, 20 Pa. St. 17; Erb *v.* Erb, 9 Watts & S. (Pa.) 147; *Ex p.* Moore, 3 Head (Tenn.) 171; Jones *v.* Walkup, 5 Sneed (Tenn.) 135. It has been held in Maryland that where real estate is sold under a decree of court during the lifetime of the defendant, but the sale is not confirmed until after his death, there is no conversion of it to personalty. Nelson *v.* Hagerstown Bank, 27 Md. 51.

Where an heir dies after land left by his ancestor is sold under orders of the orphans' court, and confirmation of such sale, but before deed is made, his interest descends as land and not as money. *In re* Schmidt, 182 Pa. St. 267, 37 Atl. 928.

73. Oberly *v.* Lerch, 18 N. J. Eq. 346; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447; Cooke *v.* Dealey, 22 Beav. 196; Jermy *v.* Preston, 13 Sim. 356, 36 Eng. Ch. 356. But *compare* Graham *v.* Dickinson, 3 Barb. Ch. (N. Y.) 169. In this case a testator charged his personal estate with payment of his debts, but it being insufficient his executors obtained an order for the sale of his real estate in the possession of his devisees, and the

doctrine to the extent of holding that such surplus proceeds vest in the persons entitled to such real estate, in such proportions and for like interests, respectively, as they may have had in the real estate, although they vest as personalty and not as realty.[74]

3. Partition Sale. The better doctrine seems to be that the proceeds of land of an intestate sold in partition are personalty;[75] but in some jurisdictions they are held to still retain the character of real estate.[76] No conversion takes place by virtue of proceedings in partition before sale or an allotment and acceptance of the purparts. Until then the interests of the several owners retain all the qualities of real estate.[77]

4. Foreclosure Sale. In some jurisdictions it has been held that where a mortgage is foreclosed, the surplus remaining after the satisfaction of such mort-

proceeds were applied to the payment of debts. Subsequently the executors recovered a sum of money upon a claim which their testator held at the time of his death. It was held that while the money thus received was, in equity, to be considered a substitute for the real estate sold for the payment of debts, it would be treated as money and not as land on the death of a devisee entitled thereto, and would go to her personal representative.

Mass. Pub. Stat. c. 142, § 9, provides that in every sale of the real estate of a decedent by an executor or administrator the proceeds remaining on the final settlement of the accounts shall be considered as real estate and be disposed of as such; and it has been held under this statute that the unexpended balance of the proceeds of the sale of real estate of a testator sold to pay debts is to be treated as real estate, and should be paid over by the administrator to those entitled thereto. Adams *v.* Jones, 176 Mass. 185, 57 N. E. 362.

74. Culbertson's Appeal, 76 Pa. St. 145; Carter *v.* Trueman, 7 Pa. St. 315; Erb *v.* Erb, 9 Watts & S. (Pa.) 147; Grider *v.* McClay, 11 Serg. & R. (Pa.) 224; Diller *v.* Young, 2 Yeates (Pa.) 261; Wale's Estate, 11 Phila. (Pa.) 156, 33 Leg. Int. (Pa.) 409. In McCarthy's Estate, 11 Phila. (Pa.) 85, 32 Leg. Int. (Pa.) 249, it was held that the balance of the proceeds of real estate sold for the payment of debts of a minor's father remained as realty and would be distributed as such. So in Lloyd *v.* Hart, 2 Pa. St. 473, 45 Am. Dec. 612, it was held that a sale of real estate by the committee of a lunatic, for the payment of his debts under a decree of the court, works no conversion of the surplus, but that it remains real estate and is distributed as such according to rules of descent.

Where property has once vested.— It is held in Squire's Appeal, 10 Wkly. Notes Cas. (Pa.) 118, that the provisions of section 33 of the act of Feb. 24, 1834, that the surplus proceeds of the land of a decedent sold at sheriff's sale shall be paid to his executor or administrator, and by him be distributed as the real estate from which they arise would have been, is simply an application of the general rule in equity with regard to conversion; that the operation of this rule is confined to the first transmission, and the money having once vested in the person entitled is no longer to be treated as real estate.

75. Jacobus *v.* Jacobus, 36 N. J. Eq. 248; *In re* Scott, 137 Pa. St. 454, 20 Atl. 623; Hough's Estate, 3 Pa. Dist. 187; *In re* Morgan, [1900] 2 Ch. 474, 69 L. J. Ch. 735. In Wentz's Appeal, 126 Pa. St. 541, 551, 17 Atl. 875 [*followed* in Scott's Estate, 137 Pa. St. 454, 20 Atl. 623], the court said: "It is not uncommon to say that the proceeds of real estate remain realty, etc., but the expression is not accurate. The money never is real estate, in law any more than in fact, but for certain purposes, and within certain limits, it is treated as if it were real estate. The purpose is to preserve the inheritable quality of the estate, so that the title may not be diverted from the previous owner, and the limit is the first devolution." In Findley *v.* Findley, 42 W. Va. 372, 377, 26 S. E. 433, the court said: "This whole doctrine of equitable conversion, by which what is in fact land is treated as personalty, or money as realty is merely a fiction of courts of equity, to give impress to property to carry out the intent of wills. This reason does not apply to a sale in lieu of partition, where the very purpose is to change it into money, so it may be divided. 3 Pomeroy Eq. Jur. § 1167, says that, when land is sold by a court, it is the doctrine of the court that its character should be changed, 'only so far as may be necessary to accomplish the particular purpose.' Then, what is the purpose in partition sales? A total division of dollars. You cannot accomplish the purpose otherwise than by dividing the dollars. That is the very end to be accomplished,— not like a sale of decedent's land, where there is a surplus."

76. Smith *v.* Smith, 63 Ill. App. 534 [*affirmed* in 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403]. Where a court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds to designate whether he will hold them as personalty or as realty. And when for any reason that party is incapable of making such designation the court will hold them subject to all the incidents of realty. Turner *v.* Dawson, 80 Va. 841. See also Ashby *v.* Smith, 1 Rob. (Va.) 55.

77. Jenkins *v.* Simms, 45 Md. 532; Thompson *v.* Owen, 8 Kulp (Pa.) 36. It is held in Eberts *v.* Eberts, 55 Pa. St. 110, that the interest of a husband, after proceedings in

gage is personalty, and passes to the personal representative of decedent.[78] In other jurisdictions, however, such surplus has been held to retain the character of realty and to pass to the heir.[79]

5. Tax-Sale. It has been held in the United States court of claims that a surplus remaining after a sale of lands, under the Direct Tax Acts of 1861 and 1862, is a chose in action, and personal estate, although derived from realty.[80]

6. Persons Under Disability — a. Married Women — (I) *Rule in United States.* The general rule seems to be that where real estate of a *feme covert* is sold by order of court, the proceeds of such sale are personalty, and on her death pass to her husband and his representatives;[81] but the mere order of court for the sale of the real estate of a *feme covert* does not convert the realty into personalty, and until an actual sale confirmed by the court the nature of the estate remains unchanged.[82]

(II) *Rule in England.* In England by virtue of the Leases and Sales of Settled Estates Act, where the real estate of a married woman is sold by order of court, in the absence of election by such married woman (provided for by statute)[83] the proceeds of such sale are upon her death treated as realty for the purposes of devolution.[84] But by statute the share of a married woman in the proceeds of the sale of real estate devised to her in fee, which has been sold in a partition suit, may be treated as personalty and paid to her husband on her electing by examination in court to take the money as personal estate.[85]

b. Infants. The rule in a number of jurisdictions is, that when the real estate of an infant is converted into money by statute or order of court, and the infant dies intestate before attaining his majority, the fund will be treated as real estate, and as such descend to the heirs at law of the infant.[86] In some jurisdictions, however, it is held that where real estate of an infant is sold, pursuant to a statute or order of court, and the infant subsequently dies during minority and

partition, of real estate of which his deceased wife is one of the heirs, is real estate.

78. Sweeney *v.* Horn, 190 Pa. St. 237, 42 Atl. 709. This seems to have been the former doctrine in New York. Bogert *v.* Furnham, 10 Paige (N. Y.) 496; Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495. But see *infra*, note 79.

In Pennsylvania it has been held that a purchase of land by the executor at a sheriff's sale is a conversion thereof into personalty. Gumaer *v.* Barber, 182 Pa. St. 31, 37 Atl. 848.

79. Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293; *In re* Knapp, 25 Misc. (N. Y.) 133, 54 N. Y. Suppl. 927. See also Varnum *v.* Meserve, 8 Allen (Mass.) 158.

80. Cromwell *v.* U. S., 23 Ct. Cl. 303; Graham *v.* U. S., 21 Ct. Cl. 47; Chisholm *v.* U. S., 19 Ct. Cl. 435; Chaplin *v.* U. S., 19 Ct. Cl. 424.

81. Gutshall *v.* Goodyear, 107 Pa. St. 123; Spangler's Appeal, 24 Pa. St. 424; Yohe *v.* Barnet, 1 Binn. (Pa.) 358; Cowden *v.* Pitts, 2 Baxt. (Tenn.) 59; Jones *v.* Walkup, 5 Sneed (Tenn.) 135. But see Beyer *v.* Reesor, 5 Watts & S. (Pa.) 501. It was held in Hay's Appeal, 52 Pa. St. 449, that the act of March 29, 1832, prohibiting the orphans' court from awarding a payment of a married woman's portion to her husband unless he gives security, does not preclude a conversion of such portion consisting of realty into personalty on partition; that the act extended no further than to regulate the first descent, and after it vested in the heirs it was no longer real estate for any purpose.

82. Where a female heir died after the order of the court for the sale of her share of real estate had been granted, but before an actual sale, it was held that her husband was not entitled, as her administrator, to the whole of her share of the money arising from the sale, and that he was only entitled, as tenant by the curtesy, to the interest of it during life. Ferree *v.* Com., 8 Serg. & R. (Pa.) 312. See also Withers' Appeal, 14 Serg. & R. (Pa.) 185, 16 Am. Dec. 488.

83. See *infra*, cases cited in note 85.

84. Midmay *v.* Quicke, 6 Ch. D. 553, 46 L. J. Ch. 667, 25 Wkly. Rep. 788. See also Foster *v.* Foster, 1 Ch. D. 588.

85. Wallace *v.* Greenwood, 16 Ch. D. 362, 50 L. J. Ch. 289, 43 L. T. Rep. N. S. 720; Standering *v.* Hall, 11 Ch. D. 652, 48 L. J. Ch. 382, 27 Wkly. Rep. 749; *In re* Shaw, 49 L. J. Ch. 213, 41 L. T. Rep. N. S. 670.

Where proceeds are under two hundred pounds.— Where in a partition action, the share of a married woman in the proceeds of sale of real estate is under two hundred pounds, the court will order the same to be paid out to her upon her separate receipt and upon affidavit of no settlement, and will dispense with her separate examination as to her election to take the money as personal estate. Wallace *v.* Greenwood, 16 Ch. D. 362, 50 L. J. Ch. 289, 43 L. T. Rep. N. S. 720.

86. *Kentucky.*— Collins *v.* Champ, 15 B. Mon. 118, 61 Am. Dec. 179.

intestate, the proceeds of the sale go to such infant's distributees as personalty and not to his heirs as realty.[87]

New Jersey.— Merriam *v.* Dunham, 62 N. J. Eq. 567, 50 Atl. 235; Wetherill *v.* Hough, 52 N. J. Eq. 683, 29 Atl. 592; Fidler *v.* Higgins, 21 N. J. Eq. 138; Oberly *v.* Lerch, 18 N. J. Eq. 346; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— *In re* Price, 67 N. Y. 231; Horton *v.* McCoy, 47 N. Y. 21; Wells *v.* Seeley, 47 Hun 109; Shumway *v.* Cooper, 16 Barb. 556; *In re* Reeve, 38 Misc. 409, 77 N. Y. Suppl. 936; Matter of Woodworth, 5 Dem. Surr. 156. See also Forman *v.* Marsh, 11 N. Y. 544.

North Carolina.— Wood *v.* Reeves, 58 N. C. 271; Bateman *v.* Latham, 56 N. C. 35; Jones *v.* Edwards, 53 N. C. 336; Dudley *v.* Winfield, 45 N. C. 91; March *v.* Berrier, 41 N. C. 524; Scull *v.* Jernigan, 22 N. C. 144.

Pennsylvania.— See Tilghman's Estate, 5 Whart. 44.

South Carolina.— Major *v.* Hunt, 64 S. C. 97, 41 S. E. 816.

West Virginia.— Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433.

England.— *In re* Norton, [1900] 1 Ch. 101, 69 L. J. Ch. 31, 81 L. T. Rep. N. S. 724, 48 Wkly. Rep. 140; Kelland *v.* Fulford, 6 Ch. D. 491, 25 Wkly. Rep. 506; Foster *v.* Foster, 1 Ch. D. 588; *Ex p.* Phillips, 19 Ves. Jr. 118, 12 Rev. Rep. 151.

See 11 Cent. Dig. tit. "Conversion," § 13.

The cases show that where conversion is compulsory, that is, against the will or without the consent of the owner, the fund will be treated as real estate until the owner being *sui juris*, or of disposable capacity, manifests a willingness to accept it as personal. Wetherell *v.* Hough, 52 N. J. Eq. 683, 29 Atl. 592. In Ware *v.* Polhill, 11 Ves. 257, 278, 8 Rev. Rep. 144, Lord Chancellor Eldon said: "I have uniformly made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision that, if he shall not attain the age, at which he will have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit, in all the circumstances surprise or accident can throw around it."

Under 2 N. Y. Rev. Stat. p. 196, § 186, providing that no sale of the real estate of an infant should give such infant any other or greater interest than he had in the estate so sold, and that the proceeds shall be deemed real estate of the same nature as the property sold, the proceeds of an infant's real estate will be regarded as real estate for all purposes of distribution in all cases where the infant died before he attained his majority. Foreman *v.* Foreman, 7 Barb. (N. Y.) 215.

The Pennsylvania act of 1853 declares in express terms that "no purchase or sale by authority of this act shall change the course of descent, or transmission of any property, changed in its nature, by virtue thereof as respects persons who are not of competent ability to dispose of it." Therefore, the proceeds of land sold under this act retains its character as real estate and so devolves. Holmes' Appeal, 53 Pa. St. 339, 342; Hough's Estate, 3 Pa. Dist. 187. See also Davis' Appeal, 60 Pa. St. 118; Grenawalt's Appeal, 37 Pa. St. 95.

Foreclosure sale.— It has been held in New York that when at the time of the sale of mortgaged premises under decree of foreclosure, the equity of redemption therein is owned by a minor, and a surplus arises from the sale, the interest of the minor therein is deemed real estate and will be disposed of as such at his death, if he dies under age; and that such surplus will not be converted into personalty, even when it has been invested by the court in personal securities for the benefit of such minor. Sweezy *v.* Thayer, 1 Duer (N. Y.) 286.

Estoppel.— It was held in Wetherill *v.* Hough, 52 N. J. Eq. 683, 29 Atl. 592, that where all tenants in common of real estate who are of age undertake to convey the fee, including the interest of one not of age, and the portion of the purchase-money supposed to represent interest of the latter be paid to his guardian, as to the adults, the conversion is out and out, and the fund so held by the guardian will be treated as personal estate as between the adults and the legal personal representatives of the infant in case of his death.

87. *Arkansas.*— *In re* Simmons, 55 Ark. 485, 18 S. W. 933.

Massachusetts.— Emerson *v.* Cutler, 14 Pick. 108. See also Holland *v.* Adams, 3 Gray 188.

Ohio.— Armstrong *v.* Miller, 6 Ohio 118.

Pennsylvania.—Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875; Kann's Estate, 69 Pa. St. 219; McCune's Appeal, 65 Pa. St. 450; Hay's Appeal, 52 Pa. St. 449; Pennell's Appeal, 20 Pa. St. 515; Eckert's Estate, 12 Phila. 93, 35 Leg. Int. 193; Gilbert *v.* Garber, 7 Pa. L. J. Rep. 381. And see Dyer *v.* Cornell, 4 Pa. St. 359, holding that the proceeds of land retaining the character of land lose that character and become personalty on the first transmission, although to an infant.

England.— Steed *v.* Preece, L. R. 18 Eq. 192, 43 L. J. Ch. 687, 22 Wkly. Rep. 432.

See 11 Cent. Dig. tit. "Conversion," § 13.

Reason of rule.— This line of decisions seems to be based on the rule that both the real and personal representatives are volunteers; that there are no equities between them, and each must take what they find at the death of the person entitled for life, in the condition which they find it. Oxenden *v.* Compton, 2 Ves. Jr. 69, 2 Rev. Rep. 131.

Real estate was sold by order of court, the court being of the opinion that the same would be for the benefit of the infant defendant, and the adult defendant consenting. The infant's share of proceeds were paid into court, and the infant died before attaining

c. Lunatics. Where real estate of a lunatic is sold by his committee, under a statute or by order of court, the better doctrine is that the proceeds of such sale remain realty for the purpose of distribution upon the death of the lunatic.[88]

7. PERSONALTY INTO REALTY — a. Infants — (I) *BY DECREE OF COURT.* Although a court of equity may direct and sanction the conversion of an infant's personal estate into realty, where it is for the manifest convenience and advantage of the infant,[89] yet the general rule is that such property will continue to be considered as personalty during the minority of such infant to the same extent as before such conversion was made, and on his death under age will pass to his personal representatives.[90]

(II) *BY ACT OF GUARDIAN.* Where a guardian without authority converts an infant's personal property into realty, such property will be regarded in equity

his majority. It was held that the fund in court belonged to his personal representative and was not to be treated as realty. Steed *v.* Preece, L. R. 18 Eq. 192, 43 L. J. Ch. 687, 22 Wkly. Rep. 432.

Under the Pennsylvania act of April 19, 1794, providing for sale of the land of intestates by the orphans' court under certain conditions, it has been held that surplus money arising from the sale of land by such order, whether it belong to an infant, a *feme covert*, or a male of full age, is to be considered simply as money and nothing else. Grider *v.* McClay, 11 Serg. & R. 224 [*followed* in Clepper *v.* Livergood, 5 Watts 113]. See also Weaver's Estate, 2 Lanc. L. Rev. 114.

Where a guardian sells realty of his minors, under the act of April 18, 1853, the minor dies, and the guardian pays the amount to the administrator, who accounts for it as money, on the distribution of such fund it is to be treated as personalty. Ray's Estate, 24 Pa. Co. Ct. 366.

88. Holmes' Appeal, 53 Pa. St. 339; Hart's Appeal, 8 Pa. St. 32; Lloyd *v.* Hart, 2 Pa. St. 473, 45 Am. Dec. 612; Hough's Estate, 3 Pa. Dist. 187; *In re* Tugwell, 27 Ch. D. 309, 53 L. J. Ch. 1006, 51 L. T. Rep. N. S. 83, 33 Wkly. Rep. 132; *In re* Barker, 17 Ch. D. 241, 50 L. J. Ch. 334, 44 L. T. Rep. N. S. 33, 29 Wkly. Rep. 873; Midland Counties R. Co. *v.* Oswin, 1 Coll. 74, 8 Jur. 138, 13 L. J. Ch. 209, 3 R. & Can. Cas. 497, 28 Eng. Ch. 74. It was held in Matter of Cross, Sim. N. S. 260, 40 Eng. Ch. 260 [*distinguishing* Midland Counties R. Co. *v.* Oswin, 1 Coll. 74, 8 Jur. 138, 13 L. J. Ch. 209, 3 R. & Can. Cas. 497], that money paid into court by a railway company, for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility and who continued in that state until his death, but was not the subject of a commission of lunacy, should not be reinvested in or considered as land, but should be paid to his executors.

Sale of growing timber.— It was held in Oxenden *v.* Compton, 2 Ves. Jr. 69, 2 Rev. Rep. 131, that the produce of timber on the estate of a lunatic cut and sold by order on report that it would be for his benefit is personal assets.

Estoppel.—A cotenant of land with a lunatic, with whom he was related so as to be entitled to inherit from him as heir at law, was a party to a decree purporting to divest the lunatic of his interest in the land, and requiring such cotenant to pay therefor. It was held that after the lunatic's death the cotenant was estopped to deny that the lunatic's interest was converted into personalty. Anderson's Appeal, 4 Yeates (Pa.) 35.

Where a committee were suspended.— A lunatic's realty was sold by his committee in 1871. In 1872, by a decree adjudging him restored to sanity, the committee were suspended, and they filed an account of the proceeds of the sale, which they retained and reinvested until 1885, when by a further decree the suspension was terminated and they were reinstated as committee. It was held that on the lunatic's death the proceeds should be distributed as personalty; the restoration of the lunatic to sanity in 1872, and the subsequent reinvestment of the proceeds of the realty, although not actually made by him, causing such proceeds to lose the character of realty impressed upon them by the original sale. Jones' Estate, 3 Pa. Dist. 318.

89. There are many cases in which the court will for the manifest convenience and advantage of the infants direct or sanction the making of an absolute purchase of real estate with his personalty, or with the rents and proceeds of his estate; and thus in fact convert his personalty into realty. This, however, is never done without a complete saving to the infant of all his rights by continuing to consider during his infancy the property as personalty to the same extent as before such conversion was made. Because the court can neither do nor sanction any act which may in its consequence impair the rights of the infant, or those who claim under him, either by altering the nature of his property or by changing his domicile so as to cast it into a different course of succession. *In re* Williams, 3 Bland (Md.) 186. See also Witter *v.* Witter, 3 P. Wms. 99, 24 Eng. Reprint 985; Winchelsea *v.* Norcliffe, 1 Vern. 435.

90. *In re* Williams, 3 Bland (Md.) 186; Paul *v.* York, 1 Tenn. Ch. 547; Tullit *v.* Tullit, Ambl. 370, Dick. 322, 27 Eng. Reprint 246; Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648; Webb *v.* Shaftsbury, 6 Madd.

as personalty, and on the death of the infant before attaining his majority will pass to his personal representatives and not to his heirs.[91]

b. Foreclosure Sale. A foreclosure, obtained by a mortgagee after the publication of a will, converts the mortgage from personal into real estate, which descends to the heirs, unencumbered by any bequest in the will not charged upon the real estate.[92]

B. Exercise of Right of Eminent Domain. The better doctrine seems to be that where there is a compulsory conversion of real estate, that is, against the will or consent of the owner, such as the exercise of the right of eminent domain, the fund will be treated as real estate until the owner, being *sui juris* or of disposable capacity, manifests a willingness to accept it as personalty.[93]

C. Time of Conversion. Where land is directed to be sold by order of court, the conversion of the realty into personalty does not take place until the confirmation of such sale by the court. This act of the court is necessary to change the character of the property from realty to personalty, and without it the rights of all parties as to the proceeds will remain as if there had been no sale.[94]

100, 22 Rev. Rep. 249; *Ex p.* Phillips, 19 Ves. Jr. 118, 12 Rev. Rep. 151; Ashburton *v.* Ashburton, 6 Ves. Jr. 6, 5 Rev. Rep. 201.

91. Roberts *v.* Jackson, 3 Yerg. (Tenn.) 77.

Unauthorized investment.— Real property, purchased by a guardian with the funds of the ward, pursuant to an unauthorized order of the surrogate, will be treated, with reference to the statute of descents, as personal property of the ward. Matter of Bolton, 37 N. Y. App. Div. 625, 56 N. Y. Suppl. 1105 [*affirmed* in 159 N. Y. 129, 53 N. E. 756].

92. Swift *v.* Edson, 5 Conn. 531, but to produce this effect the foreclosure must be complete, extending to every person having a right to redeem.

93. Simonds *v.* Simonds, 112 Mass. 157; Wetherill *v.* Hough, 52 N. J. Eq. 683, 29 Atl. 592; Durando *v.* Durando, 23 N. Y. 331; Matter of Wharton, 5 De G. M. & G. 33, 18 Jur. 299, 23 L. J. Ch. 522, 2 Wkly. Rep. 248, 54 Eng. Ch. 28; Matter of Taylor, 9 Hare 596, 41 Eng. Ch. 596; *In re* Stewart, 22 L. J. Ch. 369, 1 Smale & G. 32.

It has been held in England that purchase-money paid into court by a railway company under section 69 of the Lands Clauses Consolidation Act of 1845, for the land of which an infant is absolutely seized in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir at law. Kelland *v.* Fulford, 6 Ch. D. 491, 25 Wkly. Rep. 506. To the same effect see Dixie *v.* Wright, 32 Beav. 662 (which was the case of a lunatic); *Re* Harrop, 3 Drew. 726, 3 Jur. N. S. 380, 26 L. J. Ch. 516, 5 Wkly. Rep. 449 (the case of a felon who was convicted and transported. In this case if the proceeds of the sale had been held to be personalty they would have escheated to the crown. They were held to be realty). But see Cadman *v.* Cadman, L. R. 13 Eq. 470, 41 L. J. Ch. 468, 20 Wkly. Rep. 356.

It was held in Massachusetts that damages paid for land of an infant taken for public use as a highway were personalty. Emerson *v.* Cutler, 14 Pick. (Mass.) 108. But see Gibson *v.* Cooke, 1 Metc. (Mass.) 75, where it was held that where land held in trust is taken for public use under the right of eminent domain, the money paid for it stands in its place, subject to the same trust and the same ultimate disposition. See also Holland *v.* Cruft, 3 Gray (Mass.) 162.

Pennsylvania doctrine.— It was held in Pennsylvania, however, that money received in condemnation proceedings from a railroad for a right of way through an infant's lands devolves as personal property. Hough's Estate, 3 Pa. Dist. 187. Land taken by condemnation proceedings in the decedent's lifetime is converted into personalty, to wit, the damages allowed for the taking. Stark's Estate, 9 Kulp 120.

Manumission of slaves.— Brown domiciled in Philadelphia, devised all his "real and personal property in Jamaica," part being slaves, which there were real estate. After the date of the will and during his life, parliament passed an act (3 & 4 Wm. IV, c. 73) by which slaves were set free, and appropriated money to compensate their holders. After Brown's death his proportion was ascertained by commissioners under the act and paid to his executors. It was held that this act was a conversion of the slaves from realty into personalty before Brown's death. Pleasant's Appeal, 77 Pa. St. 356. See also Richards *v.* Atty.-Gen., 13 Jur. 197, 6 Moore P. C. 381, 13 Eng. Reprint 730.

94. State *v.* Hirons, 1 Houst. (Del.) 252; Early *v.* Dorsett, 45 Md. 462; Jones *v.* Plummer, 20 Md. 416; Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717; Hammond *v.* Stier, 2 Gill & J. (Md.) 81; Leadenham *v.* Nicholson, 1 Harr. & G. (Md.) 267; State *v.* Krebs, 6 Harr. & J. (Md.) 31; Dalrymple *v.* Taneyhill, 4 Md. Ch. 171; Betts *v.* Wirt, 3 Md. Ch. 113; Manship *v.* Evitts, 2 Md. Ch. 366; Ebbs *v.* Com., 11 Pa. St. 374; Erb *v.* Erb, 9 Watts & S. (Pa.) 147; Biggert *v.* Biggert, 7 Watts (Pa.) 563; Ferree *v.* Com., 8 Serg. & R. (Pa.) 312; Cowden *v.* Pitts, 2 Baxt. (Tenn.) 59; *Ex p.* Moore, 3 Head (Tenn.) 171; Jones *v.* Walkup, 5 Sneed (Tenn.) 135.

VIII. OPERATION AND EFFECT.

A. In General. Generally speaking equity will carry out the principle of equitable conversion in all of its consequences, and as far as it is necessary to effectuate the well defined and lawful purposes of the instrument directing such conversion, and to determine the property rights of all parties claiming under or through it, will recognize all of its legitimate consequences and treat the property, from the time the conversion takes place to all intents and purposes as of the nature and character into which it should have been changed, and will determine the rights of parties to it as in its changed form.[95]

Compliance with conditions of sale unnecessary.—The confirmation of a report of sale in partition, stating that a certain proportion of the purchase-money was to be paid when the deed was made and the remainder at the death of the intestate's widow, is not a conversion of the realty into personalty until the conditions of the sale are complied with, so far at least as to entitle the purchaser to the deed. Biggert's Estate, 20 Pa. St. 17. Where real estate is sold by order of court, the mutation of the estate from real to personal may be determined to be complete when the commissioner's sale is ratified by the court and the purchaser has complied with the terms of it by paying the money if the sale is for cash, or by giving bonds to the representatives, if the sale is on credit. State *v.* Krebs, 6 Harr. & J. (Md.) 31 [*followed* in Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717].

Conversion by act of law.—In Biggert's Estate, 20 Pa. St. 17, 18, Lewis, J., in delivering the opinion of the court, said: "A conversion of real into personal estate, by act of the law, differs from a conversion by act of the party. In the latter case, where the conversion is the object of the owner, the result is produced as soon as the contract of sale is made. In the former, where payment of debts, or partition, and not conversion, is the object, the transmutation is but the unavoidable result of the proceedings, and takes place only when the estate is completely vested in the vendee and the purchase-money paid or secured."

The order for the sale of land does not operate in præsenti, and convert the land into assets in the hands of the guardian, so as to prevent judgment obtained after the order, but before the sale, from becoming a lien on the land. Shaffner *v.* Briggs, 36 Ind. 55, 10 Am. Rep. 1.

95. *Alabama.*—Masterson *v.* Pullen, 62 Ala. 145.

Arkansas.—Loftis *v.* Glass, 15 Ark. 680.

Connecticut.—Swift *v.* Edson, 5 Conn. 531.

Delaware.—*In re* Journey, 7 Del. Ch. 1, 44 Atl. 795.

Illinois.—English *v.* Cooper, 183 Ill. 203, 55 N. E. 687.

Kentucky.—Green *v.* Johnson, 4 Bush 164; Rawling *v.* Landes, 2 Bush 158; Collins *v.* Champ, 15 B. Mon. 118, 61 Am. Dec. 179.

Maryland.—Smithers *v.* Hooper, 23 Md. 273; Newcomer *v.* Owen, 2 Md. 297, 56 Am. Dec. 717; Hurtt *v.* Fisher, 1 Harr. & G. 88; Maddox *v.* Dent, 4 Md. Ch. 543; Carr *v.* Ireland, 4 Md. Ch. 251.

New Jersey.—Wurts *v.* Page, 19 N. J. Eq. 365; Oberly *v.* Lerch, 18 N. J. Eq. 346.

New York.—Bowditch *v.* Ayrault, 138 N. Y. 222, 33 N. E. 1067, 52 N. Y. St. 330; Delafield *v.* Barlow, 107 N. Y. 535, 14 N. E. 498; Hood *v.* Hood, 85 N. Y. 561; Fisher *v.* Banta, 66 N. Y. 468; Van Vechten *v.* Keator, 63 N. Y. 52; Moncrief *v.* Ross, 50 N. Y. 431; Hays *v.* Gourley, 1 Hun 38; Harris *v.* Slaght, 46 Barb. 470; Johnson *v.* Bennett, 39 Barb. 237; Lyman *v.* Parsons, 28 Barb. 564; New York Mut. L. Ins. Co. *v.* Woods, 4 N. Y. Suppl. 133, 21 N. Y. St. 341; Flanagan *v.* Flanagan, 8 Abb. N. Cas. 413; Freeman *v.* Smith, 60 How. Pr. 311; Gott *v.* Cook, 7 Paige 521; Hawley *v.* James, 5 Paige 318.

North Carolina.—Tayloe *v.* Johnson, 63 N. C. 381; *Ex p.* McBee, 63 N. C. 332; Brothers *v.* Cartwright, 55 N. C. 113, 64 Am. Dec. 563; Croom *v.* Herring, 11 N. C. 393.

Ohio.—Collier *v.* Collier, 3 Ohio St. 369; Ferguson *v.* Stuart, 14 Ohio 140.

Pennsylvania.—Jones *v.* Caldwell, 97 Pa. St. 42; McClure's Appeal, 72 Pa. St. 414; Brolasky *v.* Gally, 51 Pa. St. 509; Parkinson's Appeal, 32 Pa. St. 455; Johnson's Estate, 11 Phila. 81, 32 Leg. Int. 218.

South Carolina.—Wilkins *v.* Taylor, 8 Rich. Eq. 291.

Virginia.—Washington *v.* Abraham, 6 Gratt. 66; Siter *v.* McClanachan, 2 Gratt. 280; Com. *v.* Martin, 5 Munf. 117.

England.—Earlom *v.* Saunders, Ambl. 241, 27 Eng. Reprint 161; Frederick *v.* Aynscombe, 1 Atk. 392, 26 Eng. Reprint 250; Hoddel *v.* Pugh, 33 Beav. 489, 10 Jur. N. S. 534, 10 L. T. Rep. N. S. 446, 12 Wkly. Rep. 782; Gover *v.* Davis, 29 Beav. 222; Wilson *v.* Coles, 28 Beav. 215, 6 Jur. 1003, 8 Wkly. Rep. 383; Farrar *v.* Winterton, 5 Beav. 1, 6 Jur. 204; Warwick *v.* Edwards, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687; Chandler *v.* Pocock, 16 Ch. D. 648; Blake *v.* Blake, 15 Ch. D. 481; Wall *v.* Colshead, 2 De G. & J. 683, 4 Jur. N. S. 985, 6 Wkly. Rep. 761, 59 Eng. Ch. 536; Gillies *v.* Longlands, 4 De G. & Sm. 372, 15 Jur. 570, 20 L. J. Ch. 441; Griffith *v.* Ricketts, 7 Hare 299, 14 Jur. 166, 19 L. J. Ch. 100, 27 Eng. Ch. 299; Ward *v.* Arch, 10 Jur. 977, 15 Sim. 389, 38 Eng. Ch. 389; Stead *v.* Newdigate, 2 Meriv. 521; Ashby

B. Realty Into Personalty — 1. Descent and Distribution. So where land is converted into money, either by act of parties or operation of law, the proceeds are regarded in equity as personal property, and on the death of the party entitled thereto will pass to his personal representative and not to his heir.[96]

2. Sale After Life-Estate. Also where land is equitably converted into money by a direction in a will that it should be sold after the death of the life-tenant and then distributed, the share of a beneficiary who dies before the termination of the life-estate passes as personalty.[97]

3. Alien Beneficiaries. Where by a will or instrument *inter vivos* realty is converted into personalty, an alien, although incapable of holding land for his own benefit, can take the proceeds of the realty thus converted.[98]

4. Corporation as Beneficiary. And so in the same manner a bequest to a corporation may be valid, although it is incapable of receiving a devise of lands.[99]

5. Revocation of Devise. Since the sale of land by executory contract, where the vendor has previously devised the same, converts such land into personalty, such sale and conversion operates as a revocation of the will *pro tanto*.[1]

6. Interest Not Subject to Lien or Execution. Where a testator directs his executor to sell his land and divide the proceeds among designated legatees, it is

v. Palmer, 1 Meriv. 296, 15 Rev. Rep. 116; Scudamore *v.* Scudamore, Prec. Ch. 543, 24 Eng. Reprint 244; Greenhill *v.* Greenhill, Prec. Ch. 320, 2 Vern. 679, 24 Eng. Reprint 151; Leehmere *v.* Carlisle, 3 P. Wms. 211, 24 Eng. Reprint 1033; Elliott *v.* Fisher, 12 Sim. 505, 35 Eng. Ch. 427; Green *v.* Stephens, 17 Ves. Jr. 64; Biddulph *v.* Biddulph, 12 Ves. Jr. 161.

See 11 Cent. Dig. tit. "Conversion," § 56.

Land directed or agreed to be sold is not subject, as land, to the lien of a judgment against the person entitled to the proceeds of its sale. Turner *v.* Davis, 41 Ark. 270; Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650.

Assets for payment of debts and legacies. — Thus where the executors, acting under a general power in the will, have sold the realty and received the proceeds, such proceeds, being personalty, may be applied to the payment of the testator's debts and legacies. Bolton *v.* Myers, 83 Hun (N. Y.) 259, 31 N. Y. Suppl. 588, 64 N. Y. St. 142 [*reversing* 5 Misc. (N. Y.) 475, 26 N. Y. Suppl. 333, and *affirmed* in 146 N. Y. 257, 40 N. E. 737]. See also Smith *v.* Bloomsbury First Presb. Church, 26 N. J. Eq. 132, to the same effect.

Mortgage of land directed or agreed to be sold operates as an equitable assignment thereof. Herst *v.* Dague, 34 Ohio St. 371; Bailey *v.* Allegheny Nat. Bank, 104 Pa. St. 425.

Rents of estate prior to sale. — Where the will directs the sale of real estate, the rents of the estate between the death of the testator and the actual sale go to the party who takes the proceeds. Wright *v.* New York City M. E. Church, Hoffm. (N. Y.) 202. And the rents as well as the proceeds of sale become assets in the hands of the executor, and he is accountable therefor in his capacity as executor to the legatees. Ingrem *v.* Mackey, 5 Redf. Surr. (N. Y.) 357.

96. Beach *v.* Simmons, (Ark. 1892) 18 S. W. 933; Jacobus *v.* Jacobus, 36 N. J. Eq. 248; Bogert *v.* Furman, 10 Paige (N. Y.) 496; Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495; McCune's Appeal, 65 Pa. St. 450; Large's Appeal, 54 Pa. St. 383; Shepherd's Estate, 8 Pa. Co. Ct. 520; *In re* McCarthy, 11 Phila. (Pa.) 85, 32 Leg. Int. (Pa.) 249.

97. *Arkansas.* — Loftis *v.* Glass, 15 Ark. 680.

Kentucky. — Gedges *v.* Western Baptist Theological Institute, 13 B. Mon. 530; Burnside *v.* Wall, 9 B. Mon. 318; Haggard *v.* Rout, 6 B. Mon. 247.

Massachusetts. — Hammond *v.* Putnam, 110 Mass. 232; Holland *v.* Adams, 3 Gray 188.

New Jersey. — Fairly *v.* Kline, 3 N. J. L. 322, 4 Am. Dec. 414; Hand *v.* Marcy, 28 N. J. Eq. 59.

New York. — Snell *v.* Tutle, 44 Hun 324; Ransom's Estate, 10 N. Y. Suppl. 16, 30 N. Y. St. 737; Freeman *v.* Smith, 60 How. Pr. 311; Bunee *v.* Vander Grift, 8 Paige 37; Marsh *v.* Wheeler, 2 Edw. 156.

North Carolina. — Smith *v.* McCrary, 38 N. C. 204.

Pennsylvania. — McClure's Appeal, 72 Pa. St. 414.

Tennessee. — Green *v.* Davidson, 4 Baxt. 488; McCormick *v.* Cantrell, 7 Yerg. 615.

Vermont. — Doty *v.* Chaplin, 54 Vt. 361.

United States. — Reading *v.* Blackwell, Baldw. 166, 20 Fed. Cas. No. 11,612.

See 11 Cent. Dig. tit. "Conversion," § 56 *et seq.*

98. De Barante *v.* Gott, 6 Barb. (N. Y.) 492; Antiee *v.* Brown, 6 Paige (N. Y.) 448; Craig *v.* Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460; Du Hourmelin *v.* Sheldon, 1 Beav. 79, 17 Eng. Ch. 79, 4 Myl. & C. 525, 18 Eng. Ch. 525.

99. Gould *v.* Taylor Orphan Asylum, 46 Wis. 106, 50 N. W. 422; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

1. Blair *v.* Snodgrass, 1 Sneed (Tenn.) 1; Donohoo *v.* Lea, 1 Swan (Tenn.) 119, 55 Am. Dec. 725. See also Pleasants' Appeal, 77 Pa. St. 356.

well settled that such legatees have no estate in the land which is the subject of lien or execution.[2]

C. Right of Disposition by Beneficiary. An obvious result of conversion is the right of the beneficiary to deal with the property as in its changed form before such change has been actually effected.[3]

D. Marital Rights — 1. Rights of Husband — a. Realty Converted Into Personalty. When land is converted into personalty, by will, deed, or other instrument, the share of a *feme covert* in the proceeds belongs to her husband as other personalty.[4]

b. Personalty Into Realty. So money belonging to a *feme covert* which is directed to be converted into land is liable to the husband's curtesy.[5]

2. Widow's Dower Right — a. Testator's Widow. Where the testator directs an out and out conversion of his real estate and makes his wife a legatee under the will, the widow is put to her election as to whether she will accept the provision made for her under the will or claim her dower right in the realty;[6] but such conversion cannot defeat the widow of her dower right without her consent.[7]

b. Beneficiary's Widow. And where land is equitably converted into personalty by a direction in a will or by other instrument, the wife of a beneficiary of such proceeds has no right of dower in the realty so converted.[8]

2. *Arkansas.*— Turner *v.* Davis, 41 Ark. 270.

Maryland.— Paisley *v.* Holzshu, 83 Md. 325, 34 Atl. 832; Cronise *v.* Hardt, 47 Md. 433.

Nebraska.— Chick *v.* Ives, (1902) 90 N. W. 751.

New York.— Sayles *v.* Best, 20 N. Y. Suppl. 951.

Pennsylvania.— Hunter *v.* Anderson, 152 Pa. St. 386, 25 Atl. 538; Roland *v.* Miller, 100 Pa. St. 47; Jones *v.* Caldwell, 97 Pa. St. 42; Evans' Appeal, 63 Pa. St. 183; Brolasky *v.* Gally, 51 Pa. St. 509; Stuck *v.* Mackey, 4 Watts & S. 196; Morrow *v.* Brenizer, 2 Rawle 185; Allison *v.* Wilson, 13 Serg. & R. 330; Campbell *v.* King, 1 Am. L. Reg. 122.

Equitable assignment.— Where a will directed certain land to be sold and the proceeds divided, it was held that a mortgage of the land by the devisees was invalid and constituted only an assignment of such mortgagor's interest, which would be enforced as an equity in an alleged mortgagee. Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887.

3. *Maryland.*— Early *v.* Dorsett, 45 Md. 462.

Michigan.— Henderson *v.* Sherman, 47 Mich. 267, 11 N. W. 153.

New Jersey.— Snover *v.* Squire, (1892) 24 Atl. 365.

New York.— Matter of Ledrich, 68 Hun 396, 22 N. Y. Suppl. 978.

Pennsylvania.— Gray *v.* Smith, 3 Watts 289.

Virginia.— Siter *v.* McClanachan, 2 Gratt. 280.

See 11 Cent. Dig. tit. "Conversion," § 61.

Where testator gave his real estate to his wife during her life, and directed that at her death the same be sold and the proceeds divided among his children, it was held, under Ala. Code (1886), § 1951, providing that all persons over eighteen years of age may dispose of their personal property by will, that any of the children over such age could bequeath his interest, although his will was made before the mother's death, since the direction in the will operated as an equitable conversion. Allen *v.* Watts, 98 Ala. 384, 11 So. 646.

4. Hocker *v.* Gentry, 3 Metc. (Ky.) 463; Jones *v.* Plummer, 20 Md. 416; Hammond *v.* Stier, 2 Gill. & J. (Md.) 81; Leadenham *v.* Nicholson, 1 Harr. & G. (Md.) 267; Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34; Siter *v.* McClanachan, 2 Gratt. (Va.) 280. Where real estate directed to be sold under the terms of a will had not been sold at the time of the death of one devisee, but there had been no election by all the parties interested in the estate to reconvert the property, it was held that the husband of the deceased devisee was entitled to one fourth of such property devised as personalty of his wife, and that he was not a tenant by curtesy. Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471. But the husband cannot, under the doctrine of equitable conversion, and in virtue of his right to take the money if he can get it, take the land as money and hold it as he would the money itself free from all claim of the wife. Samuel *v.* Samuel, 4 B. Mon. (Ky.) 245.

5. Sweetapple *v.* Bindon, 2 Vern. 536.

6. Asche *v.* Asche, 113 N. Y. 232, 21 N. E. 70, 22 N. Y. St. 799; Brink *v.* Layton, 2 Redf. Surr. (N. Y.) 79.

7. Konvalinka *v.* Schlegel, 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494; *In re* Hutchins, 21 Ohio Cir. Ct. 720; *In re* Petterson, 195 Pa. St. 78, 45 Atl. 654; Cunningham's Estate, 137 Pa. St. 621, 27 Wkly. Notes Cas. (Pa.) 65, 20 Atl. 714, 21 Am. St. Rep. 901; Hoover *v.* Landis, 76 Pa. St. 354; Barber's Estate, 3 Pa. Dist. 53, 14 Pa. Co. Ct. 167.

8. Willing *v.* Peters, 7 Pa. St. 287.

By a trust paper executed by the beneficiaries of a judgment by confession, plaintiff and a co-trustee were authorized to bid in and purchase lands about to be sold under

E. Exceptions to General Rule — 1. Executor's Contract to Convey. There are, however, exceptions to the above stated rule that the property will be for all purposes treated as in its converted state. Thus where by a will the title to real estate is vested in two executors in trust, with power to sell, it has been held that one of the executors cannot, without the assent of the other, enter into a contract to convey, which will be valid and binding upon the other, as would be the case with personalty.[9]

2. Rights of Husband of Beneficiary. So where a testator has left his realty in trust to be sold for the benefit of his daughter, it has been held that her husband could not by any act of his before the sale bar his wife's right to her share of it.[10]

3. Children Not Named or Provided For in Will. It has been held also that where by statute[11] a testator is deemed to have died intestate as to any child or children not named or provided for in the will, a will which directs sale of the real estate of the testator by the executors will not work an equitable conversion of the interests of a child or children not so named or provided for.[12]

4. Mortgage by Beneficiary. Again it has been held that where a will directs real property to be sold and the proceeds distributed, this does not work a conversion of the real estate into personalty in such a sense as to render invalid a mortgage by a distributee of the real estate as such.[13]

IX. RECONVERSION.

A. Definition. Reconversion is that imaginary process by which a prior constructive conversion is annulled and the converted property restored in contemplation of law to its original state.[14]

B. Election of Beneficiary — 1. In General. In the application of the doctrine of equitable conversion, it is a well-settled rule that if money is directed by a will or other instrument to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may in either case, if he elects so to do, cause a reconversion of such property and take it in its original state.[15]

2. What Acts Will Amount to Election — a. In General. It may be stated in general that the acts or expressions declaratory of an intention on the part of the

the judgment, to take a deed thereof from the sheriff conveying the land to them as trustees for those executing the trust paper, to sell such land as soon as practicable in order to convert it into money, to execute deeds therefor, and to pay over the proceeds of sale to the beneficiaries. It was held that since such purchase by the trustees constituted an equitable conversion of the land into personalty, it was not subject to dower, in favor of the wives of any of the beneficiaries. Hunter *v.* Anderson, 152 Pa. St. 386, 25 Atl. 538.

9. Wilder *v.* Ranney, 95 N. Y. 7. Although the will directs the executors to convert land into money, such land cannot be treated as personalty and sold by one executor without the consent of the others. Crowley *v.* Hicks, 72 Wis. 539, 40 N. W. 151.

10. Franks *v.* Bollans, L. R. 3 Ch. 717, 37 L. J. Ch. 664, 18 L. T. Rep. N. S. 623, 16 Wkly. Rep. 1158.

11. Hill's Annot. Code (Oreg.) § 3075.

12. Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

13. Lawton *v.* Lawton, 7 Ohio S. & C. Pl. Dec. 493, 5 Ohio N. P. 441. See also Brook *v.* Badley, L. R. 3 Ch. 672, 36 L. J. Ch. 741, 16 L. T. Rep. N. S. 762, 16 Wkly. Rep. 947.

14. Haynes Eq. 390; Rapalje & L. L. Dict.; Snell Eq. 160. See also Shallenberger *v.* Ashworth, 25 Pa. St. 152; Beal *v.* Stehley, 21 Pa. St. 376.

15. *Georgia.*— Adams *v.* Bass, 18 Ga. 130.

Illinois.— Ridgeway *v.* Underwood, 67 Ill. 419; Jennings *v.* Smith, 29 Ill. 116; Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Heslet *v.* Heslet, 8 Ill. App. 22.

Kentucky.— Rawlings *v.* Landes, 2 Bush 158.

Michigan.— Mandlebaum *v.* McDonnell, 29 Mich. 78, 18 Am. Rep. 61.

New Jersey.— Fluke *v.* Fluke, 16 N. J. Eq. 478; Scudder *v.* Stout, 10 N. J. Eq. 377; Gest *v.* Flock, 2 N. J. Eq. 108.

New York.— Trask *v.* Sturges, 170 N. Y. 482, 63 N. E. 534 [*reversing* 68 N. Y. Suppl. 1149]; McDonald *v.* O'Hara, 144 N. Y. 566, 39 N. E. 642 [*affirming* 3 Misc. 527, 34 N. Y. Suppl. 692, 68 N. Y. St. 735]; Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; Armstrong *v.* McKelvey, 104 N. Y. 179, 10 N. E. 266; Prentice *v.* Janssen,

beneficiary to take the property in its actual rather than in its converted state must be plain and unequivocal,[16] although some of the cases have held that very slight evidence of his intention by acts done will be sufficient.[17]

79 N. Y. 478 [*affirming* 14 Hun 548]; Hetzel *v.* Barber, 69 N. Y. 1; Reed *v.* Underhill, 12 Barb. 113; Sweezy *v.* Thayer, 1 Duer 286; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

North Carolina.— Proctor *v.* Ferebee, 36 N. C. 143, 36 Am. Dec. 34.

Ohio.— Although a deed of trust, executed with directions to pay the grantor's debts and turn over to him the balance of the proceeds, operates as a conversion of his interest into personalty, such grantor may, upon paying the indebtedness, elect to take the land instead of the proceeds of the sale. Craig *v.* Jennings, 31 Ohio St. 84.

Pennsylvania.—Patterson's Appeal, (1886) 6 Atl. 759; Shallenberger *v.* Ashworth, 25 Pa. St. 152; Stuck *v.* Mackey, 4 Watts & S. 196; Smith *v.* Starr, 3 Whart. 62, 31 Am. Dec. 498; Burr *v.* Sim, 1 Whart. 252, 29 Am. Dec. 48; Morrow *v.* Brenizer, 2 Rawle 185; Allison *v.* Wilson, 13 Serg. & R. 330; Reeser's Estate, 4 Pa. Co. Ct. 417; Twaddell's Estate, 9 Phila. 316, 30 Leg. Int. 12; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516, 3 Pa. L. J. 203.

Rhode Island.— Van Zandt *v.* Garretson, 21 R. I. 418, 44 Atl. 221.

Virginia.—Effinger *v.* Hall, 81 Va. 94; Harcum *v.* Hudnall, 14 Gratt. 369; Turner *v.* Street, 2 Rand. 404, 14 Am. Dec. 792; Tazewell *v.* Smith, 1 Rand. 313, 10 Am. Dec. 533.

West Virginia.—Brown *v.* Miller, 45 W. Va. 211, 31 S. E. 956.

United States.— Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460; Rinehart *v.* Harrison, Baldw. 177, 20 Fed. Cas. No. 11,840.

England.—Crabtree *v.* Bramble, 3 Atk. 680, 26 Eng. Reprint 1191; Seeley *v.* Jago, 1 P. Wms. 389, 24 Eng. Reprint 438; Kirkman *v.* Miles, 13 Ves. Jr. 338; Wheldale *v.* Partridge, 8 Ves. Jr. 227, 7 Rev. Rep. 37; Amler *v.* Amler, 3 Ves. Jr. 583; Rashleigh *v.* Master, 1 Ves. Jr. 201, 3 Bro. Ch. 99, 29 Eng. Reprint 432.

See 11 Cent. Dig. tit. "Conversion," § 67.

Surplusage.— A provision in a will that if the heirs shall agree to a division of the estate among themselves the executor shall not be bound to sell does not prevent a conversion, and as this provision merely gives the parties interested in the proceeds a right which the law gives them independently of the will, the provision may be stricken from the will as surplusage, without altering its legal effect. Jones *v.* Caldwell, 97 Pa. St. 42.

Where the conversion has not in fact taken place, and the interest vests absolutely, whether in land or money, in one person, any act of his indicating an option in which character he takes or disposes of it will determine the succession as between his real and personal representatives. Cookson *v.* Cookson, 12 Cl. & F. 121, 9 Jur. 499, 8 Eng. Reprint 1344.

Where the ownership in property after conversion is or becomes vested in a person having the right to convert it from the one kind to the other, or in one having legal capacity to accept it, and who does accept it, or does something to recognize it or give it character in the shape in which it exists, the doctrine of equitable conversion is not applicable. Smith *v.* Bayright, 34 N. J. Eq. 424; Oberly *v.* Lerch, 18 N. J. Eq. 346.

Where the whole beneficial interest in the land directed to be converted into money belongs to the person or persons for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust,* but will permit him to take the land, if he elect to do so, before the conversion has been actually made. Fluke *v.* Fluke, 16 N. J. Eq. 478.

16. Cropley *v.* Cooper, 7 D. C. 226; Beatty *v.* Byers, 18 Pa. St. 105; Stead *v.* Newdigate, 2 Meriv. 521. A testator, after giving certain legacies, devised his real estate in trust for sale and gave his residuary estate to the trustees. They paid all of the legacies except two out of other parts of the estate and kept the real estate unsold, granting a lease of it to a tenant. The real estate remained unsold for fifty years, the two legatees permitting their legacies to remain unpaid during all that time. It was held that the trustees had by their conduct elected to take the property as reconverted into real estate and that the assent of the unpaid legatees might be inferred. Mutlow *v.* Bigg, 1 Ch. D. 385, 45 L. J. Ch. 282, 34 L. T. Rep. N. S. 273, 24 Wkly. Rep. 409.

Action for recovery of land.— Where, by a direction to sell land after the death of a lifetenant, a testator converted the character of the property taken by the remainder-men from realty into personalty, the subject-matter of an action by the remainder-men to recover the land is realty, as the plaintiffs, by the commencement of such action, elect to so treat their remainder, such election operating as a reconversion. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211.

Declaratory acts held insufficient.— Where, before the realty devised was actually converted into personalty by sale, the persons interested had no conference, and all they did or said was done and said in pleadings in a suit to have the property sold, etc., in which they simply referred to the devised property as "land" or "real estate," the decree directing the sale of which referred to the property as "land" or "real estate," it was held that there was no election or declaratory act so as to amount to a reconversion of the property into realty. Wayne *v.* Fouts, (Tenn. Ch. 1901) 65 S. W. 471.

17. Prentice *v.* Janssen, 79 N. Y. 478; Bradish *v.* Gee, Ambl. 229, 1 Ld. Ken. 73, 27 Eng. Reprint 152.

b. Conveyance of Land By Deed. Where land is devised to be sold and the proceeds divided among certain beneficiaries, if all of such beneficiaries unite in the conveyance of the land to a third person, they thereby elect to take the land as such, and their deeds are evidence of such election.[18] So where all the legatees but one unite in conveying their interest in land devised to be sold to that one, and the latter accepts such conveyance, this is an election by such beneficiary under the will to take the land instead of the proceeds thereof.[19]

c. Executing Mortgage. So the giving of a mortgage by the person entitled to the proceeds of the sale of land is a clear election on his part to take land.[20]

d. Rescission of Contract For Sale. Where a conversion of real estate is effected by a contract for its sale, the rescission of the contract after the death of the vendor will not work a reconversion of the estate from personalty to realty.[21]

e. By Parol. An early English case held that an election to take money directed to be laid out in land as money might be made by parol.[22]

3. Election Presumed. It is a general rule that where equity impresses a different quality upon property from that which it has in fact, such impression ceases whenever the possession of the estate and the right to it in each quality meet in the same person; that is, when there is no other person than the one in the actual possession who has an equitable interest in retaining the fictitious character of the estate.[23]

4. Who May Elect — a. In General. A person *sui juris* and owning the sole beneficial interest in property may elect to take the same in its actual rather than in its converted form.[24] Land devised in trust with directions for its sale cannot be reconverted into real estate by persons having only a defeasible title to the proceeds of sale. To effect such a reconversion there must be the concurrence of the absolute owners.[25]

b. In Case of Realty. So where land is directed to be converted into money,

As to what has been held to amount to an election see Bradish *v.* Gee, Ambl. 229, 1 Ld. Ken. 73, 27 Eng. Reprint 152; Crabtree *v.* Bramble, 3 Atk. 680, 26 Eng. Reprint 1191; Warwick *v.* Edwards, 1 Bro. C. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687; Pulteney *v.* Darlington, 1 Bro. Ch. 223, 28 Eng. Reprint 1095; Hewitt *v.* Wright, 1 Bro. Ch. 86, 28 Eng. Reprint 1001; Bowes *v.* Shrewsbury, 5 Bro. P. C. 144, 2 Eng. Reprint 588; Lingen *v.* Sowray, Gilb. Exch. 91, 10 Mod. 39, Prec. Ch. 400, 1 P. Wms. 172, 24 Eng. Reprint 343; Chichester *v.* Bickerstaff, 2 Vern. 295.

18. Ridgeway *v.* Underwood, 67 Ill. 419; Swan *v.* Goodwin, 2 Duv. (Ky.) 298; Greenland *v.* Waddell, 116 N. Y. 234, 22 N. E. 367, 26 N. Y. St. 667, 15 Am. St. Rep. 400; Rice *v.* Bixler, 1 Watts & S. (Pa.) 445.

19. Beal *v.* Stehley, 21 Pa. St. 376; Hannah *v.* Swarner, 3 Watts & S. (Pa.) 223, 38 Am. Dec. 754; McGarry *v.* McGarry, 9 Pa. Super. Ct. 71, 43 Wkly. Notes Cas. (Pa.) 268, 29 Pitts. Leg. J. N. S. 236.

20. Gest *v.* Flock, 2 N. J. Eq. 108; Sterr's Estate, 13 Phila. (Pa.) 239, 36 Leg. Int. (Pa.) 226.

21. Leiper's Appeal, 35 Pa. St. 420, 78 Am. Dec. 347; Leiper *v.* Irvine, 26 Pa. St. 54; *In re* Maffet, 8 Kulp (Pa.) 184.

22. Warwick *v.* Edwards, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687. See also Chaloner *v.* Butcher [*cited* in Crabtree *v.* Bramble, 3 Atk. 680, 685, 26 Eng. Reprint 1191]. *Contra*, Bradish *v.* Gee, Ambl. 229, 1 Ld. Ken. 73, 27 Eng. Reprint 152.

23. Pulteney *v.* Darlington, 1 Bro. Ch. 223, 28 Eng. Reprint 1095; Matter of Pedder, 5 De G. M. & G. 890, 54 Eng. Ch. 698; Chichester *v.* Bickerstaff, 2 Vern. 295; Wheldale *v.* Partridge, 8 Ves. Jr. 227, 7 Rev. Rep. 37. Thus when real uses have been impressed upon personal property, and the personal fund and the uses come together in the same person, the uses are considered as discharged and merged, for there is no person to call for their application. Forman *v.* Marsh, 11 N. Y. 544.

Presumption of election.— Where land was devised to be sold and the proceeds divided among certain legatees, and the executors fail for thirty years to sell it, and the legatees take no steps to compel a sale, but sell and convey their interest in the land, they will be presumed to have elected to take the land. Swan *v.* Goodwin, 2 Duv. (Ky.) 298. The son may, on attaining his majority, elect to treat the real estate unsold as land, and the fact that he afterward devises it as such is proof of his determination to so reconvert it. Burr *v.* Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

24. Benson *v.* Benson, 1 P. Wms. 130, 24 Eng. Reprint 324.

25. Rinehart *v.* Harrison, Baldw. (U. S.) 177, 20 Fed. Cas. No. 11,840; Sisson *v.* Giles, 3 De G. J. & S. 614, 32 L. J. Ch. 606, 8 L. T. Rep. N. S. 233, 68 Eng. Ch. 466. See also Woods's Estate, 9 Pa. Co. Ct. 429. Where

or money directed to be converted into land, all the parties entitled beneficially thereto have the right to take the property in its unconverted form, and thus prevent the actual conversion thereof.[26] In the case of land, however, the election of one of the beneficiaries alone will not change the character of the estate; all the persons so beneficially interested must join.[27]

c. In Case of Personalty. On the other hand if a person entitled to a partial interest in money to be laid out in land shows an intention to dispose thereof by will or otherwise as personal estate, it will pass by such disposition.[28]

d. Remainder-Men. Remainder-men and other holders of future interests cannot elect so as to affect the interests of owners of prior estates;[29] but they make an election binding upon their own real and personal representatives.[30]

e. Husband For Wife. It has been held that when land is devised to be sold for money which would go by operation of law to the husband, and he should elect to take the land for his wife, and thus secure to her a right she would otherwise be deprived of, he may do so.[31]

f. Persons Not Sui Juris — (i) *Infants.* The general rule is that an infant cannot make an election so as to reconvert property from that character which the instrument converting it has impressed upon it during the continuance of such disability.[32] It has been held, however, that the court may make an election for the infant, where it seems to be for his benefit.[33]

land is by will directed to be sold, although the beneficiaries of the proceeds of such sale may elect to take the land itself, the act of a creditor who elects to treat the interest of a distributee in the land so converted as real estate will not be attributed to the distributee as an election by him to treat as land an interest in the estate, where the terms of the will convert such interest into personalty. Yerkes *v.* Yerkes, 15 Pa. Super. Ct. 442.

26. Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61; Prentice *v.* Janssen, 79 N. Y. 478.

27. *Illinois.*— Ridgeway *v.* Underwood, 67 Ill. 419; Jennings *v.* Smith, 29 Ill. 116; Heslet *v.* Heslet, 8 Ill. App. 22. If four of the five devisees could elect to take the bequest in land instead of money, they could, without the consent of the fifth, compel her to take an undivided fifth share of the land instead of a fifth part of the money for which the whole land would sell. The fifth therefore has a right to insist that the land shall be sold, and that too unencumbered or unembarrassed by any act done or suffered by any of the other devisees. Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600.

Pennsylvania.— Evans' Appeal, 63 Pa. St. 183; Beatty *v.* Byers, 18 Pa. St. 105; Miller *v.* Meetch, 8 Pa. St. 417; Willing *v.* Peters, 7 Pa. St. 287; Singer Mfg. Co. *v.* Sproul, 20 Pa. Co. Ct. 378, 4 Lack. Leg. N. 59; Wells *v.* Sloyer, 1 Pa. L. J. Rep. 516, 3 Pa. L. J. 203.

Tennessee.— Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471.

West Virginia.—Brown *v.* Miller, 45 W. Va. 211, 31 S. E. 956.

England.— Holloway *v.* Radcliffe, 23 Beav. 163, 3 Jur. N. S. 198, 26 L. J. Ch. 401, 5 Wkly. Rep. 271.

Contra.— Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61, where it was held that each one of the beneficiaries may ordinarily so elect as to his own share, irrespective of the other beneficiaries joining him in the election.

28. Seeley *v.* Jago, 1 P. Wms. 389, 24 Eng. Reprint 438; Triquet *v.* Thornton, 13 Ves. Jr. 345.

29. Walrond *v.* Rosslyn, 11 Ch. D. 640, 48 L. J. Ch. 602; Gillies *v.* Longlands, 4 De G. & Sm. 372, 15 Jur. 570, 20 L. J. Ch. 441; Triquet *v.* Thornton, 13 Ves. Jr. 345.

30. De Vaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. 211; Harper *v.* Chatham Nat. Bank, 17 Misc. (N. Y.) 221, 40 N. Y. Suppl. 1084; Meek *v.* Devenish, 6 Ch. D. 566, 47 L. J. Ch. 57, 36 L. T. Rep. N. S. 911, 25 Wkly. Rep. 688; Crabtree *v.* Bramble, 3 Atk. 680, 26 Eng. Reprint 1191; Cookson *v.* Cookson, 12 Cl. & F. 121, 9 Jur. 439, 8 Eng. Reprint 1344; Gillies *v.* Longlands, 4 De G. & Sm. 372, 15 Jur. 570, 20 L. J. Ch. 441; Fulham *v.* Jones, 2 Eq. Cas. Abr. 296. But see *In re* Stewart, 22 L. J. Ch. 369, 1 Smale & G. 32, where it is questioned whether it is competent for a tenant in fee in remainder of land expectant on the decease of a tenant for life to elect to convert the character of real estate impressed on money in court, the produce of a compulsory purchase of the land before the determination of the life-estate.

31. Swan *v.* Goodwin, 2 Duv. (Ky.) 298; Beal *v.* Stehley, 21 Pa. St. 376; Hannah *v.* Swainer, 3 Watts & S. (Pa.) 223, 38 Am. Dec. 754.

32. Burr *v.* Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48; Carr *v.* Branch, 85 Va. 597, 8 S. E. 476; Turner *v.* Street, 2 Rand. (Va.) 404, 14 Am. Dec. 792; *Re* Harrop, 3 Drew. 726, 3 Jur. N. S. 380, 26 L. J. Ch. 516, 5 Wkly. Rep. 449; Seeley *v.* Jago, 1 P. Wms. 389, 24 Eng. Reprint 438; Van *v.* Barnett, 19 Ves. Jr. 102.

33. Swann *v.* Garrett, 71 Ga. 566; Robinson *v.* Robinson, 19 Beav. 494. See also *Re* Wragg *v.* Small, 63 L. T. Rep. N. S. 219.

(II) *Lunatics.* Nor has a lunatic power to make an election while under such disability.[34]

(III) *Married Women.* It is competent for a *fême covert* to elect to take property in its actual instead of in its converted character, but that election can only be made under the same forms and solemnities as by law are required to enable her to convey her fee.[35]

5. Time of Election. The right of election must be exercised before the property is actually converted, and until it be actually exercised the property bears the same character and remains subject to the same rules of transmission to representatives as if conversion were actually made.[36]

6. Effect of Election. Where all the beneficiaries agree to take land instead of money arising from the sale thereof which was directed by the will, such land will be treated for all purposes as if no conversion had been effected, and a judgment obtained against one of them after such election will bind his share of the land.[37]

7. Effect of Conversion Out and Out. It has been held by some of the courts that a conversion out and out will deprive the beneficiary of the right of election.[38]

8. Burden of Proof. The burden of establishing a reconversion is upon those who assert it. They must show the election claimed by proof of some une-

34. *In re* Barker, 17 Ch. D. 241, 50 L. J. Ch. 334, 44 L. T. Rep. N. S. 33, 29 Wkly. Rep. 873; Matter of Wharton, 5 De G. M. & G. 33, 18 Jur. 299, 23 L. J. Ch. 522, 2 Wkly. Rep. 248, 54 Eng. Ch. 28; Ashby *v.* Palmer, 1 Meriv. 296, 15 Rev. Rep. 116.

35. Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Bateman *v.* Latham, 56 N. C. 35; Rice *v.* Bixler, 1 Watts & S. (Pa.) 455; Oldham *v.* Hughes, 2 Atk. 452, 26 Eng. Reprint 673; Wallace *v.* Greenwood, 16 Ch. D. 362, 50 L. J. Ch. 289, 43 L. T. Rep. N. S. 720; Standering *v.* Hall, 11 Ch. D. 652, 48 L. J. Ch. 382, 27 Wkly. Rep. 749; *In re* Shaw, 49 L. J. Ch. 213, 41 L. T. Rep. N. S. 670; May *v.* Roper, 4 Sim. 360, 6 Eng. Ch. 360; Binford *v.* Bawden, 1 Ves. Jr. 512.

Election by joint deed.— Under 3 & 4 Wm. IV, c. 74, § 77, a wife might elect by means of a deed in which her husband joined, and which she properly acknowledged. Franks *v.* Bollans, L. R. 3 Ch. 717, 37 L. J. Ch. 664, 18 L. T. Rep. N. S. 623, 16 Wkly. Rep. 1158; Bowyer *v.* Woodman, L. R. 3 Eq. 313; Tuer *v.* Turner, 20 Beav. 560, 24 L. J. Ch. 663, 3 Wkly. Rep. 583; Sisson *v.* Giles, 3 De G. J. & S. 614, 32 L. J. Ch. 614, 8 L. T. Rep. N. S. 233, 68 Eng. Ch. 466; Briggs *v.* Chamberlain, 11 Hare 69, 18 Jur. 56, 23 L. J. Ch. 635, 45 Eng. Ch. 71; Forbes *v.* Adams, 9 Sim. 462, 16 Eng. Ch. 462. See also Walker *v.* Denne, 2 Ves. Jr. 170.

Tenant in tail in remainder.— A *feme covert* tenant in tail in remainder of money to be laid out in land by agreement with the tenant for life and on a private examination under 7 Geo. IV, c. 45, consented to the payment of a portion of the money to her husband, and the order was made accordingly. *In re* Silcox, 3 Russ. 369, 3 Eng. Ch. 369.

36. *District of Columbia.*—Cropley *v.* Core, 7 D. C. 226 [*affirmed* in 17 Wall. (U. S.) 167, 22 L. ed. 109].

Kentucky.— Barnett *v.* Barnett. 1 Metc. 254.

New Jersey.— Oberly *v.* Lerch, 18 N. J. Eq. 346.

New York.— Hetzel *v.* Barber, 69 N. Y. 1; Osgood *v.* Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

North Carolina.— Bateman *v.* Latham, 56 N. C. 35.

Ohio.— Holt *v.* Lamb, 17 Ohio St. 374.

Pennsylvania.— Reed *v.* Mellor, 122 Pa. St. 635, 16 Atl. 80; Allison *v.* Wilson, 13 Serg. & R. 330.

Virginia.— Turner *v.* Dawson, 80 Va. 841; Harcum *v.* Hudnall, 14 Gratt. 369.

United States.— Craig *v.* Leslie, 3 Wheat. 563, 4 L. ed. 460.

England.— Meek *v.* Devenish, 6 Ch. D. 566, 47 L. J. Ch. 57, 36 L. T. Rep. N. S. 911, 25 Wkly. Rep. 688.

Election may be made before the happening of a contingency so as to take effect when it happens. Meek *v.* Devenish, 6 Ch. D. 566, 47 L. J. Ch. 57, 36 L. T. Rep. N. S. 911, 25 Wkly. Rep. 688.

Privilege ceases on execution of trust.— The privilege of election of a *cestui que trust* is available only when exercised, for until exercised the power and duty of the trustee to sell are continued, and when the trust is executed the privilege is at an end. Craig *v.* Jennings, 31 Ohio St. 84.

Where a devise effects a conversion of real estate to take effect on the death of the life-tenant, the remainder-men may, before the termination of the life-estate, make their election to take the land instead of the proceeds, and thereby defeat the power of sale. Harper *v.* Chatham Nat. Bank, 17 Misc. (N. Y.) 221, 40 N. Y. Suppl. 1084.

37. Brownfield *v.* Mackey, 27 Pa. St. 320; Stuck *v.* Mackey, 4 Watts & S. (Pa.) 196.

38. Trelawney *v.* Booth, 2 Atk. 307, 26 Eng. Reprint 588; Doughty *v.* Bull, 2 P. Wms. 320, 24 Eng. Reprint 748; Short *v.* Wood, 1 P. Wms. 470, 24 Eng. Reprint 477; Yates *v.*

quivocal act or declaration of the beneficiaries evincing an intention on their part to extinguish the trust and terminate the equitable character impressed upon the property in the first instance by the instrument conferring the benefit.[39]

X. DOUBLE CONVERSION.

The doctrine of equitable conversion applies none the less because the conversion directed is of real property into real property, and so is a double conversion, first into money and then into land.[40]

CONVERT. To change or turn; to transmute; to transform; to change from one state or condition to another;[1] to make way with; to secrete;[2] to embezzle. Specifically, in law of personal property, unlawfully to assume ownership of or to assert the control over inconsistent with that of the owner.[3]

CONVERTED. Embezzled.[4] (See CONVERT; EMBEZZLEMENT; TROVER AND CONVERSION.)

CONVERTIBLE COUPON BONDS. Coupon bonds which may, at the option of the holder, be converted into registered bonds.[5] (See, generally, BONDS; COMMERCIAL PAPER.)

CONVEY.[6] As a noun, the term has been defined to mean the transfer of property from one person to another by means of a written instrument and other formalities.[7] As a verb, the term has been defined to mean to carry;[8] to bear;[9]

Compton, 1 P. Wms. 308, 24 Eng. Reprint 743.

39. Wayne *v.* Fouts, 108 Tenn. 145, 65 S. W. 471; Griffith *v.* Lunell, 14 Jur. 166.

40. Ford *v.* Ford, 80 Mich. 42, 44 N. W. 1057; White *v.* Howard, 46 N. Y. 144; Matter of Pedder, 5 De G. M. & G. 890, 54 Eng. Ch. 698; Pearson *v.* Lane, 17 Ves. Jr. 101.

1. Century Dict.

2. State *v.* Manley, 107 Mo. 364, 368, 17 S. W. 800, where, construing a statute, inflicting a penalty on any officer, etc., who shall convert to his use or shall make way with or secrete, any portion of the public moneys, etc., the court said: "We are not aware of any technical significance the words 'make away with,' 'secrete' and 'convert' have, that would render them repugnant or inconsistent. Either of them would characterize an embezzlement, or all of them can properly unite in designating a particular embezzlement. . . . This court in State *v.* Flint, 62 Mo. 393, did not deem the words 'make way with' and 'secrete' repugnant. If they are not repugnant to each other they certainly are not to the expression 'convert.' Indeed, we think the statute in this case makes the word 'convert' generic, and includes within it the other two expressions as modifiers."

3. Century Dict. And see Mohr *v.* Langan, 162 Mo. 474, 499, 63 S. W. 409, 85 Am. St. Rep. 503; Lancashire Wagon Co. *v.* Fitzhugh, 6 H. & N. 502, 508, 30 L. J. Exch. 231, 3 L. T. Rep. N. S. 703. See, generally, ACCESSION; CONVERTED; EMBEZZLEMENT; TROVER AND CONVERSION.

4. State *v.* Jamison, 74 Iowa 602, 604, 38 N. W. 508, where the court said: "The adverb 'fraudulently,' as used in the indictment, qualifies the words 'embezzled and converted,' immediately following it. They are each descriptive of the act done, and are synonymous, while it is descriptive of the motive with which it was done."

5. Benwell *v.* Newark, 55 N. J. Eq. 260, 264, 36 Atl. 668.

Cutting off the coupons, and indorsing the fact of registration upon the bonds "converts" them from coupon to registered bonds. People *v.* Coler, 26 Misc. (N. Y.) 327, 331, 56 N. Y. Suppl. 1072 [*affirmed* in 38 N. Y. App. Div. 339, 58 N. Y. Suppl. 5 (*affirmed* in 159 N. Y. 535, 53 N. E. 1133)], construing the Greater New York Charter, § 172.

6. It is not a term of art. Edelman *v.* Yeakel, 27 Pa. St. 26, 29.

7. Rapalje & L. L. Dict. [*quoted* in Kelly *v.* Fleming, 113 N. C. 133, 138, 18 S. E. 81, where it is said: "The word 'convey,' in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities"]. 8. Richardson New Eng. Dict. [*quoted* in Brown *v.* Fitz, 13 N. H. 283, 285]; Webster Dict. [*quoted* in Spicer *v.* Norton, 13 Barb. (N. Y.) 542, 546].

9. Francis *v.* State, 21 Tex. 280, 285.

Distinguished from "furnish."— Where the statute provided that "If any person shall convey into any jail any disguise, instrument, arms or any other thing useful to aid any prisoner in escaping, with intent," etc., and an indictment charged that "the accused did 'furnish one K, who was then and there confined in the jail of said county, charged,' etc., 'with certain instruments,'" etc., it was said: "'Furnish' and 'convey' are words of widely different meaning. To 'furnish' a thing and to 'convey' it signify very different acts. To 'furnish' is to provide, or supply

to conduct;[10] to import; to take to or from; to transport;[11] to carry or transport the thing to another person or place;[12] to assure;[13] to grant;[14] to pass; to pass a title to any thing from one person to another as by deed, assignment or otherwise;[15] to transfer;[16] to transfer the title or property;[17] to trans-

anything wanted by another; to 'convey,' is to bear, carry or transport the thing to another person or place. A person at a distance may 'furnish' the article desired, upon request by letter or otherwise, and another may 'convey' it to the person for whom it is intended. One may 'furnish,' provide or supply a person confined in jail with food, which another may 'convey into any jail' to the person therein confined. Therefore to furnish a person who is confined in jail with any thing, may, and ordinarily does mean quite a different act from what we understand by the words 'shall convey into any jail' any thing." Francis *v.* State, 21 Tex. 280, 285.

10. As, "to conduct water from place to place." Edelman *v.* Yeakel, 27 Pa. St. 26, 29.

11. Richardson New Eng. Dict. [*quoted* in Brown *v.* Fitz, 13 N. H. 283, 285].

12. Francis *v.* State, 21 Tex. 280, 285; Webster Dict.

13. Cunliffe *v.* Brancker, 3 Ch. D. 393, 402, where it is said: "The word 'convey' by itself does not shew much; it is a word of general meaning, denoting any act by which real property is passed from one person to another — a rather more modern term, I believe, than 'assure,' but having the same meaning."

14. Young *v.* Ringo, 1 T. B. Mon. (Ky.) 30, 32; Patterson *v.* Carneal, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208; Lambert *v.* Smith, 9 Oreg. 185, 193. And see Chapman *v.* Charter, 46 W. Va. 769, 779, 34 S. E. 768 [*quoting* Edelman *v.* Yeakel, 27 Pa. St. 26, 27; 3 Washburn Real Prop. 163], where it is said: "The word 'convey' means to transfer title from one person to another; 'giving the same legal effect to the word 'convey' as 'grant,' which has 'become a generic term applicable to the transfer of all classes of real property.'"

15. Webster Dict. [*quoted* in Spicer *v.* Norton, 13 Barb. (N. Y.) 542, 546].

The word "convey," if it imply a written instrument, refers to a deed of land. Brown *v.* Fitz, 13 N. H. 283, 285.

A contract to make a "deed" or to "convey," implies that the conveyance shall give the vendee a sufficient title, in view of the provisions of the statute defining what a deed must contain. Parker *v.* McAllister, 14 Ind. 12, 13.

Mining lease.— An instrument which purports to lease and "convey" for a term of years all the coal on or under certain described land is a mining lease, and authorizes the lessee to take out all the coal he can mine on the premises during the term, and is not an absolute conveyance of all the coal in the land. The court said: "We are not of opinion that the word 'convey' should be allowed to overthrow the operation of the word 'lease' which precedes it." Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 541, 37 Am. Rep. 446, 36 Am. Rep. 770 note.

16. Webster Dict. [*quoted* in Spicer *v.* Norton, 13 Barb. (N. Y.) 542, 546].

Distinguished from "assign."— Where the executors under a will were directed to divide the real and personal property into four equal shares, and were also directed "'to convey, pay and assign' three of the shares," etc., the court said: "The use of the word 'convey,' apt to pass realty, and the word 'assign,' usual in the disposition of personalty not reduced to money, must strongly negative the idea of an absolute direction for conversion" of the property, etc. Story *v.* Palmer, 46 N. J. Eq. 1, 8 18 Atl. 363.

Distinguished from "bequeath," "give," "devise."— "The term 'convey' is a technical term, long known and used in deeds conveying real estate and never known or used in a will or devise, any more than the terms 'bequeath' 'or devise' are used in a deed. The term 'give' is used in devises and deeds, because a gift may be by deed as well as by devise. To call a devise therefore a conveyance violates all propriety of legal language." Jenckes *v.* Smithfield Probate Ct., 2 R. I. 255, 256.

"Convey and devise."—A statute provided: "Any married female may take, by inheritance, gift, &c., and hold to her sole and separate use, and convey and devise, real and personal property," etc. It was said: "A married woman may 'convey and devise' real and personal property as if she were unmarried. . . . She may convey and devise her real and personal estate, but her promissory note or other personal engagement is void, as it always was by the rules of the common law." Yale *v.* Dederer, 18 N. Y. 265, 271, 72 Am. Dec. 503.

Power to sell and power to convey distinguished.—"A person may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him power to do both. Authority to convey can only be given by deed, while authority to sell may be given by parol, and, until a recent statute, even verbally." Dayton *v.* Nell, 43 Minn. 246, 247, 45 N. W. 231.

17. Burrill Dict. [*quoted* in Lambert *v.* Smith, 9 Oreg. 185, 193].

An instrument which "transfers" an interest in land "conveys such interest." Lembeck, etc., Eagle Brewing Co. *v.* Kelly, 63 N. J. Eq. 401, 408, 51 Atl. 794.

Disposition of trust property by wife.— By a deed of settlement it was stipulated that the wife should be permitted to make what disposition of the trust property she might choose, and that she might have the entire and absolute control over it, and dispose of the same by deed, will or otherwise, at her pleasure. The trustee covenanted to convey the said estates and property as she should direct. The court said: "The term 'convey' must have been used as well in reference

fer title from one person to another;[18] to transfer the title of land from one person or class of persons to another;[19] to transfer the legal title to real estate from the present owner to another.[20] (See CONVEYANCE; CONVEYANCER; CONVEYANCING)

CONVEYANCE.[21] As defined by statute, every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.[22] At common law, the term "conveyance" has been defined to mean an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another;[23]

to the personal as to the real estate." Leaycraft *v.* Hedden, 4 N. J. Eq. 512, 552.

18. Lambert *v.* Smith, 9 Oreg. 185, 193 (where it is said: "This is giving the same legal effect to the word convey as grant, which has 'become a generic term, applicable to the transfer of all classes of real property'"); Edelman *v.* Yeakel, 27 Pa. St. 26, 29 [*quoted* in Chapman *v.* Charter, 46 W. Va. 769, 779, 34 S. E. 768].

19. Bouvier L. Dict. [*quoted* in Nickell *v.* Tomlinson, 27 W. Va. 697, 720].

"The word 'convey' is appropriate to the transfer of real property and entirely inappropriate to the transfer of personal estate." Thompson *v.* Hart, 58 N. Y. App. Div. 439, 449, 69 N. Y. Suppl. 223.

The words "convey and devise" are technical terms relating to the disposition of interests in real property. It could not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or of devising it by a last will and testament. Real property may be conveyed by deed or devised by will. Dickerman *v.* Abrahams, 21 Barb. (N. Y.) 551, 561, dissenting opinion.

20. Abendroth *v.* Greenwich, 29 Conn. 356, 365.

21. Derived apparently from the French *convoyer*, to accompany (*con*, with; *voie*, Latin *via*, a way); hence to convoy, take safely from one place to another, convey. "Conveyance" in the sense of a transfer of property seems to be a comparatively modern term, the old word being "ASSURANCE," *q. v.* Coke used "conveyance" as signifying that part of a pleading which serves as an explanation or introduction to the material facts. Sweet L. Dict.

There is no magical meaning in the word "conveyance." Credland *v.* Potter, L. R. 10 Ch. 8, 12, 44 L. J. Ch. 169, 31 L. T. Rep. N. S. 522, 23 Wkly. Rep. 36.

It is a technical or quasi-technical word of precise and definite import. Pickett *v.* Buckner, 45 Miss. 226, 245.

The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. Kelly *v.* Fleming, 113 N. C. 133, 138, 18 S. E. 81 [*quoting* Smithdeal *v.* Wilkerson, 100 N. C. 52, 53, 6 S. E. 71].

22. *California.*— See Civ. Code, §§ 1213, 1214 [*quoted* in *In re* McConnell, 74 Cal. 217, 218, 15 Pac. 746]; Hoag *v.* Howard, 55 Cal. 564, 566; Brannan *v.* Mesick, 10 Cal. 95, 108.

Michigan.— Comp. Laws, c. 241, § 8994 [*quoted* in Crouse *v.* Michell, (1902) 90 N. W. 32, 35]; White *v.* McGarry, 47 Fed. 420, 421, construing Michigan statute.

Minnesota.— Gen. Stat. (1894) c. 40, § 4280 [*quoted* in Haaven *v.* Hoaas, 60 Minn. 313, 316, 62 N. W. 110; Ortman *v.* Chute, 57 Minn. 452, 455, 59 N. W. 533; Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49; Chandler *v.* Kent, 8 Minn. 524].

New York.— Rev. Stat. 762, § 38 [*quoted* in Bradley *v.* Walker, 138 N. Y. 291, 297, 33 N. E. 1079, 52 N. Y. St. 365]; Bacon *v.* Van Schoonhoven, 87 N. Y. 446, 449; Davidson *v.* Fox, 65 N. Y. App. Div. 262, 263, 73 N. Y. Suppl. 533; Davidson *v.* Crooks, 45 N. Y. App. Div. 616, 619, 61 N. Y. Suppl. 363; Wilhelm *v.* Wilken, 75 Hun 552, 555, 27 N. Y. Suppl. 853, 58 N. Y. St. 733; Baker *v.* Thomas, 61 Hun 17, 19, 15 N. Y. Suppl. 359, 39 N. Y. St. 816; Nirdlinger *v.* Bernheimer, 11 N. Y. Suppl. 609, 611, 33 N. Y. St. 1019; New York City Sav. Bank *v.* Frank, 45 N. Y. Super. Ct. 404, 410; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273, 284; Vanderkemp *v.* Shelton, 11 Paige 28, 38. And see Jackson *v.* Roberts, 1 Wend. 478, 484.

South Dakota.— See Comp. Laws, § 3293 [*quoted* in Merrill *v.* Luce, 6 S. D. 354, 360, 61 N. W. 43, 55 Am. St. Rep. 844].

Wisconsin.— Rev. Stat. § 2242 [*quoted* in Cutler *v.* James, 64 Wis. 173, 178, 24 N. W. 874, 54 Am. Rep. 603].

23. Prouty *v.* Clark, 73 Iowa 55, 56, 34 N. W. 614; Webster Dict. [*quoted* in Kelly *v.* Fleming, 113 N. C. 133, 138, 18 S. E. 81; Brigham *v.* Kenyon, 76 Fed. 30, 33].

Applied in a bankruptcy case.— Where it was alleged that the transfer and removal of certain goods constituted an act of bankruptcy, under the federal statutes which provided that "if any merchant, &c., shall, with intent unlawfully to delay or defraud his creditors, secretly convey his goods out of his house, . . . or make, or cause to be made, any fraudulent conveyance of his lands or chattels, &c., every such person shall be deemed and adjudged a bankrupt," it was said: "This conveyance was not, in the opinion of the Court, a conveyance of chattels in the technical sense, or according to the legal construction of the clause cited from the statute. Whatever may be the loose and popular sense, or possible applications, of the term conveyance, the legislature are not understood to speak in an indeterminate manner; especially if that construction would violate any general principle of jurisprudence. For, in making a statute, the legis-

a sale;[24] a transfer;[25] the act or the instrument, by which property in real estate is transferred;[26] the transfer of the title of land from one person, or class of persons, to another,[27] or, by one person to another person;[28] a deed which passes or conveys land from one man to another;[29] an instrument which carries from one person to another person an interest in land;[30] a contract under

lature are understood to refer themselves to existing customs and rules, or, in other words, when using technical terms, to employ them in a precise and technical sense. The same term conveyance is used in speaking of the transfer of lands and of chattels; and different meanings must be given to the same word to apply it to the transaction in question. In this respect the variance from the British statute operates against the construction contended for by the plaintiff. There this act of bankruptcy is described by the terms grant or conveyance of lands or goods. And if the term conveyance were less technical than grant, they might be applied respectively to the subjects, *reddendo singula singulis*. But in the statute of the United States, the same word is made use of, to describe a transfer of both species of property." Livermore *v.* Bagley, 3 Mass. 487, 510 [*quoted* in Perkins *v.* Morse, 78 Me. 17, 18, 2 Atl. 130, 57 Am. Rep. 780, where it was determined, that the word "conveyance" in the bankrupt law of 1800 referred to a deed of land, and not to a bill of sale of personal property].

Forged order for diploma.— Where a statute provided that "he is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing," etc., it was said that a forged letter asking for the delivery of a diploma of an educational institution was not a "conveyance" within the legal definition of that word. Alexander *v.* State, 28 Tex. App. 186, 12 S. W. 595.

24. Johnson *v.* Riley, 41 W. Va. 140, 150, 23 S. E. 698, dissenting opinion.

25. Johnson *v.* Riley, 41 W. Va. 140, 150, 23 S. E. 698, dissenting opinion.

26. Dudley *v.* Sumner, 5 Mass. 438, 472; Bouvier L. Dict. [*quoted* in Alexander *v.* State, 28 Tex. App. 186, 187, 12 S. W. 595].

Compared with "confirmation."— Where a statute provided that, on the completion by a company of a certain number of miles of railroad, patents of land should be issued "confirming" to the company the right and title to said lands, etc., and also, on the performance of certain conditions, patents should be issued "conveying" to the company additional sections of land, etc., the court said: "Conveyance, . . . is the generic term, of which confirmation is the species. Its operative words include those of a feoffment, which is also a species of a conveyance. We think, therefore, that when the word 'conveying' was used in the latter portion of section 4, it was employed as synonymous with the language used in the first portion thereof, viz., 'confirming the right and title.'" Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 139, 2 Pac. 322.

Wife's separate estate.— Where a statute provided that no conveyance or encumbrance for the separate debts of the husband shall be binding on the wife, beyond the amount of her income, the court said: "The legislative intention is that she shall not, beyond the income, make her property a security for her husband's debt, either by 'conveyance or incumbrance;' that is, by any form of instrument by which, under the law, a lien or hypothecation can be treated. It will be observed that the word 'conveyance' is separated by the disjunction 'or' from 'incumbrance.' These words are not used to convey the same idea. Conveyance, being a general word, comprehends the several modes of passing title to real estate." Klein *v.* McNamara, 54 Miss. 90, 104 [*citing* Pickett *v.* Buckner, 45 Miss. 226, 245].

27. Black L. Dict. [*quoted* in Argand Refining Co. *v.* Quinn, 39 W. Va. 535, 543, 20 S. E. 576]; Bouvier L. Dict. [*quoted* in Klein *v.* McNamara, 54 Miss. 90, 105].

Not apt in passing chattel interest.— The word "conveyance" does not, when standing without assistance in a statute, signify its applicability to the passing of a chattel interest in realty. Sullivan *v.* Barry, 46 N. J. L. 1, 6 [*citing* Kinney *v.* Watts, 14 Wend. (N. Y.) 38; Tone *v.* Brace, 8 Paige (N. Y.) 597, 598].

28. Bouvier L. Dict. [*quoted* in Pickett *v.* Buckner, 45 Miss. 226, 245].

29. Jacob L. Dict. [*quoted* in Perkins *v.* Morse, 78 Me. 17, 19, 2 Atl. 130, 57 Am. Rep. 780; Brown *v.* Fitz, 13 N. H. 283, 285].

Distinguished from "grantor."— As "grantor" is the most comprehensive word to signify one who conveys lands, so "conveyance" is the common statute word to intend the deed. Dudley *v.* Sumner, 5 Mass. 438, 472.

The distinction between a conveyance by deed and will is patent. The one is completed by the act, and the other does not become effective until the death of the maker. Caldwell *v.* Bowman, 1 Tenn. Cas. 601 [*quoted* in Macrae *v.* Macrae, (Tenn. Ch. App. 1899) 57 S. W. 423].

May be synonymous with "deed."— Where a statute used the words "by deed or conveyance" in respect to the devise of lands, it was said: "The terms 'deed or conveyance' appear to have been used in that section as synonymous terms, or the legislature may have intended the term 'deed' to apply to lands, and 'conveyance' to personalty, when it says 'that any deed or conveyance of any land or of personalty that may be made to any bishop,' &c." Baker *v.* Clark, 7 U. C. Q. B. 44, 59.

30. Credland *v.* Potter, L. R. 10 Ch. 8, 12, 44 L. J. Ch. 169, 31 L. T. Rep. N. S. 522, 23 Wkly. Rep. 36.

The instrument itself is called a conveyance. Pickett *v.* Buckner, 45 Miss. 226, 245 [*quoted* in Klein *v.* McNamara, 54 Miss. 90, 105].

Applied under homestead act.— Where a

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seal.[31] In the narrower sense of the word, it signifies the instrument employed to effectuate an ordinary purchase of freehold land (*e. g.* the modern deed), as opposed to settlements, wills, leases, partitions, etc.[32] In respect to transportation, that by which anything is conveyed or transported, or which serves as means or way of

statute provided that "any grant or conveyance which he (the claimant) may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void," etc., the court said: "Mortgages, always in form conveyances, were then regarded by the profession generally more as conveyances, and subject to the laws and conditions of conveyances, than at present, . . . It seems more reasonable that by these terms, 'grant and conveyance,' was intended all forms of conveyance, whether absolute, as a warranty deed, or upon condition, as a trust deed or mortgage." Brewster *v.* Madden, 15 Kan. 249, 251 [*quoted* in Norris *v.* Heald, 12 Mont. 282, 289, 29 Pac. 1121, 3 Am. St. Rep. 581].

31. Grubbe *v.* Grubbe, 26 Oreg. 363, 370, 38 Pac. 182, where it is said: "But there is often a difference between the power of contract and the power of making conveyances."

"Deeds or conveyances" exclude writings not under seal. Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 384, 7 Atl. 873.

32. Rapalje & L. L. Dict. [*quoted* in Brigham *v.* Kenyon, 76 Fed. 30, 33].

The term "deed or conveyance of lands, tenements, and hereditaments" means what it signified under the old rule of the common law, viz., a deed or conveyance of a freehold estate, such estate as must be conveyed by deed, and not a lease for years, which may be passed by writing not under seal. Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 384, 7 Atl. 873.

The word "conveyance" has been applied to an antenuptial contract (Aultman *v.* Pettys, 59 Mich. 482, 487, 26 N. W. 680), an assignment for the benefit of creditors (Haug *v.* Detroit Third Nat. Bank, 77 Mich. 474, 480, 43 N. W. 939), an assignment of a real-estate mortgage (Merrill *v.* Luce, 6 S. D. 354, 360, 61 N. W. 43, 55 Am. St. Rep. 844; Butler *v.* Mazeppa Bank, 94 Wis. 351, 356, 68 N. W. 998), an assignment of a mortgage and the satisfaction-piece of the same (Brewster *v.* Carnes, 103 N. Y. 556, 562, 9 N. E. 323; Bacon *v.* Von Schoonhoven, 87 N. Y. 446, 450; Decker *v.* Boice, 83 N. Y. 215, 220; Westbrook *v.* Gleason, 79 N. Y. 23, 30; Van Keuren *v.* Corkins, 66 N. Y. 77, 80), an ordinary deed of bargain and sale (Klein *v.* McNamara, 54 Miss. 90, 105), a properly recorded certificate of an execution sale of lands (Drake *v.* McLean, 47 Mich. 102, 104, 10 N. W. 126), a certificate of sale of school land, made by the commissioner of the state land-office (Haaven *v.* Hoaas, 60 Minn. 313, 315, 62 N. W. 110), a contract for the sale of real estate (Gregg *v.* Owens, 37 Minn. 61, 62, 33 N. W. 216; Cogan *v.* Cook, 22 Minn. 137, 143), a declaration of trust, although not under seal (Corse *v.* Leggett, 25 Barb. (N. Y.) 389, 394), deeds of trust (Klein *v.* McNamara, 54 Miss. 90, 105; Pickett *v.* Buckner, 45 Miss. 226, 245), an easement (Warner *v.* Rogers, 23 Minn. 34, 38), an instrument in the nature of a trust deed even though without seal, acknowledgment, or witnesses (White *v.* Fitzgerald, 19 Wis. 480, 486), an instrument not under seal, giving a charge on the equity of redemption of an estate (Credland *v.* Potter, L. R. 10 Ch. 8, 12, 44 L. J. Ch. 169, 31 L. T. Rep. N. S. 522, 23 Wkly. Rep. 36), a mortgage (Patterson *v.* Jones, 89 Ala. 388, 391, 8 So. 77, 78; Tolman *v.* Smith, 74 Cal. 345, 349, 16 Pac. 189; *In re* McConnell, 74 Cal. 217, 218, 15 Pac. 746; Hassey *v.* Wilke, 55 Cal. 525, 528; Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 603, 607; People *v.* Roche, 124 Ill. 9, 15, 14 N. E. 701; Babcock *v.* Hoey, 11 Iowa 375, 377; Brewster *v.* Madden, 15 Kan. 249, 250; Burns *v.* Berry, 42 Mich. 176, 179, 3 N. W. 924; Klein *v.* McNamara, 54 Miss. 90, 104; Pickett *v.* Buckner, 45 Miss. 226, 245; Bacon *v.* Von Schoonhoven, 87 N. Y. 446, 451; Decker *v.* Boice, 83 N. Y. 215, 218; Westbrook *v.* Gleason, 79 N. Y. 23, 30; Jackson *v.* Roberts, 1 Wend. (N. Y.) 478, 485; Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 28, 38; Dimond *v.* Enoch, Add. (Pa.) 356, 357; Talbot *v.* Chester, 2 Chest. Co. Rep. (Pa.) 57, 59; Merrill *v.* Luce, 6 S. D. 354, 360, 61 N. W. 43, 55 Am. St. Rep. 844; East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 25, 15 S. W. 166, 11 L. R. A. 293; Luckett *v.* Townsend, 3 Tex. 119, 129, 49 Am. Dec. 723; Rowell *v.* Williams, 54 Wis. 636, 639, 12 N. W. 86; Potter *v.* Strausky, 48 Wis. 235, 243, 4 N. W. 95; Fallas *v.* Pierce, 30 Wis. 443, 457. And see Duty *v.* Graham, 12 Tex. 427, 434, 62 Am. Dec. 534; Giardin *v.* Lampe, 58 Wis. 267, 272, 16 N. W. 614), an equitable mortgage (Shattuck *v.* Bates, 92 Wis. 633, 635, 66 N. W. 706), lease for a term exceeding one year (Jones *v.* Marks, 47 Cal. 242, 246, construing Cal. recording act (1850), §§ 27, 36. But see Perkins *v.* Morse, 78 Me. 17, 18, 2 Atl. 130, 57 Am. Rep. 780, where it is said: "A lease may be in a sense a conveyance, but such is not the commonly accepted nor the accurate meaning of the term"), a quitclaim deed, within the meaning of a statute regulating vendor's liens (Chrisman *v.* Hay, 43 Fed. 552, 554), a release of mortgage (Baker *v.* Thomas, 61 Hun (N. Y.) 17, 19, 15 N. Y. Suppl. 359, 39 N. Y. St. 816), a release, as an instrument by which the title to real estate might be affected in law or equity (Palmer *v.* Bates, 22 Minn. 532), a release of part of land covered by a mortgage (Merchant *v.* Woods, 27 Minn. 396, 398, 7 N. W. 826; Palmer *v.* Bates, 22 Minn. 532, 534; Mutual L. Ins. Co. *v.* Wilcox, 55 How. Pr. (N. Y.) 43, 49. And see Frear *v.* Sweet, 118 N. Y. 454, 463, 23 N. E. 910, 29 N. Y. St. 972; St. John *v.* Spalding, 1 Thomps. & C. (N. Y.) 483), a satisfaction-piece of a mortgage within the meaning of the recording act (Bacon *v.* Von Schoonhoven, 87 N. Y. 446),

carriage, as any vehicle;[33] any means by which persons or things are transported.[34] In pleading, introduction or inducement.[35] (Conveyance: Acknowledgment of, see ACKNOWLEDGMENTS. Award Directing, see ARBITRATION AND AWARD. By — Assignment, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; Bill of Sale, see SALES; Deed, see DEEDS; Gift, see GIFTS; Lease, see LANDLORD AND TENANT; Mortgage, see CHATTEL MORTGAGES; MORTGAGES; Partition Deed, see PARTITION; Tax Deed, see TAXATION. By or To — Administrator, see EXECUTORS AND ADMINISTRATORS; Association, see ASSOCIATIONS; Bank, see BANKS AND BANKING; Corporation, see CORPORATIONS; Executor, see EXECUTORS AND ADMINISTRATORS; Guardian, see GUARDIAN AND WARD; Husband, see HUSBAND AND WIFE; Infant, see INFANTS; Insane Person, see INSANE PERSONS; Married Woman, see HUSBAND AND WIFE; Sheriff, see EXECUTIONS; Ward, see GUARDIAN AND WARD; Wife, see HUSBAND AND WIFE. Cancellation of, see CANCELLATION OF INSTRUMENTS. Contract to Make, see VENDOR AND PURCHASER. Covenant in,

and a will (Stamm *v.* Bostwick, 122 N. Y. 48, 53, 25 N. E. 233, 33 N. Y. St. 293, 9 L. R. A. 597. And see Baker *v.* Clark, 7 U. C. Q. B. 44, 58. But see Comstock *v.* Adams, 23 Kan. 513, 524, 33 Am. Rep. 191, where it is said that a conveyance as defined by statute does not include a will). But the word does not embrace a bond for title (Kingsley *v.* Gilman, 15 Minn. 59. *Compare* Dahl *v.* Pross, 6 Minn. 89), a charter-party (Mott *v.* Buckman, 17 Fed. Cas. No. 9,881, 3 Blatchf. 71, 74 [*quoted* in Perkins *v.* Morse, 78 Me. 17, 18, 2 Atl. 130, 57 Am. Rep. 780]), a grant of wharfage for one year (New York *v.* Mabie, 13 N. Y. 151, 158, 64 Am. Dec. 538 [*quoted* in Perkins *v.* Morse, 78 Me. 17, 18, 2 Atl. 130, 57 Am. Rep. 780]), a lease for a term of years (Tone *v.* Brace, 11 Paige (N. Y.) 566, 569), a lease for one year (Topping *v.* Parrish, 96 Wis. 378, 382, 71 N. W. 367), or the lien of a judgment, within the meaning of the registry act (Wilcoxson *v.* Miller, 49 Cal. 193, 194).

33. Van Bokkelen *v.* Travelers' Ins. Co., 34 N. Y. App. Div. 399, 401, 54 N. Y. Suppl. 307.

Applied to transportation of passengers or freight.— In Berliner *v.* Travelers' Ins. Co., 121 Cal. 458, 462, 53 Pac. 918, 66 Am. St. Rep. 49, 41 L. R. A. 467, an insurance policy qualified the liability of the insurer by a provision exempting it from liability while the insured was in or on any conveyance not provided for transportation of passengers. The court said: "The term 'conveyance' applies as well to the means of transporting freight as of passengers, and in the clause exempting the insurance company from liability for accidents occurring in 'entering or trying to enter or leave a moving conveyance using steam as a motive power' is so applied; while the clause here under consideration distinguishes a 'conveyance provided for the transportation of passengers' from those used for the transportation of freight. Neither clause specifies railroad trains, and each includes as clearly vessels propelled by steam." Where a life-insurance policy provided that "if such injuries are sustained while riding as a passenger in any passenger conveyance, . . . the amount to be paid shall be double the sum specified." The court said: "But where the liability is confined to a case where the passenger was injured when 'in any passenger conveyance,' it would seem to exclude an injury received by a person when riding otherwise than inside of a passenger conveyance." Van Bokkelen *v.* Travelers' Ins. Co., 34 N. Y. App. Div. 399, 401, 54 N. Y. Suppl. 307. And where an insurance policy provided that the death must be "caused by an accident while traveling by public or private conveyance provided for the transportation of passengers," it was held that a locomotive or engine was embraced within this clause of the policy, as the insurance ticket was sold to a person known to be an engineer. The court said: "A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. But this ticket was designed to include and cover something more than the ordinary risk incurred by the passenger or traveler. The locomotive is a necessary part of the conveyance." Brown *v.* Railway Pass. Assur. Co., 45 Mo. 221, 225.

34. Ripley *v.* Railway Pass. Assur. Co., 20 Fed. Cas. No. 11,854.

"Public and private conveyance."— Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. Ripley *v.* Hartford Pass. Assur. Co., 16 Wall. (U. S.) 336, 479, 21 L. ed. 469. And see Oswego *v.* Collins, 38 Hun (N. Y.) 171, 172, where an omnibus is declared not to be a "public conveyance." See also Brooklyn *v.* Breslin, 57 N. Y. 591, 595. And where an accident-insurance policy provided an indemnity to the insured "while traveling by public or private conveyance" and he was injured by highwaymen, the court said: "The term 'private-conveyance,' used as a compound word, has no precise or definite meaning, while the word 'private' pertains to persons, and the word 'conveyance' to any means by which persons or things are transported. Hence, self-locomotion is strictly private conveyance. And, finally, that the terms of the policy are 'traveling by,' not 'traveling in,' private or public conveyance." Ripley *v.* Railway Pass. Assur. Co., 20 Fed. Cas. No. 11,854.

35. Black L. Dict.

see COVENANTS. Dedication by, see DEDICATION. Description of Land in, see BOUNDARIES. Duty to Make, see VENDOR AND PURCHASER. In Fraud of Creditors, see FRAUDULENT CONVEYANCES. In Trust, see TRUSTS. Of—Easement, see EASEMENTS; Equity of Redemption, see MORTGAGES; Homestead, see HOMESTEADS; Land Held Adversely, see CHAMPERTY AND MAINTENANCE; Married Woman's Property, see HUSBAND AND WIFE; Mine, see MINES AND MINERALS; Mortgaged Property, see CHATTEL MORTGAGES; MORTGAGES; Public Land, see PUBLIC LANDS; Riparian Right, see NAVIGABLE WATERS; Vessel, see SHIPPING; Water Right, see WATERS. Pending Suit, see LIS PENDENS. Reformation of, see REFORMATION OF INSTRUMENTS.)

CONVEYANCER. Every person, other than one having paid the special tax as a lawyer or claim agent, whose business it is to draw deeds, bonds, mortgages, wills, writs, or other legal papers, or to examine titles to real estate.[36] Now generally means a barrister who chiefly devotes himself to the practice of conveyancing or combines it with equity drafting.[37]

CONVEYANCING. A term including both the science and act of transferring titles to real estate from one man to another.[38]

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the lord chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing.[39]

CONVEYER. In old English law, to derive title; to derive by descent. To show in pleading.[40]

CONVICIA SI IRASCARIS TUA DIVULGAS; SPRETA EXOLESCUNT. A maxim meaning "If you be moved to anger by insults, you publish them; if despised, they are forgotten."[41]

CONVICIUM. In the civil law, the name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*.[42] (See, generally, LIBEL AND SLANDER.)

CONVICT. To condemn; to find guilty of an offense [usually] by the verdict of a jury;[43] to prove or find guilty of an offense or crime charged; to pronounce guilty as by legal decision;[44] to find against a defendant in a civil case.[45] (Convict: As a noun, see CONVICTS. See CONVICTED; CONVICTION.)

CONVICTED. Found guilty of the crime whereof one stands indicted.[46] The word "convicted" is sometimes used to mean that a judgment of final condem-

36. 14 U. S. Stat. at L. 118.

37. Sweet L. Dict.

38. Black L. Dict.

Conveyancing is that part of the lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer, or extinguish rights. It therefore includes the investigation of the title to land, and the preparation of agreements, wills, articles of association, private statutes operating as conveyances, and many other instruments in addition to conveyances properly so called. Sweet L. Dict.

39. Black L. Dict.

40. Burrill L. Dict.

41. Black L. Dict.

42. Black L. Dict.

43. Burrill L. Dict. See also 4 Bl. Comm. 362.

44. Webster Dict. [*quoted* in Eagan *v.* Jones, 21 Nev. 433, 32 Pac. 929].

45. Burrill L. Dict. And *compare* Reagh *v.* Spann, 3 Stew. (Ala.) 100, 107, where it is said: "The word convicted, as expressed in the statute, must be taken to mean convicted on the trial of the penal action of debt for the recovery of the penalty, and cannot mean a previous conviction on an indictment."

46. Anderson L. Dict. [*quoted* in Eagan *v.* Jones, 21 Nev. 433, 32 Pac. 929]. And see Messner *v.* People, 45 N. Y. 1, 12.

"Convicted" means when a person has been indicted by a grand jury, tried by a court and jury, and found guilty of the offense charged in the indictment. Eagan *v.* Jones, 21 Nev. 433, 32 Pac. 929.

"Convictus,— he that is found guilty of an offense by verdict of a jury." Jacob L. Dict. [*quoted* in *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829].

"If the jury find him [the accused] guilty, he is then said to be convicted of the crime whereof he stands indicted." 4 Bl. Comm. 262. These words of Blackstone have been quoted in the following cases:

California.— *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829.

Florida.— State *v.* Barnes, 24 Fla. 153, 4 So. 560.

nation has been pronounced against the accused.[47] (See CONVICT; CONVICTS; CONVICTION.)

CONVICT LABOR. See CONVICTS.

CONVICTION.[48] CONDEMNATION,[49] *q. v.*; the finding of guilt;[50] the finding a person guilty of an offense;[51] the finding of a person guilty by verdict of a jury;[52] that legal proceeding of record which ascertains the guilt of the party,

Massachusetts.— Com. *v.* Lockwood, 109 Mass. 323, 326, 12 Am. Rep. 699.

Pennsylvania.— York County *v.* Dalhousen, 45 Pa. St. 372, 375.

United States.— U. S. *v.* Watkinds, 6 Fed. 152, 158, 7 Sawy. 85.

England.—Burgess *v.* Boctefeur, 8 Jur. 621, 623, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 479.

Compared with "conviction."—"With respect to some purposes and consequences, the words 'convicted' and 'conviction,' when used in a statute, mean no more than the judicial ascertainment of guilt by verdict or plea." Com. *v.* Miller, 6 Pa. Super. Ct. 35, 39. See also Com. *v.* Gorham, 99 Mass. 420, 422, where it is said: "The words 'conviction' and 'convicted' describe the same condition of the offender."

"When the statute says, 'convicted as if such larceny . . . had been committed in this state,' the word 'convicted' includes the accusation and the trial. And, if the statute in terms had said such a defendant may be charged, tried, convicted, and punished in the same manner as if such larceny had been committed in this state, the error of defendant's contention as to lack of jurisdiction would be palpable; yet such is the fair significance of the word 'convicted,' as used in the section of the code." People *v.* Black, 122 Cal. 73, 75, 54 Pac. 385.

Distinguished from "attainted."— "There is a great difference between a man convicted and attainted, though they are frequently, though inaccurately, confounded together." Jacob L. Dict. [*quoted* in *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829; Blair *v.* Com., 25 Gratt. (Va.) 850, 853]. "Attainder is larger than conviction; a man is convicted when he is found guilty by verdict or confesses the crime before judgment had, but not attainted till judgment is also passed on him." Coke Litt. 390 [*quoted* in Reg. *v.* Hinks, Den. C. C. 84, 87]. "A felon was convicted by the verdict of a jury; he was attainted by the judgment rendered on the verdict." Jacob L. Dict. [*quoted* in Shepherd *v.* People, 25 N. Y. 406, 419]. "The difference between a man attainted and convicted is, that a man is said to be convict before he hath judgment; as if a man be convict by confession, verdict or recreancy. And when he hath his judgment upon the verdict, confession or recreancy, or upon outlawry or abjuration, then he is said to be attaint." 1 Coke Inst. 391 [*quoted* in Quintard *v.* Knoedler, 53 Conn. 485, 487, 2 Atl. 752, 55 Am. Rep. 149, and *cited* in *Ex p.* Brown, 68 Cal. 176, 178, 8 Pac. 829; U. S. *v.* Watkinds, 6 Fed. 152, 158, 7 Sawy. 85].

47. Gallagher *v.* State, 10 Tex. App. 469, 472 [*citing* Bouvier L. Dict.; Tex. Pen. Code, art. 27]; Black L. Dict. [*quoted* in Eagan *v.* Jones, 21 Nev. 433, 32 Pac. 929]. In Faunce *v.* People, 51 Ill. 311 [*quoted* in State *v.* Barnes, 24 Fla. 153, 4 So. 560; State *v.* Townley, 147 Mo. 205, 208, 48 S. W. 833], it was held that a person cannot be said to be convicted of a crime so as to render him incapable of giving testimony until judgment is rendered on a verdict of guilty, for not until then is he "convicted" by law. And in Gallagher *v.* State, 10 Tex. App. 469, 472 [*quoted* in State *v.* Townley, 147 Mo. 205, 208, 48 S. W. 833], it was said that the word "convicted . . . has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. . . . To say that a party had been 'convicted' and then add, that he stood his trial and that 'judgment final' was rendered against him would be tautology." The same rule was announced in Rex *v.* Turner, 15 East 570 [*cited* in State *v.* Townley, 147 Mo. 205, 208, 48 S. W. 833].

48. "The term conviction, as its composition (*convinco, convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode." U. S. *v.* Watkinds, 6 Fed. 152, 158, 7 Sawy. 85.

Under a statute giving the district attorney certain fees for convictions, a conviction is meant in which the district attorney or his deputy took some part, either by the institution of the proceedings by being present or aiding at the trial, or in some other way performing some service as district attorney. Edwards *v.* Fresno County, 74 Cal. 475, 16 Pac. 239.

49. Bouvier L. Dict. [*quoted* in Egan *v.* Jones, 21 Nev. 433, 32 Pac. 929; Blair *v.* Com., 25 Gratt. (Va.) 850, 853; Reg. *v.* Zickrick, 5 Can. Crim. Cas. 380, 385; *In re* Fraser, 13 Nova Scotia 354, 364].

50. People *v.* Adams, 95 Mich. 541, 543, 55 N. W. 461 [*citing* State *v.* Volmer, 6 Kan. 379; Nason *v.* Staples, 48 Me. 123; Stevens *v.* People, 1 Hill (N. Y.) 261; Bishop Cr. L. § 963].

51. Rapalje & L. L. Dict [*quoted* in Hempstead County *v.* McCollum, 58 Ark. 159, 161, 24 S. W. 9 (where it is said: "Bouvier's, Black's, Burrill's, Anderson's give nothing which expresses it more succinctly or more completely"); Egan *v.* Jones, 21 Nev. 433, 32 Pac. 929].

52. *Arkansas.*— Fanning *v.* State, 47 Ark. 442, 443, 2 S. W. 70 [*quoting* Bishop Cr. L. § 223].

California.— People *v.* Rodrigo, 69 Cal. 601, 605, 11 Pac. 481 [*quoting* Bishop Cr. L. § 223]; *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829 [*quoting* 2 Bishop Cr. L. § 903; Bishop Stat. Cr. § 348; Jacob L. Dict.], where it is said: "The word 'conviction' ordinarily

and upon which the sentence or judgment is founded,[53] as a verdict, a plea of guilty and outlawry, and the like;[54] the act of proving, finding or determining

signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned."

Connecticut.— Quintard *v.* Knoedler, 53 Conn. 485, 487, 2 Atl. 752, 55 Am. Rep. 149 [*quoting* Bishop Stat. Cr. § 348].

Florida.— State *v.* Barnes, 24 Fla. 153, 4 So. 560.

Louisiana.— State *v.* Moise, 48 La. Ann. 109, 122, 18 So. 943, 35 L. R. A. 701 [*quoting* State *v.* Wilson, 14 La. Ann. 446, 448 (*citing* 1 Chitty Cr. L. 601, 648, 653); Bishop Stat. Cr. § 348], where it is said: "The word 'conviction,' which occurs in Art. 66 of the Constitution, signifies that the defendant's guilt has been ascertained by the verdict of the jury, and not that the sentence of the law has been pronounced by the court."

Maryland.— Francis *v.* Weaver, 76 Md. 457, 467, 25 Atl. 413.

Massachusetts.— Com. *v.* Gorham, 99 Mass. 420, 422 [*quoted* in Com. *v.* Kiley, 150 Mass. 225, 226, 23 N. E. 55; Com. *v.* Lockwood, 109 Mass. 323, 330, 12 Am. Rep. 699].

New York.— Blaufus *v.* People, 69 N. Y. 107, 109, 25 Am. Rep. 148; Schiffer *v.* Pruden, 64 N. Y. 47, 52; Messner *v.* People, 45 N. Y. 1, 12 [*citing* 4 Bl. Comm. 362; Bouvier L. Dict.].

North Carolina.— State *v.* Alexander, 76 N. C. 231, 232, 22 Am. Rep. 675 [*quoted* in *Ex p.* Brown, 68 Cal. 176, 180, 8 Pac. 829], where Read, J., speaking for the court, said: "The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or, they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him nor that the Judge convicted him."

Pennsylvania.—Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 91, 31 Am. St. Rep. 738 [*citing* Smith *v.* Com., 14 Serg. & R. (Pa.) 69].

Virginia.— White *v.* Com., 79 Va. 611, 615 [*quoting* 1 Bishop Cr. L. § 348].

West Virginia.— Hartley *v.* Henretta, 35 W. Va. 222, 227, 13 S. E. 375 [*quoting* Bouvier L. Dict.].

United States.— U. S. *v.* Watkinds, 6 Fed. 152, 158, 7 Sawy. 85 [*quoting* Bishop Stat. Cr. § 348]. *Compare* Williams *v.* U. S., 12 Ct. Cl. 192, 193, where it is said: "When the Government offers a reward for information which shall lead to the 'conviction' of persons illegally operating distilleries, the conditions of the offer will be deemed complied with if there be a verdict of guilty followed by a motion of the district attorney to suspend judgment on the payment of all costs by the prisoners."

53. Bouvier L. Dict. [*quoted* in Fanning *v.* State, 47 Ark. 442, 443, 2 S. W. 70; People *v.* Rodrigo, 69 Cal. 601, 605, 11 Pac. 481; Hartley *v.* Henretta, 35 W. Va. 222, 13 S. E. 375]. See also White *v.* Com., 79 Va. 611, 615 [*quoting* Bouvier L. Dict.], where it said, referring to this definition, "The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury."

54. Com. *v.* Richards, 17 Pick. (Mass.) 295, 296 [*quoted* in Com. *v.* Lockwood, 109 Mass. 323, 328, 12 Am. Rep. 699].

"Conviction may accrue in two ways, either by his [defendant's] confessing the offense and pleading guilty or by his being found so by the verdict of his country." 4 Bl. Comm. 362 [*quoted* in Healey *v.* Martin, 33 Misc. (N. Y.) 243, 248, 68 N. Y. Suppl. 413; Burgess *v.* Boetefeur, 8 Jur. 621, 625, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 481]. Conviction is on confession or verdict. 6 Dane Abr. 534, 536 [*quoted* in Com. *v.* Lockwood, 109 Mass. 323, 328, 12 Am. St. Rep. 699]. Crompton saith that conviction is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest; and when a statute excludes from clergy persons found guilty of felony, etc., it extends to those who are convicted by confession. 2 Crompton Just. 9 [*quoted* in *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829; Blair *v.* Com., 25 Gratt. (Va.) 850, 853]. So a plea of guilty by defendant constitutes a conviction of him. *Ex p.* Brown, 68 Cal. 176, 8 Pac. 829 [*quoting* Jacob L. Dict.]; Bishop Stat. Cr. § 348 [*quoted* in Quintard *v.* Knoedler, 53 Conn. 485, 487, 2 Atl. 752, 55 Am. Rep. 149]. *Compare* Blair *v.* Com., 25 Gratt. (Va.) 850, 853.

Distinguished from "judgment" or sentence."—"The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or 'the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." Com. *v.* Lockwood, 109 Mass. 323, 325, 12 Am. Rep. 699 [*cited* or *quoted* in Quintard *v.* Knoedler, 53 Conn. 485, 487, 2 Atl. 752, 55 Am. Rep. 149; State *v.* Barnes, 24 Fla. 153, 4 So. 560; State *v.* Moise, 48 La. Ann. 109, 121, 18 So. 943, 35 L. R. A. 701; People *v.* Adam, 95 Mich. 541, 543, 55 N. W. 461; Territory *v.* Griego, 8 N. M. 133, 147, 42 Pac. 81, in dissenting opinion of Laughlin, J.; People *v.* Lyman, 33 Misc. (N. Y.) 243, 248, 68 N. Y. Suppl. 331; State *v.* Alexander, 76 N. C. 231, 232, 22 Am. Rep. 675; Com. *v.* Miller, 6 Pa. Super. Ct. 35, 40; *In re* Freid-

to be guilty of an offense charged against a person before a legal tribunal, as by confession, by the verdict of a jury, or by the sentence of other tribunal, etc.;[55] the judgment of guilty pronounced against the accused by the proper tribunal, and in the mode prescribed by law.[56] It is sometimes used to denote final judgment;[57] the final judgment of the court;[58] the final judgment of the court in passing sentence;[59] the judgment of the court upon the verdict or confession of guilty;[60] judgment in a criminal prosecution.[61] As often used, the word includes

rich, 51 Fed. 747, 749]. See also Hackett *v.* Freeman, 103 Iowa 296, 299, 72 N. W. 528 [*citing* Schiffer *v.* Pruden, 64 N. Y. 47, 52; Blair *v.* Com., 25 Gratt. (Va.) 850]; Bishop Cr. L. § 361; McClain Cr. L. § 110. But see cases cited *infra*, note 58, *et seq.*

55. Webster Dict. [*quoted* in Hartley *v.* Henretta, 35 W. Va. 222, 227, 13 S. E. 375, 376].

56. People *v.* Board of Police Com'rs, 20 Hun (N. Y.) 333, 337 [*citing* Blaufus *v.* People, 69 N. Y. 107, 25 Am. Rep. 148; Schiffer *v.* Pruden, 64 N. Y. 47].

57. Bouvier L. Dict. [*quoted* in People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; White *v.* Com., 79 Va. 611, 615]. And see Blair *v.* Com., 25 Gratt. (Va.) 850, 853.

Judgment amounts to conviction. Keithler *v.* State, 10 Sm. & M. (Miss.) 192, 236 [*citing* Roscoe Crim. Ev. 123; Tomlin L. Dict. 414]. But "it doth not follow that every one who is convicted is adjudged." 2 Crompton Just. 63 [*quoted* in *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829; Blair *v.* Com., 25 Gratt. (Va.) 850, 853]. See also Reg. *v.* Hawbolt, 33 Nova Scotia 165, 173, where it is said: "The word 'conviction' is an equivocal word, but in strict legal sense it is used to denote the judgment of the court."

"When conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential. In such cases, 'when the law speaks of conviction, it means a judgment, and not merely a verdict, which in common parlance is called a conviction.'" Com. *v.* Miller, 6 Pa. Super. Ct. 35, 39 [*quoting* Smith *v.* Com., 14 Serg. & R. (Pa.) 69, 70, per Tilghman, C. J.].

58. *California.*—*Ex p.* Brown, 68 Cal. 176, 8 Pac. 129 [*citing* Blaufus *v.* People, 69 N. Y. 107, 109].

Connecticut.— Quintard *v.* Knoedler, 53 Conn. 485, 487, 2 Atl. 752, 55 Am. Rep. 149, where it is said: "The word 'conviction,' when it stands in such a connection with other words as to indicate a secondary or unusual meaning, sometimes denotes the final judgment of the court."

Florida.— State *v.* Barnes, 24 Fla. 153, 159, 4 So. 560, where it is said: "The word 'conviction,' often implies a judgment or sentence, as well as the verdict of a jury."

Maryland.— Francis *v.* Weaver, 76 Md. 457, 467, 25 Atl. 413 [*quoting* Burgess *v.* Boetefeur, 8 Jur. 621, 625, 13 L. J. U. C. 122, 7 M. & G. 504, 8 Scott N. R. 194], where it is said: "In common parlance, no doubt it (convicted) is taken to mean the verdict at the time of trial; but in strict legal sense it is used to denote the judgment of the Court."

Missouri.— State *v.* Townley, 147 Mo. 205, 209, 48 S. W. 833 [*citing* Blaufus *v.* People, 69 N. Y. 107, 109, 25 Am. Rep. 148].

New York.— Blaufus *v.* People, 69 N. Y. 107, 109, 25 Am. Rep. 148 [*citing* Keithler *v.* State, 10 Sm. & M. (Miss.) 192; Reg. *v.* Hinks, 1 Den. C. C. 84; Foster's Case, 11 Reports 107; 2 Dwarris Stat. (2d London ed.) 683; and *cited* or *quoted* in People *v.* Sullivan, 34 N. Y. App. Div. 544, 548, 54 N. Y. Suppl. 538; People *v.* Board of Police Com'rs, 20 Hun (N. Y.) 333, 337; Cameron *v.* Tribune Assoc., 3 Silv. Supreme (N. Y.) 575, 581, 7 N. Y. Suppl. 739, 27 N. Y. St. 907; Sacia *v.* Decker, 1 N. Y. Civ. Proc. 47, 56; People *v.* Sullivan, 13 N. Y. Crim. 377, 381; Com. *v.* Miller, 6 Pa. Super. Ct. 35, 40]; Schiffer *v.* Pruden, 64 N. Y. 47, 52 [*cited* or *quoted* in Blaufus *v.* People, 69 N. Y. 107, 109, 25 Am. Rep. 148; People *v.* Sullivan, 34 N. Y. App. Div. 544, 548, 54 N. Y. Suppl. 538; People *v.* Board of Police Com'rs, 20 Hun (N. Y.) 333, 337; Cameron *v.* Tribune Assoc., 3 Silv. Supreme (N. Y.) 575, 581, 7 N. Y. Suppl. 739, 27 N. Y. St. 907; Sacia *v.* Decker, 1 N. Y. Civ. Proc. 47, 56; People *v.* Sullivan, 13 N. Y. Crim. 377, 381].

59. Sacia *v.* Decker, 1 N. Y. Civ. Proc. 47, 56 [*quoted* in People *v.* Sullivan, 34 N. Y. App. Div. 544, 549, 54 N. Y. Suppl. 538, 13 N. Y. Crim. 381].

"No conviction is complete until sentence is passed and recorded." Per Lowrie, C. J., in Cumberland County *v.* Holcomb, 36 Pa. St. 349, 353 [*cited* in Com. *v.* Miller, 6 Pa. Super. Ct. 35, 39].

60. Com. *v.* Lockwood, 109 Mass. 323, 329, 12 Am. Rep. 699. In Com. *v.* Gorham, 99 Mass. 420, 422 [*quoted* in Com. *v.* Kiley, 150 Mass. 325, 326, 23 N. E. 55], construing Mass. Gen. Stat. c. 160, § 8; c. 173, § 1, it was said: "The term 'conviction' is used in at least two different senses in our statutes. In its most common use it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt." See also Faunce *v.* People, 51 Ill. 311, 312, where this language appears: "What is a conviction? Is it the verdict of guilty, or is it the sentence or judgment rendered on such a verdict? So far as our knowledge of the practice extends under this section since its adoption, the construction has been uniform, that it is the judgment on the verdict of guilty which renders the accused infamous and disqualifies him from testifying as a witness."

61. Ammidon *v.* Smith, 1 Wheat. (U. S.) 447, 461, 4 L. ed. 132 [*quoted* in Hill *v.* State, 41 Tex. 253, 255]. See also Nason *v.* Staples, 48 Me. 123, 127, where it is said: "'Conviction' is an adjudication that the

both the ascertaining of the guilt of the accused and judgment thereon by the court,[62] implying not simply a verdict, but also a judgment.[63] (Conviction: Abiding, see ABIDING. Of Crime, see CRIMINAL LAW. See also CONVICT; CONVICTS; CONVICTED.)

accused is guilty. It imports all that the statute requires before holding one to bail, and more. It involves not only the *corpus delicti*, and the probable guilt of the accused, but his actual guilt."

To what proceedings applicable.—"In its most extensive sense, this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means the judgment given against the criminal. And in its most restricted sense, it is a record of the summary proceeding upon any penal statute, before one or more justices of the peace, or other person duly authorized, in a case where the offender has been convicted and sentenced; this last has usually been termed a summary conviction." Bouvier L. Dict. [*quoted* in Egan *v.* Jones, 21 Nev. 433, 435, 32 Pac. 929; Blair *v.* Com., 25 Gratt. (Va.) 850, 853; Reg. *v.* Zickrick, 5 Can. Crim Cas. 380, 385; *In re* Fraser, 13 Nova Scotia 354, 364]. And *compare* Canfield *v.* Mitchell, 43 Conn. 169, 172; People *v.* Thornton, 25 Hun (N. Y.) 456, 465.

62. Hackett *v.* Freeman, 103 Iowa 296, 299, 72 N. W. 528 [*citing* Com. *v.* Gorham, 99 Mass. 420; Blaufus *v.* People, 69 N. Y. 107, 25 Am. Rep. 148; Schiffer *v.* Pruden, 64 N. Y. 47, 52; State *v.* Mooney, 74 N. C. 98, 21 Am. Rep. 487; Smith *v.* Com., 14 Serg. & R. (Pa.) 69; Smith *v.* State, 6 Lea (Tenn.) 637; 1 Greenleaf Ev. § 375].

63. Smith *v.* State, 6 Lea (Tenn.) 657, 659. See also Bouvier L. Dict.

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CROSS-REFERENCES

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Commutation of Sentence, see Pardon.
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Generally, see Criminal Law.
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I. DEFINITION.

A convict is one who has been condemned by a competent court; one who has been convicted of a crime or misdemeanor.[1] The term is a broad one and is not confined to those who have been convicted of felonies or misdemeanors under the general laws, but applies also to those who have been convicted of violating municipal ordinances.[2] And a person committed to prison upon a summary conviction or in default of payment of a penalty or fine adjudged to be paid upon such conviction is to be regarded as a criminal prisoner.[3]

II. STATUS OF THE CONVICT.

A. Attainder at Common Law — 1. IN GENERAL. By the ancient common law when sentence was pronounced for treason or other felony the offender was, by operation of law, placed in a state of attainder.[4] And there were three principal incidents consequent upon such attainder, namely, forfeiture, corruption of blood, and an extinction of civil rights more or less complete which was denominated civil death.[5]

1. Bouvier L. Dict. See also Abbott L. Dict.; Century Dict.; *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829.

Another definition is: "He that is found guilty of an offense by verdict of a jury." Jacob L. Dict. [*quoted* in *Ex p.* Brown, 68 Cal. 176, 179, 8 Pac. 829].

"An accused person is termed a 'convict' after final condemnation by the highest court of resort which by law has jurisdiction of his case, and to which he may have thought proper to appeal." Tex. Pen. Code, art. 27 [*quoted* in Arcia *v.* State, 26 Tex. App. 193, 205, 9 S. W. 685].

"All the definitions of the words 'convict' and 'conviction,' as asserted by the defendant's counsel, in the English lexicons and law dictionaries in general use, as well as by the chief text writers, agree in including within the term convict every person duly found guilty by a legal tribunal of a crime, whether it be a misdemeanor or a felony." Cameron *v.* Tribune Assoc., 3 Silv. Supreme (N. Y.) 575, 581, 7 N. Y. Suppl. 739, 27 N. Y. St. 907 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Stormouth Eng. Dict.; Webster Eng. Dict.; Worcester Unabr. Dict.].

That a person is a "convict" necessarily means that he has been duly tried and found guilty of some offense against the law and is subject to punishment, and it must be presumed that he was properly sentenced by the court in which his case was tried. Taylor *v.* State, 108 Ga. 384, 34 S. E. 2.

Under immigration laws.— An alien remains a convict within the meaning of the federal act regulating immigration, although he has served the full term of imprisonment imposed in the country whence he came. *In re* Aliano, 43 Fed. 517; *In re* Varana, 43 Fed. 517.

2. *Ex p.* Birmingham, 116 Ala. 186, 22 So. 454.

3. Reg. *v.* Tynemouth, 16 Q. B. D. 647, 16 Cox C. C. 74, 50 J. P. 454, 55 L. J. M. C. 181, 54 L. T. Rep. N. S. 386; Kennard *v.* Simmons, 15 Cox C. C. 397, 48 J. P. 551, 50 L. T. Rep. N. S. 28.

A person committed to prison under 6 & 7 Vict. c. 73, § 32, and 23 & 24 Vict. c. 127, § 26, for acting as a solicitor without being duly qualified, is a criminal prisoner within 28 & 29 Vict. c. 126, § 4. Osborne *v.* Milman, 18 Q. B. D. 471, 51 J. P. 437, 56 L. J. Q. B. 263, 56 L. T. Rep. N. S. 808, 35 Wkly. Rep. 397 [*reversing* 16 Cox C. C. 138].

4. 1 Bl. Comm. 132, 133; 4 Bl. Comm. 336, 380; 1 Chitty Crim. L. 723; Coke Litt. §§ 199, 200, 132*a*, 132*b*, 133*a*. See also Green *v.* Shumway, 39 N. Y. 418.

5. See opinion of Andrews, J., in Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 18 N. Y. St. 213, 6 Am. St. Rep. 368. And see ATTAINDER; BILL OF ATTAINDER.

2. Forfeiture. Forfeiture was a part of the punishment for the crime, said to have been of Saxon origin, by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the crown, the former absolutely on conviction and the latter perpetually or during the life of the offender, after sentence and office found.[6]

3. Corruption of Blood. The doctrine of corruption of blood was of feudal origin and was introduced after the Norman Conquest. The blood of the attainted person was deemed to be corrupted and stained, so that he could not transmit his estate to his heirs, nor could they take by descent from the ancestor. The crime of the attainted felon was deemed a breach of the implied condition of the original donation of the feud, *dum bene se gesserit*, and such donation was thereby determined, and his lands escheated to the lord, but this escheat was subordinate to the prior and superior law of forfeiture to the crown, unless the king was the immediate lord of the fee; in which case the distinction became immaterial.[7] And an attainted person, although pardoned, could not take by descent, for nothing short of an act of parliament could remove the effects of the attainder.[8]

4. Civil Death. The incident of civil death attended every attainder of treason or other felony, whereby in the language of Lord Coke the attainted person "is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*," [9] or as stated by Chitty, "he is disqualified from being a witness, can bring no action, nor perform any legal function, he is, in short, regarded as dead in law." [10] He could be heard in court only for the direct purpose of reversing the attainder, and not in prosecution of a civil right;[11] but although he could not sue he might be sued,[12] and his body could be taken in execution, subject, however, to the paramount claims of public justice.[13] He was not incapacitated to make a contract, but he could make no contract which he

6. 2 Bl. Comm. 251, 252; Broom & H. Comm. 404; 1 Chitty Crim. L. 723 *et seq.*; Comyns Dig. tit. Forfeiture (K). See also Cozens *v.* Long, 3 N. J. L. 764.

Goods forfeited, although clergy allowed.— A man, by a conviction of felony, although allowed his clergy, forfeited his goods. Finch's Case, 6 Coke 63*a*.

No forfeiture before conviction.— After the commission of a felony and before conviction the guilty party could make a valid sale or assignment of his personal property, provided it was made in good faith. Chowne *v.* Baylis, 31 Beav. 351, 8 Jur. N. S. 1028, 31 L. J. Ch. 757, 8 L. T. Rep. N. S. 739, 11 Wkly. Rep. 5; Whitaker *v.* Wisbey, 12 C. B. 44, 16 Jur. 411, 21 L. J. C. P. 116, 74 E. C. L. 44; *Re* Saunders, 9 Cox C. C. 279, 4 Giff. 179, 9 Jur. N. S. 570, 32 L. J. Ch. 224, 7 L. T. Rep. N. S. 704, 1 New Rep. 256, 11 Wkly. Rep. 276; Perkins *v.* Bradley, 1 Hare 219, 23 Eng. Ch. 219.

No forfeiture of lands until office found.— The attainted person was not divested of his lands till office found. Thus in Nichols *v.* Nichols, Plowd. 477, 486, the question was put, "If the possession in deed or law, of the lands of a person attainted of treason, should not be in the king before office found, in whom should it be by the course of the common law, in the life of the person attainted?" And it was held that the freehold of such lands would be, in fact, in the person attainted, so long as he should live; "for, as he hath capacity to take in deed lands by a new purchase, so hath he power to retain his ancient possessions, and he shall be tenant to every *præcipe*."

Property of the wife.— In Coombes *v.* Queen's Proctor, 16 Jur. 820, 2 Rob. Eccl. 547, it appeared that the wife of a felon under sentence of transportation died intestate leaving property acquired after the conviction of her husband, and it was held that such property belonged to the crown as accrued to the felon. But the wife could make a will and in all things act as a *feme sole*. Newsome *v.* Bowyer, 3 P. Wms. 37, 24 Eng. Reprint 959; Portland *v.* Prodgers, 2 Vern. 104.

7. 2 Bl. Comm. 251, 252; 1 Chitty Crim. L. 723 *et seq.*; Comyns Dig. tit. Forfeiture (K).

8. Viner Abr. Attainder (B), 7.

9. Coke Litt. § 199 note.

10. 1 Chitty Crim. L. 724. See also Banyster *v.* Trussel, Cro. Eliz. 516.

11. Bullock *v.* Dodds, 2 B. & Ald. 258, 20 Rev. Rep. 420; Harvey *v.* Jacob, 1 B. & Ald. 159; Barrett *v.* Power, 2 C. L. R. 488, 9 Exch. 338, 18 Jur. 156, 23 L. J. Exch. 162, 2 Wkly. Rep. 220, 25 Eng. L. & Eq. 524; Roberts *v.* Walker, 1 Russ. & M. 752, 5 Eng. Ch. 752; *Ex p.* Bullock, 14 Ves. Jr. 452.

12. Coppin *v.* Gunner, 2 Ld. Raym. 1572; Ramsay *v.* McDonald, 1 W. Bl. 30; Ramsden *v.* Macdonald, 1 Wils. C. P. 217; 1 Chitty Crim. L. 725; Viner Abr. Attainder (B).

13. Davis *v.* Duffie, 1 Abb. Dec. (N. Y.) 486, 3 Keyes (N. Y.) 606, 3 Transcr. App. (N. Y.) 54, 4 Abb. Pr. N. S. (N. Y.) 478; 1 Chitty Crim. L. 725; Viner Abr. Attainder (B).

could enforce in a court of justice.[14] He could be grantor or grantee after attainder, and the grant would be good as against all persons except the king.[15] So also it seems that he could devise his lands, subject only to the right of entry for the forfeiture.[16] And he could demise his lands before office found.[17] A right of action for damages was not forfeited to the crown upon conviction;[18] and if a personal wrong were done to an attainted person during his attainder he might, after being pardoned, have an action for it.[19]

B. Status Fixed by Statute — 1. In England. By a series of English statutes the whole doctrine of attainder, corruption of blood, and forfeiture, except forfeiture consequent upon outlawry, has been swept away, and provision is made for the administration of the estate of the convicted felon by trustees for the benefit of his creditors and the support of his family. The real property of the traitor or felon remains his own, subject to the temporary estate of the trustees, and he may dispose of it by will, but he is incapable of alienating or charging his property or of making any contract.[20]

2. In the United States — a. In General. The constitution of the United States provides that congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.[21] Consequently only the life-estate of the person for whose offense land is seized is subject to condemnation and sale, and nothing more is within the jurisdiction or judicial power of the court, and it follows that a decree condemning the fee can have no greater effect than to subject the life-estate to sale.[22] And it appears that the forfeitures and disabilities imposed by the common law upon persons attainted of treason or felony are at present unknown to the laws of the United States, and a conviction is followed by no consequences except those that are declared by statute.[23]

b. Civil Death. Accordingly it is held that a person under sentence of imprisonment for life is not civilly dead unless the statute so provides;[24] but in a number of the states there are statutes declaring in substance that a person convicted of a felony and sentenced to imprisonment for life shall be deemed and taken to be civilly dead.[25] This disability, however, continues only during the imprisonment. The effect of a pardon is to acquit the offender of the penalties annexed to the conviction and to give him a new credit and capacity.[26] And

14. Kynnaird *v.* Leslie, L. R. 1 C. P. 389, 12 Jur. N. S. 468, 35 L. J. C. P. 226, 14 L. T. Rep. N. S. 756, 14 Wkly. Rep. 761.

15. Sheppard Touch. 231; Viner Abr. Attainder (B).

16. Bacon Abr. Wills and Testaments (B); 1 Jarman Wills (5th ed.) 42.

17. Doe *v.* Pritchard, 5 B. & Ad. 765, 3 L. J. K. B. 11, 2 N. & M. 489, 27 E. C. L. 322.

18. Fleming *v.* Smith, 12 Ir. C. L. 404.

19. Banyster *v.* Trussel, Cro. Eliz. 516; Viner Abr. Attainder (B), 4.

20. 54 Geo. III, c. 45, abolished forfeiture of lands and corruption of blood in every case except treason, petit treason, and murder, and this statute has been supplemented by 33 & 34 Vict. c. 23, with the result stated in the text.

21. U. S. Const. art. 3, § 3. And similar provisions are to be found in the constitutions of the various states.

22. So held under the act of congress of July 17, 1862 (12 U. S. Stat. at L. 589), known as the Confiscation Act, and the joint resolution of the same date explanatory thereof. See Day *v.* Micou, 18 Wall. (U. S.) 156, 21 L. ed. 860; Bigelow *v.* Forrest, 9 Wall. (U. S.) 339, 19 L. ed. 696.

23. See *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111.

24. Willingham *v.* King, 23 Fla. 478, 2 So. 851; Presbury *v.* Hull, 34 Mo. 29 (*dictum*); Frazer *v.* Fulcher, 17 Ohio 260; Davis *v.* Laning, 85 Tex. 39, 19 S. W. 846, 34 Am. St. Rep. 784, 18 L. R. A. 82.

One under sentence for murder is not *civiliter mortuus*. Cannon *v.* Windsor, 1 Houst. (Del.) 143.

25. *In re* Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62; *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; Kan. Gen. Stat. (1897), c. 100, § 376; Sample *v.* Horner, 61 Kan. 738, 60 Pac. 745; Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 18 N. Y. St. 213, 6 Am. St. Rep. 368, 1 L. R. A. 264; Matter of Zeph, 50 Hun (N. Y.) 523, 3 N. Y. Suppl. 460, 20 N. Y. St. 382; Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415; Graham *v.* Adams, 2 Johns. Cas. (N. Y.) 408; Troup *v.* Wood, 4 Johns. Ch. (N. Y.) 228; Baltimore *v.* Chester, 53 Vt. 315, 38 Am. Rep. 677.

A person outlawed by the confiscation act of April 30, 1779, became *civiliter mortuus*. Greenough *v.* Welles, 10 Cush. (Mass.) 571.

26. *In re* Deming, 10 Johns. (N. Y.) 232, 483; Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118.

there are other statutes declaring that a sentence to imprisonment in the state prison for a term less than for life shall suspend during such term the civil rights of the person so sentenced;[27] and an escape during the term does not remove that disability.[28] These statutes apply to sentences in the state courts only and not to those in the federal courts;[29] and they do not apply to convicts confined in county penitentiaries or jails,[30] or in state reformatories.[31]

c. Property and Conveyances. Inasmuch as a convicted felon might be sued at common law, and, unless the statute provides other means of reaching his property, still may be sued, the law would not be consistent with itself if it held the party alive for the purpose of being sued and charged in execution, and yet dead for the purpose of transmitting his estate to his heirs.[32] It is accordingly held that a conviction and sentence to life imprisonment do not operate, *eo instanti*, to divest the title of the offender to his property;[33] and he may dispose of it by will, although he be sentenced to death.[34] Consequently letters of administration cannot be granted on his estate,[35] for his conviction and sentence do not operate a devolution of his property to the persons who would be his heirs at law in case of his physical death,[36] unless the law makes provision, in case he is sentenced for life, for the administration and disposal of his estate the same as if he were naturally dead.[37] It has been held, however, that civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law, and that a person who is civilly dead under the statute is consequently deprived of his right of inheritance.[38] Under statutes providing for a suspension of civil rights during imprisonment for terms less than for life, the offender is not divested of title to his property, although he is sometimes deprived of the control of it by the appointment of trustees to manage it during his term of imprisonment. Where this is the case he may not alienate or encumber his lands during the term of his sentence to imprisonment;[39] but he may devise his estate as though he were not convicted,[40] and he may accept a devise of an estate upon condition.[41] And in cases where the statute is silent on the subject he may take or convey an estate by grant or devise,[42] and upon his discharge or release from

27. Beck *v.* Beck, 36 Miss. 72; Presbury *v.* Hull, 34 Mo. 29; Bowles *v.* Habermann, 96 N. Y. 625.

28. Beck *v.* Beck, 36 Miss. 72.

29. Presbury *v.* Hull, 34 Mo. 29.

30. Bowles *v.* Habermann, 95 N. Y. 246.

31. Sample *v.* Horner, 61 Kan. 738, 60 Pac. 745.

32. Chancellor Kent, in Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118.

33. Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 18 N. Y. St. 213, 6 Am. St. Rep. 368, 1 L. R. A. 264; Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415. In Avery *v.* Everett, *supra*, it appeared that the testator devised his lands to his wife for life or during her widowhood, remainder in fee to his son, with a substituted remainder in fee to his nephew in case his son died without issue. The widow died, and the son remaining unmarried and without issue was sentenced to imprisonment in the state prison for life. It was contended on the part of the plaintiff that the civil death of the son divested his estate and let in the substituted remainder of the nephew, but the court decided against the plaintiff's contention on the double ground that the civil death of the son did not divest the title to his property, and that by the true construction of the will the natural death of the son without issue was the contingency upon which the nephew would take.

Kan. Gen. Stat. (1899), § 5583, providing that when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead, does not cast the descent of his property on his heirs, by the fact of such sentence and imprisonment. Smith *v.* Becker, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141.

34. Rankin *v.* Rankin, 6 T. B. Mon. (Ky.) 531, 17 Am. Dec. 161.

35. Matter of Zeph, 50 Hun (N. Y.) 523, 3 N. Y. Suppl. 460, 20 N. Y. St. 382; Frazer *v.* Fulcher, 17 Ohio 260.

36. Davis *v.* Laning, 85 Tex. 39, 19 S. W. 846, 34 Am. St. Rep. 784, 18 L. R. A. 82.

37. Williams *v.* Shackleford, 97 Mo. 322, 11 S. W. 222.

38. *In re* Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62.

39. A mortgage executed by one while undergoing such sentence is void. Williams *v.* Shackleford, 97 Mo. 322, 11 S. W. 222.

40. Wooldridge *v.* Lucas, 7 B. Mon. (Ky.) 49.

41. La Chapelle *v.* Burpee, 69 Hun (N. Y.) 436, 23 N. Y. Suppl. 453, 52 N. Y. St. 701.

42. La Chapelle *v.* Burpee, 69 Hun (N. Y.) 436, 23 N. Y. Suppl. 453, 52 N. Y. St. 701.

imprisonment so much of his estate as has not been legally disposed of reverts to him.[43]

d. Contracts Generally. In the absence of statutory inhibition one under sentence of imprisonment for life may make a contract which is enforceable against his estate, although he may not be able to enforce it with the aid of the courts.[44]

e. Actions by Convicts. Where a conviction works no forfeiture of estate, a convict may maintain an action to enforce his property rights,[45] or for personal injuries received during his imprisonment.[46] And although he be imprisoned for life he should sue in his own name; it is improper to join another party plaintiff as *prochein ami*.[47] Even a conviction and sentence to death in one state will not deprive the convict of his right to sue in the courts of another state.[48] Where, however, the statute deprives one sentenced to state prison of the right to maintain an action, the disability continues during the time of the sentence, although he has escaped.[49]

f. Actions Against Convicts. By the great weight of authority, offenders, whether sentenced to state prison for life or for a term of years during which their civil rights are suspended, are still liable to be sued, and this liability necessarily carries with it the right to defend;[50] although there are cases holding that a pending action is abated by the conviction and sentence of the defendant to imprisonment in the state prison.[51] But again it has been held that a plea or answer in abatement setting up the civil death of the defendant is inconsistent

43. Wooldridge *v.* Lucas, 7 B. Mon. (Ky.) 49.

44. Stephani *v.* Lent, 30 Misc. (N. Y.) 346, 63 N. Y. Suppl. 471. In Miller *v.* Finkle, 1 Park. Crim. (N. Y.) 374, it seems to have been assumed that one sentenced for a felony to state prison could not transfer his personal property, but the point was not necessary to the decision, for the sentence was vacated and the prisoner was resentenced, and the transfer of property having been made while the prisoner was under the vacated sentence was held valid.

Thus a statute prohibiting a convict from making any conveyance of his property or any part thereof during imprisonment does not prevent his executing an appeal-bond in a case in which he is interested as appellant. Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

45. Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

46. Dade Coal Co. *v.* Haslett, 83 Ga. 549, 10 S. E. 435.

47. Willingham *v.* King, 23 Fla. 478, 2 So. 851.

48. Wilson *v.* King, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802.

49. Beck *v.* Beck, 36 Miss. 72.

A plea in abatement under such a statute alleging that the plaintiff is confined in the state prison should conclude with a prayer that the bill remain without day until the disability be removed and not that the bill be dismissed. Beck *v.* Beck, 36 Miss. 72.

50. *California.*— Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99; Brown *v.* Mann. 68 Cal. 517, 9 Pac. 549; *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111.

Delaware.— Cannon *v.* Windsor, 1 Houst. 143.

Kentucky.—Wooldridge *v.* Lucas, 7 B. Mon. 49.

Nevada.— Maxwell *v.* Rives, 11 Nev. 213.

New Jersey.— Dunham *v.* Drake, 1 N. J. L. 315.

New York.— Bowles *v.* Habermann, 95 N. Y. 246; Davis *v.* Duffie, 1 Abb. Dec. 486, 3 Keyes 606, 3 Transcr. App. 54, 4 Abb. Pr. N. S. 478; Stephani *v.* Stephani, 75 Hun 188, 26 N. Y. Suppl. 1039, 58 N. Y. St. 185; Bonnell *v.* Rome, etc., R. Co., 12 Hun 218; Werckman *v.* Werckman, 4 N. Y. Civ. Proc. 146; Morris *v.* Walsh, 14 Abb. Pr. 387; Phelps *v.* Phelps, 7 Paige 150.

Pennsylvania.— Smith *v.* Hooton, 3 Pa. Dist. 250.

Virginia.—A citizen of the commonwealth serving a term of penal servitude in another state under sentence of a federal court may be sued in the courts of Virginia. Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

See 11 Cent. Dig. tit. "Convicts," § 6 *et seq.*

Citizenship of convict.— The fact that a citizen of a state is by judgment of a federal court confined to prison in another state does not make him a citizen of the latter state, so that a suit against him in the place of his former residence may be removed from the state court. Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

51. O'Brien *v.* Hagan, 1 Duer (N. Y.) 664; Freeman *v.* Frank, 10 Abb. Pr. (N. Y.) 370; Graham *v.* Adams, 2 Johns. Cas. (N. Y.) 408.

There is some confusion in the New York cases. Thus in Davis *v.* Duffie, 8 Bosw. (N. Y.) 617, it was held that the conviction and sentence to the state prison of a party defendant do not abate the action, and in Bonnell *v.* Rome, etc., R. Co., 12 Hun (N. Y.) 218, it was held that judgment by default might be entered against one sentenced after issue joined. This is probably the better

and bad on demurrer, because the fact that he is able to plead or answer shows him to be alive.[52] Where the statute provides for the appointment of a trustee of the estate of one imprisoned for crime, it is clear that such trustee should defend any action against the convict that may be pending at the time of his conviction and sentence, and proceedings ought to be stayed until after his appointment and qualification.[53]

g. Service of Process on Convicts. In the absence of any statutory provision on the subject process may be served personally on a convict confined in prison,[54] and a governor or warden of a prison who refuses to permit such service renders himself liable to attachment for contempt.[55] Personal service on the convict, however, is not always necessary. It has been held that service on the warden or keeper of the prison is sufficient.[56] So also it seems that a substituted service by leaving a true copy at his place of residence with an adult member of his family may be sufficient.[57]

h. As to Other Crimes — (i) *Doctrine of Autrefois Attaint.* By the early common law, as we have seen, whenever a man was attainted of felony by sentence of death, his goods and chattels, lands and tenements were forfeited to the crown, and he was deemed as civilly dead. As any further prosecution under such circumstances would be a useless and superfluous proceeding, it was considered that a plea of *autrefois attaint*, or former attainder, was a good plea in bar for the same or any other felony except treason.[58] And in an early American case this common-law doctrine was so far recognized as to hold that a conviction, judgment, and execution upon one indictment for a felony not capital was a bar to all other indictments for felonies not capital, committed previous to such conviction, judgment, and execution.[59] In England this doctrine has been swept away by a statute which provides that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offense as that charged in the indictment;[60] and the doctrine has generally been repudiated by American courts without the aid of legislation.[61]

(ii) *Crimes Committed by Convicts.* Inasmuch as the ancient doctrine of

opinion. See Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 18 N. Y. St. 213, 6 Am. Rep. 368, 1 L. R. A. 264.

52. O'Brien *v.* Hagan, 1 Duer (N. Y.) 664; Freeman *v.* Frank, 10 Abb. Pr. (N. Y.) 370; Graham *v.* Adams, 2 Johns. Cas. (N. Y.) 408; Troupe *v.* Wood, 4 Johns. Ch. (N. Y.) 228.

53. Rice County *v.* Lawrence, 29 Kan. 158; Bowles *v.* Habermann, 96 N. Y. 625; Stephani *v.* Stephani, 75 Hun (N. Y.) 188, 26 N. Y. Suppl. 1039.

Foreclosure proceedings.— It seems, however, that the appointment of a trustee is not necessary in order to foreclose a mortgage on the convict's property, as such appointment would not dispense with the necessity of making him a party to the action of foreclosure. David *v.* Duffie, 8 Bosw. (N. Y.) 617.

Where pending a civil action the defendant was sentenced to the state prison, and the plaintiff, without the appointment of a trustee to manage the estate or defend the action, took judgment by default, it was held that the judgment was a nullity and might be set aside by proper proceedings before the trial court. Rice County *v.* Lawrence, 29 Kan. 158.

54. Davis *v.* Duffie, 8 Bosw. (N. Y.) 617; Phelps *v.* Phelps, 7 Paige (N. Y.) 150.

55. Danson *v.* Le Capelain, 7 Exch. 667, 21 L. J. Exch. 219.

56. Johnson *v.* Johnson, Walk. (Mich.) 309; Newenham *v.* Pemberton, 2 Coll. 54, 9 Jur. 637, 33 Eng. Ch. 54.

57. Smith *v.* Hooton, 3 Pa. Dist. 250.

58. Sonte's Case, Dyer 214*b*; Armstrong *v* L'Isle, 12 Mod. 109; 4 Bl. Comm. 336; 2 Hawkins P. C. 375.

The exceptions, as enumerated by Blackstone, were, where the former attainder was reversed, where the attainder was upon indictment it was no bar to an appeal, cases of treason, and where a person attainted of one felony was afterward indicted as principal in another to which there were accessories, for the accessories could not be prosecuted until after the conviction of the principal. 4 Bl. Comm. 336.

59. Crenshaw *v.* State, Mart. & Y. (Tenn.) 122, 17 Am. Dec. 788. In State *v.* Fayetteville Com'rs, 6 N. C. 371, it appeared that the defendants were bound to keep all the streets of an incorporated town in good condition, and several indictments were found for the neglect of different streets. After one conviction the court sustained the plea of *autrefois convict* as a bar to the other indictments.

60. 7 & 8 Geo. IV, c. 28, § 4.

61. Singleton *v.* State, 71 Miss. 782, 16 So. 295, 42 Am. St. Rep. 488. Thus in Hawkins *v.* State, 1 Port. (Ala.) 475, 27 Am. Dec. 641, it was held that a person indicted for

autrefois attaint has no place in modern American jurisprudence, a person may now be tried for a capital felony, although he is at the time under sentence of life imprisonment for another offense.[62] And if a convict while serving his sentence commits another offense he may be tried and sentenced to a term in addition to his original sentence,[63] or for life, in which case the term will commence on the day of conviction and sentence and run concurrently with that of the former sentence;[64] or he may be sentenced to death and executed accordingly;[65] for the fact that a convict is undergoing sentence in a state prison is no bar to his trial, conviction, and sentence for another and higher grade of offense. The idea that because a convict is under many disabilities he may with impunity commit crime as he has opportunity is untenable.[66] And in such case the convict may be charged, tried, and convicted in like manner as other persons, and it is not necessary to set out in the indictment the particulars of his former trial, conviction, and sentence to imprisonment;[67] but if the facts of his former conviction are set out in detail, he is not entitled to have the count containing them stricken out on the ground that it is calculated to prejudice him in the minds of the jury.[68]

III. CUSTODY AND CONTROL.

A. In General. As a general rule after the conviction and sentence of a prisoner he is in the legal custody of the sheriff of the county until he is delivered to the warden of the prison to which he is committed by the judgment of the court;[69] but it may be the duty of the sheriff, under statutory requirement, to deliver the prisoner to a contractor for the labor of state or county convicts, and in that case if he keeps the prisoner in jail after the contractor demands him, he is chargeable with jail fees, as well as the costs of a writ of habeas corpus sued out by the contractor to obtain custody of the convict.[70] And where the statute makes provision for the employment of convicts upon public works or ways under the direction of some responsible person, they may be taken out of the custody of the sheriff for that purpose, and if he refuses to deliver them to the person duly appointed overseer he may be required to do so by a writ of mandamus;[71] but a person convicted of felony and sentenced to confinement in

horse-stealing could not legally plead in defense a subsequent conviction of negro-stealing, for which he had been pardoned. See also State *v.* McCarty, 1 Bay (S. C.) 334.

62. People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; Peri *v.* People, 65 Ill. 17; Coleman *v.* State, 35 Tex. Crim. 404, 33 S. W. 1083.

In Missouri it is held that one under sentence for a felony cannot be tried in the same court for another felony previously committed, until he has served his sentence or the judgment is set aside or reversed. State *v.* Buck, 120 Mo. 479, 25 S. W. 573; *Ex p.* Meyers, 44 Mo. 279.

63. Kennedy *v.* Howard, 74 Ind. 87; Henderson *v.* James, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290.

64. Kennedy *v.* Howard, 74 Ind. 87.

65. *Indiana.*— Kennedy *v.* Howard, 74 Ind. 87.

Mississippi.— Singleton *v.* State, 71 Miss. 782, 16 So. 295, 42 Am. St. Rep. 488.

Missouri.— State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

New York.— Thomas *v.* People, 67 N. Y. 218.

Virginia.— Ruffin *v.* Com., 21 Gratt. 790.

See 11 Cent. Dig. tit. "Convicts," § 4.

66. *Delaware.*— State *v.* Morris, 2 Harr. 534.

Georgia.— Perry *v.* State, 110 Ga. 234, 36 S. E. 781; Taylor *v.* State, 108 Ga. 384, 34 S. E. 2.

Mississippi.— Singleton *v.* State, 71 Miss. 782, 16 So. 295, 42 Am. St. Rep. 488.

Missouri.— State *v.* Johnson, 93 Mo. 73, 5 S. W. 699; State *v.* Connell, 49 Mo. 282.

Nevada.— *Ex p.* Ryan, 10 Nev. 261.

Texas.— Gaines *v.* State, (Crim. 1899) 53 S. W. 623.

See 11 Cent. Dig. tit. "Convicts," § 6.

A convict who escapes and commits a crime may be convicted and sentenced therefor before he has served out his first sentence. People *v.* Flynn, 7 Utah 378, 26 Pac. 1114.

67. State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. See also State *v.* Johnson, 93 Mo. 73, 5 S. W. 699.

68. Williams *v.* State, 130 Ala. 31, 30 So. 336.

69. Griffin *v.* State, 37 Ark. 437; Hicks *v.* Folks, 97 Cal. 241, 32 Pac. 8; Murray *v.* State, 25 Fla. 528, 6 So. 498.

70. Matthews *v.* Walker, 57 Miss. 337.

71. Hicks *v.* Folks, 97 Cal. 241, 32 Pac. 8.

the state prison is in contemplation of law in prison until he serves his term or is pardoned, although he may have been hired out to work for a contractor for convict labor,[72] for the state cannot surrender the police power of the state over the convicts.[73] A prisoner who has been convicted of a crime by a federal court and is confined in a state prison, with the consent of the state, is deemed to be in the custody of the federal authorities.[74]

B. Permission to Go at Large. In the absence of statutory authority it is unlawful for the warden of a penitentiary to allow a convict to go at large on a pass.[75] A convict thus at large may lawfully be arrested as an escaped felon by a peace officer without a warrant;[76] and where a convict is at large under a revocable permit from the prison authorities which is authorized by statute, he may, upon revocation of the permit, be rearrested, and such arrest is not subject to the rules governing arrests of persons not yet convicted.[77] Upon the conviction and sentence of a prisoner it is the duty of the sheriff to take him into his custody and dispose of him in accordance with the judgment of the court, and if he voluntarily permit the convict to go at large he is guilty of a misdemeanor and is subject to removal from office for wilful neglect of duty.[78]

C. Chastisement. A convict who violates any of the prison regulations may be subjected to solitary confinement or such other reasonable punishment as the statute may authorize;[79] but corporal punishment cannot lawfully be inflicted without legislative sanction.[80] The custodian of a county jail may be punished by attachment for contempt for inflicting a cruel or unusual punishment on a prisoner committed to such jail by a federal court.[81] And *a fortiori* the hirer of a convict under sentence of hard labor has no right to inflict corporal punishment upon him;[82] and if he does so without statutory authority he is liable to indictment for assault and battery.[83]

D. Action For Injuries to Convict Laborer. Public officers having the custody of prisoners are not liable to a prisoner for injuries caused by defective machinery with which he was put to work;[84] nor is the state liable for such injuries.[85] On the other hand a convict is the servant of the contractor to whom he is hired out, although his wages go to the county or state, and he may maintain an action against the contractor if he is injured by defective machinery

72. Ruffin *v.* Com., 21 Gratt. (Va.) 790.

73. Georgia Penitentiary Cos. Nos. 2 & 3 *v.* Nelms, 71 Ga. 301.

74. Randolph *v.* Donaldson, 9 Cranch (U. S.) 76, 3 L. ed. 662; *In re* Birdsong, 39 Fed. 599, 4 L. R. A. 628. And see *Ex p.* Le Bur, 49 Cal. 159. See also Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

75. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; Griffin *v.* State, 37 Ark. 437; Martin *v.* State, 32 Ark. 124.

76. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

77. Conlon's Case, 148 Mass. 168, 19 N. E. 164.

78. Griffin *v.* State, 37 Ark. 437. A sheriff who allows a prisoner condemned to imprisonment in the penitentiary his liberty for thirty hours is guilty of a wilful neglect of duty, justifying his removal from office. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369.

79. Boone *v.* State, 8 Lea (Tenn.) 739.

80. Smith *v.* State, 8 Lea (Tenn.) 744.

81. *In re* Birdsong, 39 Fed. 599, 4 L. R. A. 628.

82. Prewitt *v.* State, 51 Ala. 33; Werner *v.* State, 44 Ark. 122; State *v.* Norman, 53 N. C. 220.

A contractor for the labor of convicts is not clothed with any quasi-official character, the discipline remains in the hands of the warden, who may exclude the contractor or oblige him to furnish a proper superintendent, if his own presence for any cause is prejudicial to discipline. Horner *v.* Wood, 23 N. Y. 350.

83. Cornell *v.* State, 6 Lea (Tenn.) 624. See also State *v.* Jenkins, 73 Miss. 523, 19 So. 206; Horton *v.* State, (Miss. 1893) 13 So. 886.

An indictment for maltreating a convict hired out to the defendant need not allege the court by which the convict was sentenced, the term of his sentence, the offense of which he was convicted, or the terms of the contract of hiring. Sanders *v.* State, 55 Ala. 183.

Vacation of lease.— In Georgia the governor has full power, because of maltreatment of convicts, to vacate the leases under which they may be held. Asheville Cigar Co. *v.* Brown, 100 Ga. 171, 28 S. E. 37.

84. O'Hare *v.* Jones, 161 Mass. 391, 37 N. E. 371; Alamango *v.* Albany County, 25 Hun (N. Y.) 551.

85. Lewis *v.* State, 96 N. Y. 71, 48 Am. Rep. 607.

furnished by him.[86] And the rule forbidding recovery by a servant who subjects himself to injury by going without objection into a place which he knows to be dangerous[87] does not apply to a convict whose movements are controlled by a guard placed over him by the contractor with power to compel obedience, even though the convict is under the general charge of a state officer;[88] but so far as his injuries affect his ability to labor during the period of his imprisonment he cannot recover.[89]

IV. SUPPORT.

Primarily the expense of supporting convicts while in prison is a state or county charge accordingly as they are committed to the state prison or the county jail;[90] but contractors for the labor of state or county convicts are usually, by law or the express terms of their contracts, bound to support in a suitable manner the convicts committed to their charge,[91] and this includes not only food and clothing, but also suitable and necessary medical care and attention.[92]

V. CONTRACT LABOR.

A. Contracts by Convicts — 1. In General. Under a statute authorizing one convicted of a crime to procure security for the payment of his fine and the costs incidental to his conviction, by contracting with his surety to render personal services until his fine and the costs are paid, he cannot include the repayment of money advanced to him by his surety in such contract, as this would amount to imprisonment for debt.[93] If such contract requires the convict to labor in one capacity as a farm hand, he cannot be required to labor in another as a railroad section hand;[94] and if the court which tried and sentenced him had no jurisdiction, he may recover from the contractor the value of his services on a *quantum meruit*.[95] If on the other hand the contract for his services was made with the public authorities he cannot recover the value of his services from the

86. Dade Coal Co. *v.* Haslett, 83 Ga. 549, 10 S. E. 435; Hartwig *v.* Bay State Shoe, etc., Co., 43 Hun (N. Y.) 425; Dalheim *v.* Lemon, 45 Fed. 225.

But if he has petitioned the legislature for relief and obtained it, the convict cannot afterward maintain an action against the contractor to recover damages for the same injury. Metz *v.* Soule, 40 Iowa 236.

In Ohio it has been held in the court of common pleas that the relation of master and servant does not exist between a penitentiary convict and a manufacturer in the prison availing himself of the labor of the convict, under a contract with the board of managers of the penitentiary, there being no privity of contract between the parties and no statute creating the relation. Rayborn *v.* Patton, 11 Ohio Dec. (Reprint) 100, 24 Cinc. L. Bul. 434.

87. See, generally, MASTER AND SERVANT.

88. Chattahoochee Brick Co. *v.* Braswell, 92 Ga. 631, 18 S. E. 1015.

But the lessees of a penitentiary are not responsible for an injury to a convict caused by the defective construction of a bunk made by a servant of the penitentiary commissioners having charge of the convicts. Cunningham *v.* Moore, 55 Tex. 373, 40 Am. Rep. 812.

89. Dalheim *v.* Lemon, 45 Fed. 225.

90. Chambers *v.* Walker, 120 N. C. 401, 27 S. E. 77. See also Jefferson County *v.* Hudson, 22 Ark. 595; Middlesex County *v.* Lowell, 109 Mass. 162; Watson *v.* Cambridge, 18 Pick. (Mass.) 470.

Mass. Stat. (1883), c. 148, § 1, making the support of a state prison convict who has been removed to the state lunatic hospital a charge on the commonwealth until the end of his sentence in state prison, does not apply to a female convict transferred to such hospital from the reformatory prison for women. Her support remains a charge on the town or city in which she has a settlement, under Mass. Pub. Stat. c. 87, § 33. Beard *v.* Boston, 151 Mass. 96, 23 N. E. 826.

The duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff, and to him alone is the county liable for the same. Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450. See also Atchison County Com'rs *v.* Tomlinson, 9 Kan. 167.

One county cannot recover from another county for the support of its convicts unless the counties had legislative authority to make a contract for their maintenance. Kings County *v.* Queens County, 64 Hun (N. Y.) 195, 18 N. Y. Suppl. 883.

91. Ward, etc., Co. *v.* Tennessee, etc., R. Co., (Tenn. Ch. 1900) 57 S. W. 193.

92. Hyatt *v.* State, (Ark. 1890) 13 S. W. 215; Thurmond *v.* Carter, 59 Miss. 127.

93. Wynn *v.* State, 82 Ala. 55, 2 So. 630; Smith *v.* State, 82 Ala. 40, 2 So. 629.

94. Shepherd *v.* State, 110 Ala. 104, 20 So. 330.

95. Patterson *v.* Prior, 18 Ind. 440, 81 Am. Dec. 367; Patterson *v.* Crawford, 12 Ind. 241.

contractor, even if his commitment to prison was void, because he has no contractual relation express or implied with the contractor.[96] Nor can the convict maintain an action on the common counts to recover on a *quantum meruit* for work performed on Sundays and holidays, although the contractor compelled him to perform such work and thereby became guilty of a trespass.[97]

2. Prosecution For Failure to Perform Contract. A convict who is released from custody after entering into such a contract with his surety in open court is liable to criminal prosecution if he fails or refuses, without a good and sufficient excuse, to perform the services stipulated for in the contract, provided the contract creates the relation of employer and employee,[98] and defines with reasonable certainty the particular act or services undertaken to be performed;[99] and it is no defense to a prosecution for a breach of such contract that the convict was a minor at the time of entering into the contract.[1] In such prosecution the indictment or complaint should clearly allege that a fine was imposed on the accused, that the contract for services was signed in open court, that it was approved in writing by the judge of the court in which the conviction was had as required by the statute, and should give a description of the services which the defendant contracted to perform.[2]

B. Contracts by Public Authorities — 1. In General. In many of the states there are statutes providing for the leasing or hiring out by the public authorities of convicts confined in the state prison and county jails to corporations or private individuals.[3] Such contracts have no vitality except by virtue of the statute authorizing them, and generally speaking they must be made by the public officials authorized by statute to act in that capacity, and all the statutory requirements must be substantially complied with, both as to the terms of the contract and the manner of its performance.[4] Under such statutes county convicts who

See also Greer *v.* Critz, 53 Ark. 247, 13 S. W. 764.

96. Thompson *v.* Bronk, 126 Mich. 455, 85 N. W. 1084.

97. Sloss Iron, etc., Co. *v.* Harvey, 116 Ala. 656, 22 So. 994.

98. Winslow *v.* State, 97 Ala. 68, 12 So. 423.

99. Salter *v.* State, 117 Ala. 135, 23 So. 141.

1. Wynn *v.* State, 82 Ala. 55, 2 So. 630.

2. Giles *v.* State, 89 Ala. 50, 8 So. 121.

Where the complaint charged that the defendant agreed to work on the farm of one person, and the contract introduced in evidence showed that he agreed to work on the farm of another, it was held that the variance was fatal. Wade *v.* State, 94 Ala. 109, 10 So. 235.

3. *Alabama.*— Comer *v.* Bankhead, 70 Ala. 136.

Arkansas.— McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559.

Florida.— Holland *v.* State, 23 Fla. 123, 1 So. 521.

Georgia.— Georgia Penitentiary Co. *v.* Nelms, 71 Ga. 301; Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 499, 38 Am. Rep. 793.

Kentucky.— Lyon *v.* Mason, etc., Co., 102 Ky. 594, 44 S. W. 135, 19 Ky. L. Rep. 1642.

Michigan.— Wallerstein *v.* Board of Control, 116 Mich. 365, 74 N. W. 492.

Nebraska.—State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

North Carolina.— State *v.* Sneed, 94 N. C. 806.

Texas.— Grayson County *v.* May (App. 1892) 19 S. W. 331; McGonagill *v.* Evans, 3 Tex. App. Civ. Cas. § 466.

See 11 Cent. Dig. tit. "Convicts," § 19 *et seq.*

Period of contract.— Where a contract is made with prison authority for the labor of convicts, the length of time for which the contract is to run and the number of convicts to be employed must be definitely and specifically stated in the contract. Horner *v.* Wood, 15 Barb. (N. Y.) 371. Such a contract is not invalid because it is made for a period exceeding the terms of the officers who make it. McConnell *v.* Arkansas Brick, etc., Co., (Ark. 1902) 69 S. W. 559.

In Mississippi the lease system has been abolished and the authority to provide for and control the convicts vested in a board of control. See State *v.* Jenkins, 73 Miss. 523, 19 So. 206.

4. *Ex p.* Shortridge, 115 Ala. 126, 22 So. 557; Penitentiary Co. No. 2 *v.* Rountree, 113 Ga. 799, 39 S. E. 508; Walton County *v.* Powell, 94 Ga. 646, 19 S. E. 989; Harris *v.* Com., 64 S. W. 434, 23 Ky. L. Rep. 775.

A contract for the hire of county convicts, made with the probate judge, without any order or authority of the commissioners' court, is illegal and void as against public policy and will not support an action. State *v.* Metcalfe, 75 Ala. 42.

A contract made with the county judge in vacation and not with the court as the statute requires is invalid. *In re* Burrow, 55 Ark. 275, 18 S. W. 170; Greer *v.* Critz, 53 Ark. 247, 13 S. W. 764.

have been fined and committed to jail in default of payment of their fines may generally be hired out or put to work upon public improvements on a *per diem* credit until their fines and the costs of prosecution have been paid.[5]

2. BOND OF CONTRACTOR. The contractor is generally required to give bond for the proper care of the convicts hired to him and the payment of the wages for their work;[6] and the approval of such bond by the officials designated by statute

Where the statute requires an advertisement and sealed bids for convict labor, a contract made without these prerequisites is invalid. People *v.* Dulaney, 96 Ill. 503; State Prison *v.* Lathrop, 1 Mich. 438; Horner *v.* Wood, 23 N. Y. 350; Jones *v.* Lynds, 7 Paige (N. Y.) 301. But where the prison authorities have complied with the statute in respect to advertising and receiving bids, the court will not interfere with the discretion allowed them under the statute in awarding the contract. State *v.* Ohio Penitentiary, 5 Ohio St. 234. See also Branton *v.* Washington County, 79 Miss. 277, 30 So. 659.

A failure to incorporate in the contract an express statutory provision or inhibition is not a fatal defect, as such provision or inhibition will be implied. *Ex p.* White, 81 Ala. 80, 1 So. 700.

A statutory prohibition against employing convicts upon railroads becomes an implied term of a contract of hiring and it is not necessary to express it. *Ex p.* White, 81 Ala. 80, 1 So. 700; *Ex p.* Adams, 60 Ark. 93, 28 S. W. 1086.

5. *Alabama.*— Fuller *v.* State, 97 Ala. 27, 12 So. 392; Trammell *v.* Lee County, 94 Ala. 194, 10 So. 213; Trammell *v.* Chambers County, 93 Ala. 388, 9 So. 815; Jefferson County *v.* Truss, 85 Ala. 486, 5 So. 86; *Ex p.* Small, 81 Ala. 85, 2 So. 21; *Ex p.* White, 81 Ala. 80, 1 So. 700.

Arkansas.— *Ex p.* Timpson, 68 Ark. 22, 56 S. W. 272; State *v.* McNally, 67 Ark. 580, 55 S. W. 1104; *In re* Owens, 63 Ark. 403, 38 S. W. 1116; *In re* Burrow, 55 Ark. 275, 18 S. W. 170; State *v.* Stanley, 52 Ark. 178, 12 S. W. 327; State *v.* Barnes, 37 Ark. 448; Griffin *v.* State, 37 Ark. 437.

Florida.— Holland *v.* State, 23 Fla. 123, 1 So. 521.

Georgia.— Rountree *v.* Durden, 95 Ga. 221, 22 S. E. 149.

Mississippi.— State *v.* Oliver, 78 Miss. 5, 27 So. 988; *Ex p.* Hill, (1893) 12 So. 902; Matthews *v.* Walker, 57 Miss. 337.

North Carolina.— Herring *v.* Dixon, 122 N. C. 420, 29 S. E. 368; State *v.* Yandle, 119 N. C. 874, 25 S. E. 796, 34 L. R. A. 392; State *v.* Weathers, 98 N. C. 685, 4 S. E. 512; State *v.* Shaft, 78 N. C. 464.

Texas.— Grayson County *v.* May, (App. 1892) 19 S. W. 331; *Ex p.* Bogle, 20 Tex. App. 127; Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775; McGonagill *v.* Evans, 3 Tex. App. Civ. Cas. § 466.

See 11 Cent. Dig. tit. "Convicts," § 19 *et seq.*

A man may be hired out to his wife under such a statute. State *v.* Shaft, 78 N. C. 464.

A prisoner who has been fined and committed to the county jail for an offense for which he might have been sentenced to the state prison cannot, under such a statute, be hired out to liquidate his fine and costs. Ward *v.* White, 86 Tex. 170, 23 S. W. 981.

Convicts may be hired out to municipal corporations within the county as well as to others, and it is no concern of a convict what are the terms of the contract or whether the county is compensated. Lark *v.* State, 55 Ga. 435.

The public improvements on which convicts may be worked include all public works of the state, county, or municipality; and a city ordinance forbidding the employment of convicts on the public streets and declaring it a nuisance is wholly unavailing. Ward *v.* Little Rock, 41 Ark. 526, 48 Am. Rep. 46.

The court cannot require a greater hire *per diem* than the minimum fixed by statute, or direct that the hiring be for a less number of days than one for every seventy-five cents of the fine and costs. State *v.* Barnes, 37 Ark. 448.

Under a statute providing that it shall not be lawful to farm out convicts unless the court before whom the trial is had shall in its judgment so authorize, the court cannot give such authority at a subsequent term. State *v.* Pearson, 100 N. C. 414, 6 S. E. 387.

Under the Alabama act regulating the hiring of county convicts, and providing that persons convicted of offenses involving moral turpitude shall not work with those convicted of other offenses, the court of county commissioners must establish a system of hiring for each class of offenders, which must appear of record, otherwise a convict cannot be hired out to hard labor. *Ex p.* Crews, 78 Ala. 457.

6. Camp *v.* McLin, (Fla. 1902) 32 So. 927; State *v.* Oliver, 78 Miss. 5, 27 So. 988; Norton *v.* Galveston County, 3 Tex. App. Civ. Cas. § 239.

A bond executed with only one surety is invalid. *Ex p.* Millsap, 39 Tex. Crim. 93, 45 S. W. 20.

Parol evidence is not admissible to vary the terms of such a bond. Walton County *v.* Powell, 94 Ga. 646; Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775.

Set-off.— In a suit on the contractor's bond, the fees paid to the sheriff for preparing and approving the contract are a proper set-off. Hyatt *v.* State, (Ark. 1890) 13 S. W. 215.

That it was executed on Sunday is no objection to the bond. *Ex p.* Millsap, 39 Tex. Crim. 93, 45 S. W. 20.

Where a county convict's hiring bond is void he may be arrested under a capias pro fine, and the fact that he may have settled

is a condition precedent to the validity of the contract of hiring.[7] The prison authorities cannot be compelled by mandamus to perform the contract until the bond required by the statute has been given.[8] But if the contract of hiring is illegal, the bond is not valid either as a statutory or common-law bond, and will not support an action.[9] The contract terminates with the death of the contractor, and his estate and bondsmen are liable under the contract only up to that time.[10]

3. **Power to Annul Contract.** Inasmuch as the state cannot surrender its police power over convicts, it is customary in contracts for their labor to reserve the right of revocation in certain contingencies therein specified or provided by law.[11] The prison authorities, however, may not arbitrarily and without cause annul a contract which has been legally made,[12] although the rights of the lessee or contractor are subject to the power of the governor to pardon and thereby discharge the convicts.[13]

4. **Locality For Employment.** County convicts who have been hired out should as a rule be employed in the county in which they were convicted;[14] but if the interests of the county require it, or there is no demand for their labor in such county, the authorities may hire them out to perform labor in another county,[15] and their decision as to the advantage or necessity of such hiring has the force of a judgment *in rem* and cannot be questioned collaterally.[16]

5. **Escape of Convict Laborers.** If a convict sentenced to hard labor escapes, the time elapsing before his rearrest is not allowed him; his term does not expire until he has been at hard labor the full number of days for which he was sentenced.[17] And the hirer of convicts under a contract with a county is liable for the hire of convicts who have escaped, to the extent of the fines and costs charged against them, at least where the right to recapture them was in no way wrongfully interfered with by the county.[18] The hirer has no authority to rearrest the convict unless he has escaped;[19] and a bondsman of the hirer has no right to rearrest him even if he has escaped from the hirer.[20] The lessee of state convicts is liable on his bond for damages to the state, if through his negligence such convicts are permitted to escape;[21] and he is personally liable for the damages specified in the statute, although he did not give the statutory bond.[22] And if a person in charge of convicts employed on public works negligently allows them to escape he is liable to a fine.[23]

6. **Action on Contract.** A contract legally made for hire of convicts in a state prison is the contract of the state and cannot be enforced against the warden or

with his hirer or principal in the bond does not satisfy the judgment for the fine and costs. *Ex p.* Millsap, 39 Tex. Crim. 93, 45 S. W. 20.

7. Camp *v.* McLin, (Fla. 1902) 32 So. 927.

8. Nugent *v.* Arizona Imp. Co., 173 U. S. 338, 19 S. Ct. 461, 43 L. ed. 721.

9. State *v.* Pollard, 89 Ala. 179, 7 So. 765; Walton County *v.* Franklin, 95 Ga. 538, 22 S. E. 279; *Ex p.* Medaris, 38 Tex. Crim. 493, 43 S. W. 517; Ward *v.* White, (Tex. Civ. App. 1893) 24 S. W. 312.

10. State *v.* Oliver, 78 Miss. 5, 27 So. 988.

11. Jefferson County *v.* Truss, 85 Ala. 486, 5 So. 86; Comer *v.* Bankhead, 70 Ala. 136; Porter *v.* Haight, 45 Cal. 631; Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775.

12. Young *v.* Beardsley, 11 Paige (N. Y.) 93.

The circuit court has no jurisdiction on its own motion to annul a contract made by the county court for the hire of county convicts. *In re* Owens, 63 Ark. 403, 38 S. W. 1116.

13. State *v.* McCauley, 15 Cal. 429.

14. *Ex p.* Small, 81 Ala. 85, 2 So. 21; *Ex p.* Medaris, 38 Tex. Crim. 493, 43 S. W. 517.

15. Haralson *v.* State, 123 Ala. 89, 26 So. 653; *Ex p.* Small, 81 Ala. 85, 2 So. 21; *Ex p.* White, 81 Ala. 80, 1 So. 700; *In re* Burrow, 55 Ark. 275, 18 So. 170; *Ex p.* Higgins, 57 Miss. 824.

16. *Ex p.* Small, 81 Ala. 85, 2 So. 21; *Ex p.* White, 81 Ala. 80, 1 So. 700; *In re* Burrow, 55 Ark. 275, 18 S. W. 170.

17. *Ex p.* Buckalew, 84 Ala. 460, 4 So. 424; *In re* Edwards, 43 N. J. L. 555, 39 Am. Rep. 610.

18. Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775.

19. *Ex p.* Logsden, 35 Tex. Crim. 56, 31 S. W. 646.

20. *Ex p.* Logsden, 35 Tex. Crim. 56, 31 S. W. 646.

21. Penitentiary Co. No. 2 *v.* Gordon, 85 Ga. 159, 11 S. E. 584; Lipscomb *v.* Seegers, 19 S. C. 425, 22 S. C. 407.

22. Lipscomb *v.* Seegers, 19 S. C. 425.

23. State *v.* Sneed, 94 N. C. 806.

his successor personally.[24] In an action on the contractor's bond to recover the wages of county convicts, the county is the proper party plaintiff, not only because it is the interested party but because the bond runs to it;[25] but where the bond is made payable to an officer in his official capacity, he may sue on the same in his own name for the benefit of the county.[26] In an action against the contractor to recover the wages of convicts hired to him, he may set off any loss and damage caused by the failure of the state to perform its stipulation to keep the convicts under good discipline and at diligent and faithful labor;[27] and where the prosecution of his own work has been interrupted in order to make repairs and improvements to the state prison, he may set off the damages thereby sustained against the rent sued for by the state;[28] and if he is compelled by the prison authorities to incur additional expenses in order to retain the benefit of his contract, he may recover back money so paid, as paid under duress;[29] but he cannot set off damages caused by a wilful tort committed by the convicts hired to him;[30] nor is he entitled to a deduction for loss of services due to an escape unless it is so stipulated in his contract.[31] A contractor who has had the benefit of the labor of county convicts is liable for the value of the same, and the county may recover such value on the common counts, even though the contract were indefinite and some of the statutory provisions were not complied with,[32] and where labor has been performed by city convicts under a contract with the city which is *ultra vires*, but not illegal, the city is entitled to recover for the work actually done by the prisoners and not paid for, and the contractor after having derived benefits under the contract is estopped from denying its validity.[33] A lessee or hirer of convicts may legally employ an agent to superintend their work for him;[34] but he has no authority to sublet them, and if he does so the contract of subhiring is illegal and void and will not support an action.[35]

7. Discharge From Custody. A warrant of commitment of a convict should distinctly state the terms on which the convict is entitled to his discharge, and if the convict, after having complied with the terms of his sentence, is unlawfully detained by the keeper, he may be freed from his illegal restraint by appropriate process;[36] but an escaped convict who has been convicted and sentenced for another crime may, at the expiration of the latter sentence, be held to serve out the remainder of the first sentence.[37] A county convict hired out to pay his fine and costs must be discharged when the value of his services, reckoned at the statutory *per diem*, equals the sum of the fine and costs,[38] even though the contractor be insolvent and his bond worthless.[39] If the county gives the prisoner no opportunity to pay his fine and costs by labor he is entitled to his discharge without such payment;[40] and he may be discharged on habeas corpus if he is not

24. Comer *v.* Bankhead, 70 Ala. 493; Neal *v.* Suber, 56 S. C. 298, 33 S. E. 463.

25. Pike County *v.* Hanchey, 119 Ala. 36, 24 So. 751.

26. Johnson *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 682; Day *v.* Johnson, (Tex. Civ. App. 1895) 33 S. W. 675, 676.

27. *In re* Southwestern Car Co., 22 Fed. Cas. No. 13,192, 9 Biss. 76.

28. Com. *v.* Todd, 9 Bush (Ky.) 708.

29. Horner *v.* State, 42 N. Y. App. Div. 430, 59 N. Y. Suppl. 96.

30. Austin *v.* Foster, 9 Pick. (Mass.) 341.

31. Trammell *v.* Lee County, 94 Ala. 194, 10 So. 213; State *v.* Banks, 66 Miss. 431, 6 So. 184; *Ex p.* Logsden, 35 Tex. Crim. 56, 31 S. W. 646.

32. Trammell *v.* Lee County, 94 Ala. 194, 10 So. 213.

33. St. Louis *v.* Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764.

34. Gordon *v.* Mitchell, 68 Ga. 11.

35. Arrington *v.* Morgan, 75 Ala. 606; Arkansas Industrial Co. *v.* Neel, 48 Ark. 283, 3 S. W. 631; Gordon *v.* Mitchell, 68 Ga. 11. In Bush *v.* Mattox, 110 Ga. 472, 35 S. E. 640, it seems to be assumed that a binding subcontract may be made, but it is there said that the state has no interest in the disposition of the money due the contractor from the subcontractor.

36. Kenney *v.* State, 5 R. I. 385. See also Com. *v.* Heiffer, 2 Woodw. (Pa.) 311; State *v.* Jack, 90 Tenn. 614, 18 S. W. 257; State *v.* Tennessee, etc., R. Co., 16 Lea (Tenn.) 136.

37. Henderson *v.* James, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290.

38. *Ex p.* Duren, 40 Tex. Crim. 162, 49 S. W. 374.

39. *Ex p.* Price, 11 Tex. App. 538.

40. *Ex p.* Bogle, 20 Tex. App. 127; *Ex p.* Stubblefield, 1 Tex. App. 757. See also Monroe County *v.* McDaniel, 68 Miss. 203, 8 So. 645.

put to work within a reasonable time after adjournment of the court which sentenced him;[41] but a convict sentenced to hard labor cannot complain that he was not immediately put at labor, when the delay was at his own request.[42] So also if a convict sentenced to hard labor under the contract labor system be physically disabled, so that no one will hire him, he should be discharged, although he is unable to pay his fine and costs, for the punishment imposed by the judgment of the court cannot be changed from hard labor to imprisonment.[43] A contract for the hire of county convicts for a period longer than the statute authorizes is valid for the full legal term, but is void as to the excess.[44] A county convict hired out to labor is not entitled to his discharge on habeas corpus merely on the ground that the contract does not bind his hirer to pay the costs of his prosecution.[45]

8. Disposition of Proceeds of Convict Labor. Where a county convict is hired out to pay his fine and the costs of prosecution the contract itself directs the application of the proceeds of his labor; but in some cases the statute directs the application of the proceeds of such labor.[46] Sometimes the statute directs that the surplus proceeds of their labor shall be paid to the convicts upon their discharge, but the repeal of such a statute before a prisoner's discharge deprives him of the right to receive money earned before such repeal.[47] The warden of the prison is not entitled to the proceeds of convict labor, although he may have settled with the institution for the services of convicts whose labor he used.[48]

CONVINCE. To overcome or subdue; and, in logic, to satisfy the mind by proof.[1]

CONVINCING PROOF. That degree of certainty required to sustain a given postulate.[2] (See, generally, Criminal Law; Evidence.)

CONVIVIUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year.[3]

CONVOCATION. In English law, an assembly of all of the clergy for the purpose of consulting on ecclesiastical matters.[4]

CONVOY. A naval force under the command of a person appointed by the

41. *Ex p.* Crews, 78 Ala. 457.

42. Haralson *v.* State, 123 Ala. 89, 26 So. 653.

43. *Ex p.* Stewart, 98 Ala. 66, 13 So. 660.

44. Trammell *v.* Chambers County, 93 Ala. 388, 9 So. 815.

A contract requiring a convict to work longer than is necessary to pay his fine and costs at the statutory *per diem* is void as against public policy and as an unlawful attempt to deprive the convict of his liberty. State *v.* Stanley, 52 Ark. 178, 12 S. W. 327.

45. *Ex p.* Adams, 60 Ark. 93, 28 S. W. 1086.

46. Thus under a statute directing that money received by officials for the hire of convicts shall be applied to the payment of the fees of the officers who rendered services in the cases of such convicts, only the balance remaining after the payment of such fees can be lawfully paid into the county treasury. Pulaski County *v.* De Lacy, 114 Ga. 583, 40 S. E. 741. See also Rountree *v.* Durden, 95 Ga. 221, 22 S. E. 149.

47. Williams *v.* Middlesex County, 4 Metc. (Mass.) 76.

48. Stolbrand *v.* Hoge, 5 S. C. 209.

1. Evans *v.* Rugee, 57 Wis. 623, 626, 16 N. W. 49, where it is said: "When one is convinced he cannot be more convinced. If evidence is convincing, it is sufficient in any case, and to say it ought to be more convincing in one case than another, is giving to the word degrees of comparison when the word itself is superlative."

To be convinced means that the evidence must be such that the reason sees no doubt left of the defendant's guilt. Territory *v.* Barth, (Ariz. 1887) 15 Pac. 673, 676.

2. French *v.* Day, 89 Me. 441, 442, 36 Atl. 909.

3. Black L. Dict.

4. Burrill L. Dict. [*citing* Termes de la Ley].

It is in the nature of a parliament, being, in the province of Canterbury, composed of two houses, of which the archbishop and bishops form the upper house, and the lower consists of deans, arch-deacons, the proctors for the chapters, and the proctors for the parochial clergy. In York, it consists of one house only. The convocation has always met in time of parliament, and although it has long been the course to summon it *pro forma* only, it is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterward, without even proceeding to the despatch of business. Burrill L. Dict.

government of the country to which the vessel insured belongs;[5] certain ships of force appointed by the government to sail with merchantmen from their port of discharge to the place of their destination;[6] an association for a hostile object.[7]

COÖBLIGOR. A joint obligor; one bound jointly with another or others in a bond or obligation.[8]

COOKING STOVE. An article of household furniture.[9]

COOL BLOOD. See HOMICIDE.

COOLING TIME. See HOMICIDE.

COOPER. A seaman in contemplation of law, although he has peculiar duties on board of the ship.[10] (See, generally, SEAMEN.)

COÖPERATE. To act or operate jointly with another or others; to concur in action, effort, or effect.[11]

COÖPERATION. The combined action of numbers;[12] working together;[13] acting together or simultaneously, unitedly, to a common end — a unitary result.[14]

COÖPERATIVE. Promoting the same end; helping; acting together to accomplish the same end.[15]

5. Christin *v.* Ditchell, 2 Peake 141, 143, 4 Rev. Rep. 898.

6. Burrill L. Dict. [*citing* Postlethwaite Dict.].

The clause, "warranted to depart with convoy," as used in an insurance policy, must be construed according to the usage among merchants, i. e., from such place where convoys are to be had, as the downs, etc. Lethulier's Case, 2 Salk. 443. And see Jeffries *v.* Legandra, 2 Salk. 442, where it is said: "The words warranted to depart with convoy mean only, that he will leave the port, and sail with the convoy, without any wilful default in the master." And see Lilly *v.* Ewer, Dougl. 72, 74.

7. The Atlanta, 3 Wheat. (U. S.) 409, 423, 4 L. ed. 422, where it is said: "In undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding his fortune to theirs; or if involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been made liable to, in case of capture."

8. Black L. Dict.

9. Crocker *v.* Spencer, 2 D. Chipm. (Vt.) 68, 70, 15 Am. Dec. 652, where it is said: "It is calculated for no other use. It is not an article of ornament or luxury; and if it is not necessary, it is difficult to account for its origin or its continuance in use. Though of modern invention, it is, in the present state of the country, as necessary as any other single article of household furniture; and, when actually appropriated to the use designed, falls clearly within the reason of those cases."

10. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168.

11. Thus "'bring all your lutes and harps of heaven and earth, whate'er co-operates to the common mirth.'" Webster Dict. [*quoted* in Wilkins Shoe-Button Fastener Co. *v.* Webb, 89 Fed. 982, 987].

12. Black L. Dict.

It is of two distinct kinds: (1) Such coöperation as takes place when several persons help each other in the same employment; (2) such coöperation as takes place when several persons help each other in different employments. These may be termed "simple coöperation" and "complex coöperation." Black L. Dict. [*citing* Mills Pol. Econ. 142].

13. Swisher *v.* Illinois Cent. R. Co., 182 Ill. 533, 547, 55 N. E. 555, where it is said: "The two clauses draw a contrast between, or set over against each other, co-operation in a particular business and habitual association in the performance of duties. But whether the co-operation is in a particular business in the same line of employment, or there is habitual association in the performance of duties, in either case the situation of the parties must be such that they may exercise a mutual influence upon each other promotive of proper caution. Persons can be directly co-operating with each other in a particular business in hand, and still not be in such a position that one could influence the other so as to make him cautious."

14. Boynton Co. *v.* Morris Chute Co., 82 Fed. 440, 444; Holmes Burglar Alarm Tel. Co. *v.* Domestic, etc., Tel. Co., 42 Fed. 220, 227 [*citing* Hoffman *v.* Young, 2 Fed. 77; Birdsall *v.* McDonald, 3 Fed. Cas. No. 1,434, 1 Ban. & A. 165; Forbush *v.* Cook, 9 Fed. Cas. No. 4,931, 2 Fish. Pat. Cas. 668].

15. Hawthorn *v.* People, 109 Ill. 302, 313, 50 Am. Rep. 610, where it is said: "This being the meaning of the word, it seems to describe the business transacted by appellants and those who furnished the milk to be manufactured. They all promoted the same end, and hence coöperated,— the farmers by fur-

COÖPERATIVE SOCIETY. A union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member.[16] (See, generally, ASSOCIATIONS.)

COÖPTATION. A concurring choice; the election, by the members of a close corporation, of a person to fill a vacancy.[17]

COÖRDINATE AND SUBORDINATE. Terms often applied as a test to ascertain the doubtful meaning of clauses in an act of parliament.[18]

COPABLE. Guilty.[19]

COPARCENARY. See TENANCY IN COMMON.

COPARCENER. See TENANCY IN COMMON.

COPARTICEPS. In old English law, a coparcener.[20] (See, generally, TENANCY IN COMMON.)

COPARTNER. See PARTNERSHIP.

COPARTNERSHIP. See PARTNERSHIP.

COPARTNERY. In Scotch law, the contract of copartnership; a contract by which the several partners agree concerning the communication of loss or gain, arising from the subject of the contract.[21] (See, generally, PARTNERSHIP.)

CO-PARTY. See PARTIES.

COPE. A custom or tribute due to the crown or lord of the soil, out of the lead mines in Derbyshire; also a hill, or the roof and covering of a house; a church vestment.[22]

COPEMAN or **COPESMAN.** A CHAPMAN,[23] *q. v.*

COPESMATE. A merchant; a partner in merchandise.[24]

COPIA. A COPY,[25] *q. v.* In civil and old English law, opportunity or means of access.[26]

COPIA VERA. In Scotch practice, a true copy; words written at the top of copies of instruments.[27]

COPIE. In French and old English law, copy; a COPY,[28] *q. v.*; a multitude; a great number.[29]

COPPA. In English law, a crop or cock of grass, hay, or corn, divided into titheable portions, that it may be more fairly and justly tithed.[30]

COPPER. A metal distinguished from all others by its peculiar red color; a copper coin; a penny; a CENT,[31] *q. v.*; a policeman.[32]

COPPER CASH. The only coin in China.[33] (See COIN.)

COPPER COIN. Copper money, generally, and not a single coin, nor any specific number or kind of coins.[34] (See COIN.)

nishing the milk, and appellants by manufacturing and selling the product. Whatever the factory be locally called, it is manifestly operated in the coöperative plan. This establishment being within the meaning of the term 'coöperative' plan of manufacturing butter and cheese, it is found in both the title to and in the body of the act, and the constitutional requirement is fulfilled."

The terms "co-operative or dividend plan," used as convertible terms in a statute see Hawthorn *v.* People, 109 Ill. 302, 313, 50 Am. Rep. 610.

16. Century Dict. [*quoted* in Finnegan *v.* Noerenberg, 52 Minn. 239, 244, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778].

17. Black L. Dict.

18. Wharton L. Lex.

If there be two, one of which is grammatically governed by the other, it is said to be "subordinate" to it; but, if both are equally governed by the same third clause, the two are called coördinate." Wharton L. Lex.

19. Burrill L. Dict. [*citing* Kelham Dict.].

20. Black L. Dict.

21. Burrill L. Dict. [*citing* Bell Dict.].

22. Black L. Dict.

23. Black L. Dict.

24. Black L. Dict.

25. Burrill L. Dict. [*citing* Clerke Prax. Cur. Adm. tit. 48].

26. Black L. Dict.

27. Black L. Dict. And see Uchiltrie's Case, 3 How. St. Tr. 427, 430, 432.

28. Burrill L. Dict.

29. Burrill L. Dict. [*citing* Kelham Dict.].

30. Black L. Dict.

31. Century Dict.

32. People *v.* Connor, 68 Hun (N. Y.) 78, 79, 22 N. Y. Suppl. 669.

33. Crocker *v.* Redfield, 6 Fed. Cas. No. 3,400, 4 Blatchf. 378, where it is said: "The pieces were composed of 60 per cent. to 70 per cent. of copper, and 30 per cent. to 40 per cent. of lead or nickel."

34. Com. *v.* Gallagher, 16 Gray (Mass.) 240, 241.

COPPERED. Covered or sheathed with sheets of copper.[35]

COPPIRE. In old records, to cover.[36]

COPULATIO VERBORUM INDICAT ACCEPTATIONEM IN EODEM SENSU.[37] A maxim meaning "The coupling of words together shows that they are to be understood in the same sense."[38]

COPY. As a noun, a transcript of an original writing;[39] a writing like another writing;[40] a document which is taken or written from another, as opposed to an original;[41] that which comes so near to the original as to give to every person seeing it the idea created by the original;[42] a reproduction or limitation, as of a writing, printing, drawing, painting, or other work of art, so as to have another

35. Century Dict. See also Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 580, 8 L. ed. 1043, discussing the meaning of the words "coppered ship," as used in an insurance contract.

36. Burrill L. Dict.

37. The maxim of Lord Bacon.— Fowler *v.* Danvers, 8 Allen (Mass.) 80, 85.

Scope of maxim.— It is intended to aid in arriving at the meaning of the parties. Coondoo *v.* Watson, 9 App. Cas. 561, 569.

38. Broom Leg. Max.

Applied or explained in the following cases:

Massachusetts.— Saltonstall *v.* Sanders, 11 Allen 446, 470; Fowler *v.* Danvers, 8 Allen 80, 85.

Missouri.— State *v.* Bryant, 93 Mo. 273, 283, 6 S. W. 102; *Ex p.* Marmaduke, 91 Mo. 228, 259, 4 S. W. 91, 60 Am. Rep. 250; McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457, 463.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86, 89.

Wisconsin.— Gibson *v.* Gibson, 43 Wis. 23, 33, 28 Am. Rep. 527; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, 519.

England.— Coondoo *v.* Watson, 9 App. Cas. 561, 569.

Applied to interpretation of doubtful phrases.— In Fowler *v.* Danvers, 8 Allen (Mass.) 80, 85, it is said: "The maxim of Lord Bacon, *Copulatio verborum indicat acceptationem in eodem sensu*, is a safe and sound rule in the construction of doubtful phrases and sentences; and, unless there is something to indicate a different intent, it is fair to presume that a word in question and those which surround it or immediately follow it are designed to be *ejusdem generis*, and referrible to the same subject-matter, or to be interpreted in a similar sense." And see State *v.* Gedicke, 43 N. J. L. 86, 89 [*citing* Broom Leg. Max. 450], where it is said: "The collocation of the words in this statute requires that the thing used to effect the miscarriage should be noxious — that is, hurtful. The words 'poison, drug, medicine or noxious thing,' indicate the character of the means that must be used. The rule, *copulatio verborum indicat acceptationem in eodem sensu*, and the maxim *noscitur a sociis*, govern the construction of these words as they stand connected in this statute."

39. Ticonic Bank *v.* Stackpole, 41 Me. 302, 305; Bouvier L. Dict. [*quoted* in Kaalaea Plantation *v.* Bolabola, 3 Hawaii 818, 822; McCuaig *v.* City Sav. Bank, 111 Mich. 356, 358, 69 N. W. 500; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 412]; Webster Dict. [*quoted* in Kaalaea Plantation *v.* Bolabola, 3 Hawaii 818, 822; Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373].

Copy of any paper on file.— A copy certified and issued by the supervisor as a copy; not a duplicate printed copy of an original paper issued as an original document. Muirhead *v.* U. S., 13 Ct. Cl. 251, 256, construing federal statutes in relation to supervisors of elections.

Copy of the record.— See Updergraff *v.* Perry, 4 Pa. St. 291, 294 [*citing* Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135, 137], where it was said: "A copy of the docket entry, in legal or common parlance, is not understood to mean a copy of the whole record, but rather the contrary. And in most cases, the language would be understood to mean something less than the whole."

An exemplification is a perfect copy of a record or office book, so far as relates to the matter in question. Bouvier L. Dict. [*quoted* in Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 412].

40. Webster Dict. [*quoted* in Kaalaea Plantation *v.* Bolabola, 3 Hawaii 818, 822; Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373].

Not a reproduction of only a portion of the thing copied, but of the whole of it. Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373.

41. Rapalje & L. L. Dict. [*quoted* in Rasmussen *v.* Baker, 7 Wyo. 117, 140, 50 Pac. 819, 38 L. R. A. 723].

As used in bankruptcy proceedings.—Where a form in bankruptcy proceedings provided that "a copy of said petition, together with a writ of subpœna, be served" as therein provided, the court said: "When, therefore, the act provides that a petition shall be filed in duplicate, 'one copy for the clerk and one for service on the bankrupt,' it must be held to have intended that one petition in the form of two duplicate originals should be filed. The use of the term 'copy' in such a connection is not unusual. A deed executed in duplicate is not in legal contemplation two deeds, but only one, and it is quite common to say that A holds one copy and B the other. Unless 'copy' as here used means a duplicate original there would be much difficulty in construing the law." *In re* Stevenson, 94 Fed. 110, 116, 2 Am. Bankr. Rep. 66.

42. Hanfstaengl *v.* Baines, (1895) A. C. 20, 27 [*citing* West *v.* Francis, 5 B. & Ald.

or others similar to the original;[43] a completed reproduction, or one of a set or number of reproductions containing the same matter or having the same form or appearance;[44] an individual book, as a copy of the Bible;[45] a single book or sets of books, or a sheet reproducing any literary composition;[46] a single book or sets of books containing a composition resembling the original work.[47] As a verb, to make a copy or copies of; to write, print, engrave, or paint after an original; to duplicate; to reproduce; to transcribe; as to copy a manuscript, inscription, design, painting, etc.[48] (Copy: Of Account Annexed or Filed With Pleading, see ACCOUNTS AND ACCOUNTING; PLEADING. Of Document as Evidence, see ADMIRALTY; EVIDENCE. Of Indictment or Information to Be Served on Accused, see CRIMINAL LAW. Of Instrument Sued on Filed With Pleading, see PLEADING. Of Writ and Other Papers Authorizing Arrest in Civil Action, see ARREST.)

COPYHOLD. A species of estate at will, or customary estate in England, the only visible title to which consists of the copies of the court rolls, which are made out by the steward of the manor, on a tenant's being admitted to any parcel of land, or tenement belonging to the manor.[49] (See, generally, ESTATES.)

COPYHOLD COMMISSIONERS. Commissioners appointed to carry into effect various acts of parliament, having for their principal objects the compulsory commutation of manorial burdens and restrictions, (fines, heriots, rights to tim-

737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402].

43. Standard Dict. [*quoted* in Rasmussen *v.* Baker, 7 Wyo. 117, 140, 50 Pac. 819, 38 L. R. A. 773].

Compared with "engrave, etch or work."— Where a statute provided that "If any person shall engrave, etch or work, sell or copy," with intent to deceive, etc., the court said: "The word 'copy' is a general term, added to the more specific terms before used, for the very purpose of covering methods of reproduction not included in the words 'engrave, etch or work,' and, if it covers anything, should cover the photographic method, which, more nearly than any other, produces a perfect copy. This construction of the American act is sustained by the construction given by the English courts to the British act, which contains the word 'copy,' used in a similar connection." Rossiter *v.* Hall, 20 Fed. Cas. No. 12,082, 5 Blatchf. 362.

"Copies" or "original."— Where a statute provided that no person shall maintain an action for infringement of a book, etc., unless the word "Copyright," etc., be entered in the book, chromo, etc., the court said: "Each chromo is as much an 'original' as a 'copy,' and either term applies equally well to all chromos. We copyright a painting, and section 4962 requires notice of copyright upon the published painting, and upon each replica or reproduction which is published. And what has been said with respect to a book, map, chromo, or painting applies to the other copyrighted things enumerated in this section. Section 4962 does not deal with 'copies' as distinct from 'originals,' or with 'originals' as distinct from 'copies,' as those terms are commonly understood; but it deals with published copyrighted things, and it declares that no action for infringement will lie unless each copyrighted thing which is published or made public, be it a 'copy' so called, or an 'original,' so called, or another edition or reproduction of such copy or original, has inscribed upon it the notice of copyright." Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 57, 18 C. C. A. 431.

44. Century Dict. [*quoted* in Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373].

Copy of a book.— A transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. Rasmussen *v.* Baker, 7 Wyo. 117, 140, 50 Pac. 819, 38 L. R. A. 773 (where it is said: "The same conceptions clothed in another language can not constitute the same composition, nor can it be called a transcript, or 'copy' of the same book"); Stowe *v.* Thomas, 23 Fed. Cas. No. 13,514, 2 Wall. Jr. 547 (where it is said: "The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or 'copy' of the same 'book'").

45. Webster Int. Dict. [*quoted* in Pierce, etc., Mfg. Co. *v.* Werkmeister, 72 Fed. 54, 57, 18 C. C. A. 431].

46. Standard Dict. [*quoted* in Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373].

47. Webster Dict. [*quoted* in Johnson *v.* Weed-Parsons Printing Co., 36 Misc. (N. Y.) 628, 629, 74 N. Y. Suppl. 373].

48. Webster Dict. [*quoted* in Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 276, 75 N. W. 101].

"Copied for survey" as used in a survey see Wilson *v.* Stoner, 9 Serg. & R. (Pa.) 38, 42, 11 Am. Dec. 664.

49. Black L. Dict.

It is an estate at the will of the lord, yet such a will as is agreeable to the custom of the manor, which customs are preserved and evidenced by the rolls of the several courts baron, in which they are entered. In a larger sense, copyhold is said to import every customary tenure, (that is, every tenure pend-

ber and minerals, etc.,) and the compulsory enfranchisement of copyhold lands.[50]

COPYHOLDER. A tenant by copyhold tenure, (by copy of court-roll).[51]

ing on the particular custom of a manor,) as opposed to free socage, or freehold, which may now (since the abolition of knight-service) be considered as the general or common-law tenure of the country. Black L. Dict. [*citing* 2 Bl. Comm. 95; 1 Stephen Comm. 210].

50. Black L. Dict. [*citing* 1 Stephen Comm. 643].

51. Black L. Dict. [*citing* 2 Bl. Comm. 95].

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CROSS-REFERENCES

For Matters Relating to:
Common-Law Copyright, see LITERARY PROPERTY.
Patent of Design, see PATENTS.
Right of Author Exclusive of Copyright Acts, see LITERARY PROPERTY.
See also TRADE-MARKS AND TRADE-NAMES.

I. NATURE AND ACQUISITION.

A. In General. Copyright, which may be defined to mean the exclusive right of multiplying and vending copies of an intellectual work,[1] or, in the case of a dramatic or musical composition, of publicly performing or representing it, or causing it to be performed or represented by others,[2] as distinguished from the common-law right of literary property,[3] is of purely statutory origin.[4] Whether

1. Tuck *v.* Priester, 19 Q. B. D. 629, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93; Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81. See also Bouvier L. Dict., where copyright is defined to be "the exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions."

The copyright of a work is the exclusive right to multiply copies of the work, not merely a right to do so in common with others. Sims *v.* Marryat, 17 C. B. 281, 20 L. J. Q. B. 454, 79 E. C. L. 281. Copyright, as defined by the English act, means the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied. Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39. To the same effect see Ager *v.* Peninsular, etc., Steam Nav. Co., 26 Ch. D. 637, 53 L. J. Ch. 589, 50 L. T. Rep. N. S. 477, 33 Wkly. Rep. 116; Chappell *v.* Purday, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303; Maple *v.* Junior Army, etc., Stores, 21 Ch. D. 369, 52 L. J. Ch. 67, 47 L. T. Rep. N. S. 589, 31 Wkly. Rep. 70.

Copyright is "an incorporeal right, resting entirely in the reasonable interpretation of the terms of the grant; and so disconnected from, and independent of any material substance such as manuscript or plate, that a sale of either or both of these will not necessarily carry with it any right on the part of the purchaser thereof to make copies of the original work — the right to copy or the 'copyright' still remaining in the author, his legal representative or assignee, a distinct, well-defined, though intangible legal estate." Carter *v.* Bailey, 64 Me. 458, 462, 18 Am. Rep. 273. See also Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528; Millar *v.* Taylor, 4 Burr. 2303, 2396.

2. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; 29 U. S. Stat. at L. 481 [U. S. Comp. Stat. (1901) p. 3415], amending U. S. Rev. Stat. (1878) § 4966.

3. See, generally, LITERARY PROPERTY.

4. The earliest statute on the subject is that of 8 Anne, c. 19, enacted in 1710, which provided that an author should have the ex-

or not there existed at common law a copyright after,[5] or even, in the United States, before publication,[6] it is now definitively settled in both countries that after publication copyright only exists as to the subjects therein enumerated by virtue of such statutes.[7] As giving effect to what may be considered the inherent right of an author in his own work, the provisions of the copyright acts should receive a liberal construction.[8]

B. Subjects of Copyright — 1. In General. Substantially the same productions may be copyrighted in England and the United States. Under the federal statute any book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or negative thereof, painting, drawing, chromo, statue, statuary, and models or designs intended to be perfected as works of the fine arts are entitled to the provisions of the act. The right of public performance or representation of dramatic or musical compositions, or of causing them to be performed or represented, is also protected; and authors may reserve the right to dramatize or to translate their own works.[9] But there cannot be two successive copyrights

clusive right of publishing his book for a specified term and prescribed penalties for infringement.

Under the federal constitution congress is empowered "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U. S. Const. art. 1, § 8, cl. 8. The first statute passed in pursuance of this provision was that of May 31, 1790 (1 U. S. Stat. at L. 124). See Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Grant *v.* Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

In construing a statute imposing a penalty for the infringement of copyright, if there is a reasonable interpretation which will avoid the penalty in any particular case, it should be adopted. If there are two reasonable constructions, the more lenient one should be given. Such is the settled rule for the construction of penal sections. Hildesheimer *v.* Faulkner, [1901] 2 Ch. 552, 70 L. J. Ch. 800, 85 L. T. Rep. N. S. 322, 49 Wkly. Rep. 708 [*citing* with approval Tuck *v.* Priester, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93]. See also, generally, Statutes.

5. See, generally, Literary Property.

6. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055. But see Drone Copyright 47, 101. And see, generally, Literary Property.

7. Rees *v.* Peltzer, 75 Ill. 475; Banker *v.* Caldwell, 3 Minn. 94; Holmes *v.* Hurst, 174 U. S. 82, 19 S. Ct. 606, 43 L. ed. 904 [*affirming* 80 Fed. 514, 25 C. C. A. 610]; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Stowe *v.* Thomas, 23 Fed. Cas. No. 13,514, 2 Wall. Jr. 547; Wheaton *v.* Peters, 29 Fed. Cas. No. 17,486, 8 Pet. 725, 8 L. ed. 1106; Donaldson *v.* Becket, 2 Bro. P. C. 129 [*cited* in Millar *v.* Taylor, 4 Burr. 2303, 2408]; Reade *v.* Conquest, 9 C. B. N. S. 755, 7 Jur. N. S. 265, 30 L. J. C. P. 209, 3 L. T. Rep. N. S. 888, 9 Wkly. Rep. 434; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Osborne *v.* Donaldson, 2 Eden 327; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Chappell *v.* Purday, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303; Cadell *v.* Robertson, 5 Paton App. Cas. 493; Rooney *v.* Kelley, 14 Ir. C. L. 158; Drone Copyright 27 [*citing* Midwinter *v.* Hamilton, 10 Mor. Dict. Dec. 8295; (on appeal, *sub nom.* Midwinter *v.* Kincaid, 1 Paton App. Cas. 488); Hinton *v.* Donaldson, 10 Mor. Dict. Dec. 8307]. But see Millar *v.* Taylor, 4 Burr. 2303; Tonson *v.* Walker, 3 Swanst, 672; Eyre *v.* Walker, cited in Millar *v.* Taylor, 4 Burr. 2303, 2325; Motte *v.* Falkner, cited in Millar *v.* Taylor, 4 Burr. 2303, 2325; Walthoe *v.* Walker, cited in Millar *v.* Taylor, 4 Burr. 2303, 2325. See also Tonson *v.* Collins, 1 W. Bl. 301.

8. Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441. And see Daly *v.* Brady, 69 Fed. 285, where it was held that U. S. Rev. Stat. § 4966, making one presenting a copyrighted dramatic composition without the consent of the proprietor thereof liable in damages is a penal statute.

9. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; U. S. Rev. Stat. (1878) § 4966, as amended 29 U. S. Stat. at L. 481 [U. S. Comp. Stat. (1901) p. 3415].

In England the various subjects of statutory copyright are provided for by different statutes beginning with 8 Anne, c. 19 (books), which has been followed by 8 Geo. II, c. 13 (the Engraving Copyright Act of 1734); 7 Geo. III, c. 38 (the Engraving Copyright Act of 1776); 15 Geo. III, c. 53 (the Copyright Act of 1775); 17 Geo. III, c. 57 (the Prints Copyright Act of 1777); 54 Geo. III, c. 56 (the Sculpture Copyright Act of 1814); 3 Wm. IV, c. 15 (the Dramatic Copyright Act of 1833); 5 & 6 Wm. IV, c. 65 (the Lecturers' Copyright Act of 1835); 6 & 7 Wm. IV, c. 69 (the Prints and Engravings Copyright Act of 1836); 6 & 7 Wm. IV, c. 110 (the Copyright Act of 1836); 5 & 6 Vict. c. 45 (the Copyright Act of 1842); 7 & 8 Vict. c. 12 (the International Copyright Act of 1844); 10 &

of the same literary work. To permit this would render possible an extension of the statutory period through which a copyright runs, which the law will not allow.[10]

2. Books — a. In General. A literary production, to be entitled to copyright, need not be a book in the common and ordinary acceptation of the word, a volume printed or written, made up of several sheets and bound together.[11] The literary property intended to be protected is not to be determined by the size, form, or shape in which it appears, but by the subject-matter of the work.[12]

11 Vict. c. 95 (the Colonial Copyright Act of 1847); 15 & 16 Vict. c. 12 (the International Copyright Act of 1852); 25 & 26 Vict. c. 68 (the Fine Arts Copyright Act of 1862); 38 & 39 Vict. c. 12 (the International Copyright Act of 1875); 49 & 50 Vict. c. 33 (the International Copyright Act of 1886).

Only such writings and discoveries are included within the constitutional provision as to copyright as are the result of intellectual labor; the term "writings" may be liberally construed to include designs for engraving and prints that are original and are founded in the creative powers of the mind — the fruits of intellectual labor. Prints upon a single sheet might be considered a book if it otherwise met the spirit of the constitutional provision; but to be entitled to copyright, the article must have, by, and of itself, some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached. J. L. Mott Iron Works *v.* Clow, 82 Fed. 316, 27 C. C. A. 250 [*citing* with approval Higgins *v.* Keuffel, 140 U. S. 428, 11 S. Ct. 731, 35 L. ed. 470; Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349; Baker *v.* Selden, 101 U. S. 99, 25 L. ed. 841; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055].

Specifications of patents are not subjects of copyright. Wyatt *v.* Barnard, 3 Ves. & B. 77, 13 Rev. Rep. 141. But see Newton *v.* Cowe, 4 Bing. 234, 5 L. J. C. P. O. S. 159, 12 Moore C. P. 457, 29 Rev. Rep. 541, 13 E. C. L. 482, where it was held that an engraving on a reduced scale of a specification of a new invention enrolled at the patent office may be the subject of copyright, such reduction having required labor and some degree of skill to preserve the proportions. And see, generally, PATENTS.

A system of indexes, constituting a letter-file, being designed for use, and not for conveying information, is not a proper subject of copyright. Amberg File, etc., Co. *v.* Smith, 82 Fed. 314, 37 C. C. A. 246 [*affirming* 78 Fed. 479].

A railway ticket is not a subject of copyright. Griffin *v.* Kingston, etc., R. Co., 17 Ont. 660.

Commercial works.— Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing, it would seem, evincing, in its make-up, that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded. A belief that in no other way can the labor of the brain, in these useful departments of life, be adequately protected, is doubtless responsible for this wide departure from what was unquestionably the original purpose of the constitution." National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 297, 60 L. R. A. 805.

10. Mifflin *v.* Dutton, 112 Fed. 1004, 50 C. C. A. 661.

11. **For definition** of "book" see 5 Cyc. 859.

Statutory definition.— Under 5 & 6 Vict. c. 45, § 2, "book" is to be "construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published."

12. Brightley *v.* Littleton, 37 Fed. 103; Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; While *v.* Geroch, 2 B. & Ald. 298, 1 Chit. 24, 22 Rev. Rep. 786, 18 E. C. L. 28; Storace *v.* Longman, 2 Camph. 27, note *a*, 11 East 244, note *a*; Hime *v.* Dale, 2 Camph. 27, note *b*, 11 East 244, note *a*; Clementi *v.* Goulding, 2 Camph. 25, 11 East 244; Platts *v.* Button, Coop. 303, 19 Ves. Jr. 447, 10 Eng. Ch. 303; Bach *v.* Longman, Cowp. 623; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Chappell *v.* Purday, 4 Y. & C. Exch. 485, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303; D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 4 L. J. Exch. Eq. 21.

The face of a barometer, displaying special letter-press, is not capable of registration under the copyright act of 1842, not being within the second section of that act, "a book separately published." Davis *v.* Comitti, 54 L. J. Ch. 419, 52 L. T. Rep. N. S. 539.

Photograph album.— An album for holding photographs, with pictorial borders containing views of castles, with short descriptions attached, is not a book within 5 & 6 Vict. c. 45, § 1, so as to be capable of obtaining copyright for the contents. Schove *v.* Schmincké, 33 Ch. D. 546, 25 L. J. Ch. 892, 55 L. T. Rep. N. S. 212, 34 Wkly. Rep. 700.

Part of volume.— The word "book" includes a part of a book under the interpretation clause of section 2 of the copyright act

b. Manuscripts. Unprinted manuscript, such as a collection of letters, has been held to be within the meaning of 8 Anne, c. 19;[13] and in the United States an author's or proprietor's property in an unpublished manuscript is specifically protected by statute.[14]

c. Translations. Translations are subject to copyright in the name of the translator or proprietor.[15]

d. New Editions — (I) *In General.* New editions which are but reprints of the original are protected by the original copyright;[16] but in order to protect new and original matter incorporated into a new edition, a new copyright must be obtained, such editions being new books within the meaning of the statute, and protection being afforded as to such new and original matter from the date of the new copyright.[17]

(II) *Where New and Old Matter Is Separable.* Where the new matter is separable from the old, or where only a portion of the original matter has been rewritten or revised, the new copyright will extend only to such distinct and separable matter.[18]

e. Law Reports — (I) *Opinions.* It is well settled that neither the reporter of, nor the judge delivering, an opinion can obtain a copyright therein,[19] and the better opinion seems to be, at least in the United States, that no copyright in judicial opinions exists in favor of the government.[20]

of 1842. Kelly's Directories *v.* Gavin, [1901] 1 Ch. 374, 70 L. J. Ch. 237, 84 L. T. Rep. N. S. 581, 49 Wkly. Rep. 313.

An inchoate intended publication is not the subject of copyright, as such right extends to the book only and not to the subject. Centennial Catalogue Co. *v.* Porter, 5 Fed. Cas. No. 2,546, 2 Wkly. Notes Cas. (Pa.) 601. See also Platt *v.* Walter, 17 L. T. Rep. N. S. 157.

13. Pope *v.* Curl, 2 Atk. 342, 26 Eng. Reprint 608.

14. U. S. Rev. Stat. (1878) § 4967, as amended 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3416]. And see Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

Letters.— The copyright act of 1831 (U. S. Rev. Stat. (1878) § 4967 [U. S. Comp. Stat. (1901) p. 3416]) protects the author's right to his manuscript, which includes private letters. Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32, 2 Fed. Cas. No. 1,082, 4 McLean 300.

15. Lesser *v.* Sklarz, 15 Fed. Cas. No. 8,276*a*; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Wyatt *v.* Barnard, 3 Ves. & B. 77, 13 Rev. Rep. 141; Rooney *v.* Kelley, 14 Ir. C. L. 158. See also Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768.

16. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639.

17. Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Black *v.* Murray, 9 Sc. Sess. Cas. (3d ser.) 341; Tonson *v.* Walker, 3 Swanst. 672. See also Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651.

Where the original copyright is unexpired, only the author or his assignee has the right to bring out a new edition. Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572. See also Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Tonson *v.* Walker, 3 Swanst. 672.

18. Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285. See also Black *v.* Murray, 9 Sc. Sess. Cas. (3d ser.) 341, where it was discussed, although not decided, whether by change of one word copyright may be acquired in a new edition. And see Cary *v.* Faden, 5 Ves. Jr. 24.

19. Banks *v.* Manchester, 2 Del. Co. (Pa.) 372; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; State *v.* Gould, 34 Fed. 319; Banks *v.* Manchester, 23 Fed. 143; Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441; Chase *v.* Seaborn, 10 Fed. Cas. No. 2,628, 4 Cliff. 306; Gould *v.* Hastings, 10 Fed. Cas. No. 5,639; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362.

20. Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559; Banks *v.* Manchester, 2 Del. Co. (Pa.) 372; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425 [*affirming* 23 Fed. 143]; State *v.* Gould, 34 Fed. 319; Banks *v.* West Pub. Co., 27 Fed. 50; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362 (under N. Y. Const. (1846) art. 6, § 22, which provides that all "judicial decisions shall be free for publication by any person"). *Contra,* Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143. See also Drone Copyright 162 [*citing* Atkins' Case, cited in Millar *v.* Taylor, 4 Burr. 2303, 2315, reported in Carter 89; Bacon Abr. Prerog. F, 5; Roper *v.* Streater, cited in Millar *v.* Taylor, 4 Burr. 2303, 2316, reported in Skin. 234, 1 Mod. 257; Millar *v.* Taylor, 4 Burr. 2303; Baskett *v.* Cambridge University, 1 W. Bl. 105, 2 Burr.

(11) *Syllabi, Statements, Indexes, Etc.* All original matter prepared by the reporter, such as head-notes, statements of facts, and of arguments of counsel, indexes, tables of cases, and notes, is entitled to protection.[21] It is, however, competent for the government to contract with the reporter that the copyright in such matter shall vest in itself;[22] and where the syllabi or statement of facts are prepared by the court, no right to copyright vests in the reporter.[23]

f. Statutes. While it has been broadly stated that the government, as owner, may copyright statutes,[24] the contrary would seem the better doctrine for the same reasons as are applicable to reports.[25] A compiler or publisher of an annotated edition may, however, obtain a copyright covering and protecting such part of the contents as may be fairly deemed the product of his own labor.[26]

g. Official Letters and Documents. The author or his representative may obtain a copyright in official letters and documents, if their publication is not contrary to public policy; but such right is subject to that of the government to publish such documents when the public service renders it necessary.[27]

h. Legal Blanks. Legal blanks prepared in accordance with statutory requirements may be copyrighted;[28] and this is true, although minor parts of

661, 2 Ld. Ken. 397; Rex *v.* Clement, 4 B. & Ald. 218, 23 Rev. Rep. 260, 25 Rev. Rep. 710, 6 E. C. L. 458; Tichborne *v.* Mostyn, L. R. 7 Eq. 55 note; Gurdney *v.* Longman, 13 Ves. Jr. 493]. And see Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Butterworth *v.* Robinson, 5 Ves. Jr. 709; Hodges *v.* Welsh, 2 Ir. Eq. 266.

"It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter; that is to say, the indexes, the tables of cases, and the statement of points made and authorities cited by counsel." Banks *v.* Manchester, 23 Fed. 143, 145. See also Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559.

As to the right to publish reports or control publication see, generally, Reports.

21. Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559; Banks *v.* Manchester, 2 Del. Co. (Pa.) 372; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425 [*affirming* 23 Fed. 143]; Paige *v.* Banks, 13 Wall. (U. S.) 608, 20 L. ed. 709 [*affirming* 18 Fed. Cas. No. 10,671, 7 Blatchf. 152]; Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328; Backus *v.* Gould, 7 How. (U. S.) 798, 12 L. ed. 919; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441; Banks *v.* McDivitt, 1 Fed. Cas. No. 961, 13 Blatchf. 163; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Cowen *v.* Banks, 6 Fed. Cas. No. 3,295, 24 How. Pr. (N. Y.) 72; Gould *v.* Hastings, 9 Fed. Cas. No. 5,639; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51; Sweet *v.* Shaw, 3 Jur. 217; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Butterworth *v.* Robinson, 5 Ves. Jr. 709; Hodges *v.* Welsh, 2 Ir. Eq. 266.

22. Banks *v.* West Pub. Co., 27 Fed. 50; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362. See also Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328; Banks *v.* Manchester, 23 Fed. 143; Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441.

23. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628.

24. Drone Copyright 164 [*citing* Baskett *v.* Cambridge University, 2 Burr. 661, 2 Ld. Ken. 397, 1 W. Bl. 105; Baskett *v.* Cunningham, 2 Eden 137, 1 W. Bl. 370].

25. Davidson *v.* Wheelock, 27 Fed. 61. See also, *supra*, I, B, 2, e, (I)].

26. Howell *v.* Miller, 91 Fed. 129, 33 C. C. A. 407; Davidson *v.* Wheelock, 27 Fed. 61. See also Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163.

27. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100.

28. Brightley *v.* Littleton, 37 Fed. 103; Drone Copyright 153 [*citing* Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. (2d ser.) 748]. But see Carlisle *v.* Colusa County, 57 Fed. 979, where it was held, construing section 3630 of the California political code, that there could be no copyright in any particular arrangement of the matter which the California code required the assessors to deliver to each person as a blank form of property statements, for the assessors should not be embarrassed in the performance of their duties by any distinctions of convenience of forms prepared by private persons.

such a form are old, if they are so combined with the parts drawn in pursuance of the statute as to make a complete form.[29]

i. Cyclopedias and Periodicals. In England encyclopedias, reviews, magazines, and periodical works, or works published in a series of books or parts, are specifically protected by statute.[30] Previous to this enactment protection had been afforded such publications under the judicial construction of the word "book," as used in 8 Anne, c. 19.[31] In the United States it has been held that newspapers are not within the statute,[32] but the sounder view seems to be that they are.[33]

j. Compilations — (I) *In General.* While the author of a book has a copyright in the plan, arrangement, and combination of his material, if such plan, arrangement, and combination be new and original in substance, yet before he can invoke an application of this rule he must make it appear that his book exhibits a substantially new and original system of arranging material, which system is his own invention.[34] He must in all cases go to the original sources for his information, and cannot appropriate that gathered by his predecessor.[35] A compilation comprising a choice of articles treating in an original manner of subjects taken from books on which the copyright has expired, together with its nomenclature, may, when properly registered, be the subject of copyright.[36]

(II) *Advertisements, Price-Lists and Catalogues.* While no copyright can be acquired in the employment of a particular method of advertising,[37] or in a mere price-list,[38] yet it may be acquired in an advertising catalogue which contains original matter, the product of intellectual labor on the part of the author or designer.[39]

29. Brightley *v.* Littleton, 37 Fed. 103.

30. 5 & 6 Vict. c. 45, § 18.

Newspapers.— Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206; Walter *v.* Howe, 17 Ch. D. 708, 50 L. J. Ch. 621, 44 L. T. Rep. N. S. 727, 29 Wkly. Rep. 776. *Compare* Platt *v.* Walter, 17 L. T. Rep. N. S. 157, in which it was doubted whether 5 & 6 Vict. c. 45, § 18, extends to newspapers. Further as to newspapers see *infra*, I, B, 2, j, (IV).

Work published in instalments.—Any copyright protection for a work, secured under 4 U. S. Stat. at L. 436, by entering for copyright in the name of the publishers the issues of a magazine which contain instalments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name. Mifflin *v.* R. H. White Co., 190 U. S. 260, 23 S. Ct. 769, 47 L. ed. 436 [*affirming* 112 Fed. 1004, 50 C. C. A. 661].

31. Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51; Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30. And see *supra*, I, B, 2, a.

32. Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382.

33. Drone Copyright 169. See also Brightley *v.* Littleton, 37 Fed. 103.

Further as to newspapers see *infra*, I, B, 2, j, (IV).

34. Bullinger *v.* Mackey, 4 Fed. Cas. No. 2,127, 15 Blatchf. 550. See also Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306.

35. Williams *v.* Smythe, 110 Fed. 961 [*citing* List Pub. Co. *v.* Keller, 30 Fed. 772; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 4 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496].

36. Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255.

37. Ehret *v.* Pierce, 10 Fed. 553, 18 Blatchf. 302. See also Collendor *v.* Griffith, 6 Fed. Cas. No. 3,000, 11 Blatchf. 212.

38. Iron Works *v.* Clow, 82 Fed. 316, 27 C. C. A. 250; Mutual Advertising Co. *v.* Refo, 79 Off. Gaz. (U. S.) 159; Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934. See also Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963.

39. Grace *v.* Newman, L. R. 19 Eq. 623, 44 L. J. Ch. 298, 23 Wkly. Rep. 517; Maple *v.* Junior Army, etc., Stores, 21 Ch. D. 369, 52 L. J. Ch. 67, 47 L. T. Rep. N. S. 589, 31 Wkly. Rep. 70 [*overruling* Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963]; Bogue *v.* Houlston, 5 De G. & Sm. 267, 16 Jur. 372, 21 L. J. Ch. 470; Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934. See also Lawrence *v.* Cupples, 15 Fed. Cas. No. 8,135; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640. *Compare* J. L. Mott Iron Works *v.* Clow, 82 Fed. 316, 27 C. C. A. 250.

Illustrations.— The plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture which were duly registered under the copyright acts as a book. The illustrations were engraved from original drawings made by artists employed by the

(III) *CALENDARS.* Although copyright cannot, as such, subsist in a calendar, it may in the individual work expended upon it.[40]

(IV) *NEWSPAPERS.* There can be no general copyright, as an entirety, of a daily newspaper which is composed in large part of matter not entitled to protection.[41]

(V) *CREDIT RATINGS.* A book of credit ratings and financial standing of persons engaged in a particular line of business is entitled to copyright, where the information has been collected from original sources.[42]

(VI) *TICKER TAPE.* A printed tape showing the results of races is not within the meaning of the copyright laws.[43]

3. MAPS AND CHARTS. Maps, charts, or plans come within the definition of "book" as contained in 5 & 6 Vict. c. 45, § 2.[44] In the United States maps and charts are specifically enumerated in the statute.[45]

plaintiffs, but the book contained no letter-press of such a description as to be the subject of copyright, and it was not published for sale but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the plaintiffs' book. It was held that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book. Maple *v.* Junior Army, etc., Stores, 21 Ch. D. 369, 52 L. J. Ch. 67, 47 L. T. Rep. N. S. 589, 31 Wkly. Rep. 70. So too in Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452, the chromo entitled "Gambrinus and his Followers," intended as a glorification of lager-beer drinking, and designed and circulated as an advertisement of the publisher's business as a lager-beer brewer, was held to be a proper subject of copyright [*distinguishing* Ehret *v.* Pierce, 10 Fed. 553, 18 Blatchf. 302, upon the ground that the copyrighted article in that case was not a work of art and had no value as such, and was merely a mode of advertising]. In the principal case, Brown, District J., held that the chromo of Gambrinus was a work of the imagination, and had such obvious artistic qualities as in his judgment to render it fairly a subject of copyright without regard to the use the plaintiff may have made, or might have intended to make, of it. See also Courier Lithographing Co. *v.* Donaldson Lithographing Co., 104 Fed. 993, 44 C. C. A. 296. And see Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. 474; Schumacher *v.* Schwencke, 25 Fed. 446, 23 Blatchf. 373.

40. Longman *v.* Winchester, 16 Ves. Jr. 269; Matthewson *v.* Stockdale, 12 Ves. Jr. 270.

41. Chicago Tribune Co. *v.* Associated Press, 116 Fed. 126 [*citing* with approval Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382 (*quoted* in Baker *v.* Selden, 101 U. S. 99, 25 L. ed. 841; J. L. Mott Iron Works *v.* Clow, 82 Fed. 316, 27 C. C. A. 250)].

Further as to newspapers see *supra*, I, B, 2, i.

42. Ladd *v.* Oxnard, 75 Fed. 703.

43. National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 298, 60 L. R. A. 805, in which it was said that printed tape "has no value at all as a book or article. It lasts literally for an hour, and is in the waste-basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded — the happening, as a happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality — to coin a word, the precommunicatedness of the information — is the essence of appellee's service; the quality that wins from the patron his patronage."

44. Stannard *v.* Lee, L. R. 6 Ch. 346, 40 L. J. Ch. 489, 24 L. T. Rep. N. S. 459, 19 Wkly. Rep. 615 [*overruling* 23 L. T. Rep. N. S. 306, where it was held that maps were copyrightable as engravings]. See also Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118; Cary *v.* Faden, 5 Ves. Jr. 24. *Compare* Stannard *v.* Harrison, 24 L. T. Rep. N. S. 570, 19 Wkly. Rep. 811.

A sleeve chart, which consists of a piece of cardboard in the shape of a sleeve with certain lines and figures printed upon it, is not the subject of copyright under 5 & 6 Vict. c. 45. Hollinrake *v.* Truswell, [1894] 3 Ch. 420, 63 L. J. Ch. 719, 71 L. T. Rep. N. S. 419, 7 Reports 568.

45. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]. See also Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393; 3 Fed. Cas. No. 1,580, 2 Paine 397; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

New editions of maps are included in the copyright laws of congress. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

Tabulated information.—The word "chart," as used in the copyright law, does not include sheets of paper exhibiting tabulated or methodically arranged information. Taylor *v.* Gilman, 24 Fed. 632, 23 Blatchf. 325.

Dressmaking pattern.— A chart on a single sheet, containing diagrams representing a system of taking measures for and cutting

4. Dramatic Compositions — a. In General. Dramatic compositions are entitled to copyright both in England[46] and in the United States.[47]

b. Translations, Dramatizations, and Adaptations. Translations, dramatizations, and adaptations of literary works are copyrightable, where the author may legally make use of the original work.[48] In the United States authors or their assigns are given the right of dramatization and translation.[49]

c. What Constitutes Dramatic Composition — (i) *In General.* What constitutes a dramatic composition within the meaning of the statutes cannot be clearly defined. The courts are, however, extremely liberal in their construction, and will hold any piece in which the dramatic element is present, and which is suitable for representation to come within the clear intent of the legislature.[50]

women's dresses, with instructions for its use, is a "book" within the copyright law. Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540.

46. 3 & 4 Wm. IV, c. 15; 5 & 6 Vict. c. 45, § 20. See also Cumberland *v.* Planché, 1 A. & E. 580, 3 L. J. K. B. O. S. 194, 28 E. C. L. 276, 3 N. & M. 537; Chappell *v.* Boosey, 21 Ch. D. 232, 51 L. J. Ch. 625, 46 L. T. Rep. N. S. 854, 30 Wkly. Rep. 733.

Definition.— "The words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." 5 & 6 Vict. c. 45, § 2.

47. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406].

48. Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 6 Blatchf. (U. S.) 87; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Chatterton *v.* Cave, L. R. 10 C. P. 572, 44 L. J. C. P. 386, 33 L. T. Rep. N. S. 255, 23 Wkly. Rep. 657 [*affirmed* in 2 C. P. D. 42, 46 L. J. C. P. 97, 35 L. T. Rep. N. S. 587, 25 Wkly. Rep. 102 (*affirmed* in 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498)]; Toole *v.* Young, L. R. 9 Q. B. 523, 43 L. J. Q. B. 176, 30 L. T. Rep. N. S. 599, 22 Wkly. Rep. 694; Planche *v.* Braham, 4 Bing. N. Cas. 17, 33 E. C. L. 574, 8 C. & P. 68, 34 E. C. L. 614, 3 Hodges 288, 1 Jur. 823, 8 L. J. C. P. 25, 5 Scott 242; Shepherd *v.* Conquest, 17 C. B. 427, 2 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427; Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479.

49. U. S. Rev. Stat. (1878) § 4952, as amended 26 U. S. Stat. at L. 1106 [U. S. Comp. Stat. (1901) p. 3406].

50. Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10; Daly *v.* Palmer, 10 Fed. Cas. No. 3,552, 6 Blatchf. 256; Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217; Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871; Clark *v.* Bishop, 25 L. T. Rep. N. S. 908.

Statute construed.— In construing the definitions of "dramatic piece" as contained in 5 & 6 Vict. c. 45, § 2, Denman, C. J., said: "These words comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by a performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience." Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217.

A song which relates to the burning of a ship at sea and the escape of those on board, which describes their feelings in vehement language and sometimes expresses them in the supposed words of the suffering parties, is dramatic, and therefore at all events within the meaning of the statute, although it be sung by one person only, sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress. Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217. See also Clark *v.* Bishop, 25 L. T. Rep. N. S. 908.

A stage dance illustrating the poetry of motion by a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, but telling no story, portraying no character, and depicting no emotion, is not a "dramatic composition," within the meaning of the Copyright Act. Fuller *v.* Bemis, 50 Fed. 926.

So too a stage performance consisting of the singing of well-known songs by a woman dressed to personate other singers, prefaced by a short and commonplace dialogue having no reference to such performance, and with a kinetoscope exhibition during the interval when the performer is changing costume, in which she is shown while making such changes by means of moving pictures previously taken photographically on a film, is not a subject of copyright, the dialogue not being a dramatic composition within the meaning of the statute, and neither the dialogue, performance, nor exhibition being such as to "promote the progress of science" or "useful arts," within the meaning of the constitutional provision conferring upon congress power to enact copyright laws, and by which such power is limited. Barnes *v.* Miner, 122 Fed. 480.

Pantomimes are dramatic compositions within the meaning of the copyright statutes. Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871. See also Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256.

(II) *Spectacular Productions.* A mere exhibition, spectacle, or scene is not a dramatic composition within the meaning of the copyright laws, and as such entitled to protection.[51]

(III) *Stage Contrivances.* While scenic effects which constitute mere links in an extended chain of incident, speech, and action will be protected as dramatic compositions,[52] mere mechanical contrivances used upon the stage to represent a particular incident of a production will not be protected by a copyright of the play in which the incident is contained.[53]

(IV) *Stage Directions.* A written work consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas.[54]

5. Musical Compositions. While musical compositions were construed to be within the intent of 8 Anne, c. 19,[55] and were specifically protected in the United States,[56] the right of exclusive performance or representation was not secured. This right, however, is now given by statute in both England and the United States.[57]

51. Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, 1 Abb. 356, Deady 216.

52. Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10; Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256; Chatterton *v.* Cave, L. R. 10 C. P. 572, 44 L. J. C. P. 386, 33 L. T. Rep. N. S. 255, 23 Wkly. Rep. 657. See also 5 & 6 Vict. c. 45, § 2.

Illustration.—A scene in a play represented a person placed by another on a track over which a train was momentarily expected to arrive, and so fastened that he could not move from his dangerous position, and his rescue by a third person at the last moment. It was displayed before the audience by a series of incidents grouped in a certain sequence, and realistically presented, but with very little dialogue. It was held that such combination of dramatic events, although its success was largely dependent on what was seen, irrespective of the dialogue, was a dramatic composition, entitled to protection under the copyright laws. Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10.

53. Scranna *v.* Jefferson, 33 Fed. 347; Freligh *v.* Carroll, 9 Fed. Cas. No. 5,092*a* [*cited* in 2 Morgan, lit. 222, to the point that a mechanical contrivance used upon the stage to represent the incident of a drawbridge surreptitiously opened to precipitate an approaching train into a stream below, etc., being patentable, cannot be protected by a copyright of the play in which the incident is contained].

A mechanical contrivance consisting of a tank into which water is made to fall, and running thence off underneath the stage, representing a river into which, in the course of a play, the villain falls from a bridge above, not being a link in the chain of incident which, together with the speech and action of the performance, constitute a series of events concededly novel, is not such a mechanical contrivance as will be protected by copyright of the play in which it is introduced. Scranna *v.* Jefferson, 33 Fed. 347.

54. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256, per Blatchford, J. See also Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871.

55. White *v.* Geroch, 2 B. & Ald. 298, 1 Chit. 24, 22 Rev. Rep. 786, 18 E. C. L. 28; Storace *v.* Longman, 2 Campb. 27 note *a*, 11 East 244 note *a*; Hime *v.* Dale, 2 Campb. 27 note *b*, 11 East 244 note *a*; Clementi *v.* Golding, 2 Campb. 25, 11 East 244; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Platts *v.* Button, Coop. 303, 19 Ves. Jr. 447, 10 Eng. Ch. 303; Bach *v.* Longman, Cowp. 623, 1 Chit. 26; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288; Chappell *v.* Parday, 4 Y. & C. Exch. 485, 16 L. J. Exch. Eq. 50, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303.

56. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; Henderson *v.* Tompkins, 60 Fed. 758; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72.

Topical song.— The introduction, skeleton, and chorus of a topical song, part of a dramatic composition, designed merely to amuse, although possessing little literary merit or originality, may be subject to copyright if of value for the purposes for which they were designed. Henderson *v.* Tompkins, 60 Fed. 758.

57. U. S. Rev. Stat. (1878) § 4966, as amended 29 U. S. Stat. at L. 481 [U. S. Comp. Stat. (1901) p. 3415]; 5 & 6 Vict. c. 45, § 20 (incorporating 3 & 4 Wm. IV, c. 15, and extending its provisions to musical compositions). See also Reichardt *v.* Sapte, [1893] 2 Q. B. 308; *Re* Musical Compositions, etc., L. R. 4 Q. B. D. 483, 48 L. J. Q. B. 505, 41 L. T. Rep. N. S. 144, 27 Wkly. Rep. 857 [*overruling* 4 Q. B. D. 90, 48 L. J. Q. B. 29, 39 L. T. Rep. N. S. 396, 27 Wkly. Rep. 261]; Planche *v.* Braham, 4 Bing. N. Cas. 17, 33 E. C. L. 574, 8 C. & P. 68, 34 E. C. L. 614, 3

6. Engravings, Cuts, Prints, and Photographs — a. In General. Engravings, cuts, prints, and photographs are protected by the copyright laws of both England and the United States,[58] and when such engravings, cuts, prints, or photographs

Hodges 288, 1 Jur. 823, 8 L. J. C. P. 25, 5 Scott 242; Boosey *v.* Fairlie, 7 Ch. D. 301; Buxton *v.* James, 5 De G. & Sm. 80, 16 Jur. 15; Russell *v.* Smith, 15 L. J. Ch. 340, 15 Sim. 181, 38 Eng. Ch. 181. And see Hatton *v.* Kean, 7 C. B. N. S. 268, 6 Jur. N. S. 226, 29 L. J. C. P. 20, 1 L. T. Rep. N. S. 10, 8 Wkly. Rep. 7, 97 E. C. L. 268; Wallenstein *v.* Herbert, 15 L. T. Rep. N. S. 364, 16 L. T. Rep. N. S. 453, 15 Wkly. Rep. 838.

Rearrangements.— A person who writes words to an old air and procures an accompaniment and publishes them together is entitled to the copyright in the whole work. Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 12 Jur. 1091, 18 L. J. C. P. 97, 62 E. C. L. 4. See also Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72; Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182.

Score for piano.— The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright within 5 & 6 Vict. c. 45, and 7 & 8 Vict. c. 12. Wood *v.* Boosey, L. R. 3 Q. B. 223, 9 B. & S. 175, 37 L. J. Q. B. 84, 18 L. T. Rep. N. S. 105, 16 Wkly. Rep. 485. See also Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Jollie *v.* Jacques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618.

58. England.— 8 Geo. II, c. 13 (engravings, prints, and cuts, when subject or design is original. See Blackwell *v.* Harper, 2 Atk. 93, 26 Eng. Reprint 458, holding that the act is not confined to works of invention only, but means the designing or engraving of anything that is already in nature); 7 Geo. III, c. 38 (extending protection to "any print taken from any picture, drawing, model, or sculpture either ancient or modern"); 17 Geo. III, c. 57 (giving an action for damages); 6 & 7 Wm. IV, c. 59 (extending law to Ireland); 15 & 16 Vict. c. 12, § 14 (including "prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely"); 25 & 26 Vict. c. 68 (extending protection to photographs. See Matter of Copyright Acts, L. R. 4 Q. B. 715, 20 L. T. Rep. N. S. 877, 17 Wkly. Rep. 1018, holding that a photograph of a painting is so far original that it would be infringing the statute to copy it). See also Graves *v.* Ashford, L. R. 2 C. P. 410, 36 L. J. C. P. 139, 16 L. T. Rep. N. S. 98, 15 Wkly. Rep. 498; Maple *v.* Junior Army, etc., Stores, 21 Ch. D. 369, 52 L. J. Ch. 67, 47 L. T. Rep. N. S. 589, 31 Wkly. Rep. 70; Gambart *v.* Ball, 14 C. B. N. S. 306, 9 Jur. N. S. 1059, 32 L. J. C. P. 166, 8 L. T. Rep. N. S. 426, 11 Wkly. Rep. 699, 108 E. C. L. 306.

United States.— U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349 [*affirming* 17 Fed. 591]; Rigney *v.* Dutton, 77 Fed. 176; Falk *v.* Donaldson, 57 Fed. 32; Falk *v.* Brett Lithographing Co., 48 Fed. 678; Schreiber *v.* Thornton, 17 Fed. 603; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Richardson *v.* Miller, 20 Fed. Cas. No. 11,791. But see Wood *v.* Abbott, 30 Fed. Cas. No. 17,938, 5 Blatchf. 325, in which it was held that a photograph is not a "print" within the meaning of section 1 of the act of Feb. 3, 1831, and therefore not the subject of copyright under that act.

"The words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." 18 U. S. Stat. at L. 79 [U. S. Comp. Stat. (1901) p. 3412]. See also Rosenbach *v.* Dreyfuss, 2 Fed. 217, where it was held that prints of balloons and hanging baskets, with printing on them for embroidery and cutting lines, showing how the paper may be cut and joined to make the different parts fit together, and not intended as a mere pictorial representation of something, are not copyrightable. *Compare* Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540 (where it was held that a dress pattern might be copyrighted as a print or chart); Richardson *v.* Miller, 20 Fed. Cas. No. 11,791 (where it was held that a design for playing cards was copyrightable).

Engraved advertisements.—Engravings representing ballet dancers or fancy bicycle riding, designed for use as show-bills or advertisements of a circus, are not entitled to copyright under the constitution or under the United States statutes. Bleistein *v.* Donaldson Lithographing Co., 98 Fed. 608. See also Courier Lithographing Co. *v.* Donaldson Lithographing Co., 104 Fed. 993, 44 C. C. A. 296.

Prints.— U. S. Rev. Stat. (1878) § 4956 [U. S. Comp. Stat. (1901) p. 3407], authorizes the copyright of any "book, map, chart, . . . cut, print, . . . or design for a work of the fine arts: provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited, . . shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States." It was held that pictures printed in successive colors from metal plates, from which part of the metal has been cut so as to leave portions thereof in relief, were entitled to copyright as "prints," within the general enumeration of the section, and were not within the proviso because not "printed from drawings on stone." Hills *v.* Austrich, 120 Fed. 862.

Prints from lawful plate.— A being employed by B to engrave plates from drawings belonging to B, took from the plates so engraved by him a number of proof impressions, which he retained for his own use. A afterward became bankrupt, and the proofs of

are used to illustrate a copyrighted book they will be protected by the copyright of the book.[59] A series of photographs arranged for use in a machine for producing a panoramic effect is entitled to copyright.[60]

b. Labels. Mere labels used to indicate the contents of a package to which they are affixed are not within the provisions of the copyright law.[61]

7. Paintings, Drawings, Chromos, Statues, and Models. In the United States paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts are subjects of copyright.[62] In England practically the same subjects are protected.[63]

which he had possessed himself were advertised by his assignee for sale. It was held that neither he nor his assignees were liable to an action for having disposed of pirated prints without the consent of the proprietor, inasmuch as 17 Geo. III, c. 57, applied to impressions of engravings pirated from other engravings and not to prints taken from a lawful plate. Murray *v.* Heath, 1 B. & Ad. 804, 9 L. J. K. B. O. S. 111, 20 E. C. L. 698.

Photographs.— A photographer who arranges the light background and other details for a photograph and poses the subject so as to produce an artistic and pleasing picture is entitled to a copyright for such photograph. Falk *v.* Gast Lithograph, etc., Co., 48 Fed. 262. See also Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349.

A colored photograph or picture of natural scenery may be the subject of a copyright. Cleland *v.* Thayer, 121 Fed. 71 [*citing* Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239, 23 S. Ct. 298, 47 L. ed. 460].

Nature of photograph.—A photograph may be something more than a mere mechanical and chemical product, and may rise to the dignity of art through the blending of the mechanical parts of the process with the original intellectual conception of an artist. Courier Lithographing Co. *v.* Donaldson Lithographing Co., 104 Fed. 993, 44 C. C. A. 296.

Constitutionality of statute protecting photographs.— Under U. S. Const. art. 1, § 8, empowering congress to secure "to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," congress can authorize copyright of photographs, so far as they embody original intellectual conceptions of the author. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349 [*affirming* 17 Fed. 591].

A chromolithograph is a print within the act of 1831 (4 Stat. at L. 436, § 1), granting a copyright in prints. Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452.

Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright under the federal statutes as "pictorial illustrations," even assuming that only such illustrations as are "connected with the fine arts" are within the protection of such laws. Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239, 23 S. Ct. 298, 47 L. ed. 460 [*reversing* 104 Fed. 993, 44 C. C. A. 296].

Pictorial illustrations are none the less within the protection of the copyright law, because they are drawn from real life. Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239, 23 S. Ct. 298, 47 L. ed. 460 [*reversing* 104 Fed. 993, 44 C. C. A. 296].

59. Grace *v.* Newman, L. R. 19 Eq. 625, 44 L. J. Ch. 298, 23 Wkly. Rep. 517; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Bogue *v.* Houlston, 5 De G. & Sm. 267, 16 Jur. 372, 21 L. J. Ch. 470. See also Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963.

60. Edison *v.* Lubin, 122 Fed. 240 [*reversing* 119 Fed. 993].

61. Higgins *v.* Keuffel, 140 U. S. 428, 11 S. Ct. 731, 35 L. ed. 470 [*affirming* 30 Fed. 627]; Schumacher *v.* Wogram, 35 Fed. 210; Coffeen *v.* Brunton, 5 Fed. Cas. No. 2,946, 4 McLean 516; Marsh *v.* Warren, 16 Fed. Cas. No. 9,121, 14 Blatchf. 263; Scovelle *v.* Toland, 21 Fed. Cas. No. 12,553; Margetson *v.* Wright, 2 De G. & Sm. 420. See also U. S. Rev. Stat. § 4929. And see Trade-Marks and Trade-Names; Patents.

62. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452.

A chromo, if a meritorious work of art, may be copyrighted, although designed and used for gratuitous distribution as an advertisement for the purpose of attracting business. Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452.

Not protected as "manuscript."—The word "manuscript," in the copyright law of 1831 (4 U. S. Stat. at L. 438), giving a remedy when any person shall publish any manuscript without the consent of the author or proprietor, does not include pictures. Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537.

63. 25 & 26 Vict. c. 68 (paintings, drawings, etc.); 54 Geo. III, c. 56 (sculpture). See also Gahagan *v.* Cooper, 3 Campb. 111, construing 38 Geo. III, c. 71, which was repealed by 24 & 25 Vict. c. 101.

Canada.— The Imperial Act, 25 & 26 Vict. c. 68, being an act for amending the law relating to copyright in works of fine art, does not extend to the colonies, and copyright conferred thereby is confined to the United Kingdom. Graves *v.* Gorrie, 32 Ont. 266.

C. Form and Quality of Subject-Matter — 1. In General. The form or size of a work in order that it may be entitled to protection under the copyright acts is immaterial. It must, however, be original, meritorious, and free from illegality or immorality.[64]

2. Originality — a. In General. A work in order to be copyrighted must be original, in the sense that the author has created it by his own skill, labor, and judgment, without directly copying or evasively imitating the work of another.[65]

64. **Form or size.**—Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373; Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698; Scoville *v.* Toland, 21 Fed. Cas. No. 12,553; Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963; Church *v.* Linton, 25 Ont. 131; Griffin *v.* Kingston, etc., R. Co., 17 Ont. 660.

Printing not necessary.— A literary composition may be a book entitled to copyright without being printed. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698.

Size of painting.— The fact that a painting is only seven by four and one-half inches in size, and could be readily lithographed and used as an advertising label, will not affect the copyright. Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373.

65. Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Bartlett *v.* Crittenden, 17 Fed. Cas. No. 1,076, 5 McLean 32; Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72; Richardson *v.* Miller, 20 Fed. Cas. No. 11,791; Lazarus *v.* Charles, L. R. 16 Eq. 117, 42 L. J. Ch. 507; Sayre *v.* Moore, 1 East 361 note *b*, 6 Rev. Rep. 288 note; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Cable *v.* Marks, 52 L. J. Ch. 107, 47 L. T. Rep. N. S. 432, 31 Wkly. Rep. 221; Barfield *v.* Nicholson, 2 L. J. Ch. O. S. 90, 3 Sim. & St. 1; Bailey *v.* Taylor, 3 L. J. Ch. O. S. 66; Black *v.* Murray, 9 Sc. Sess. Cas. (3d ser.) 341.

Originality of conception as criterion.— In National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 297, 60 L. R. A. 805, it is said: "It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this line easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author, as well as the thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation, would have observed; and its statement in the substantial form that people generally would have adopted. A catalogue, or table of statistics, or business publications generally, may thus belong to either one or the other of these classes. If, in their makeup, there is evinced some peculiar mental endowment — the grasp of mind, say in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions — there may be authorship within the meaning of the copyright grant as interpreted by the courts. But if, on the contrary, such writings are a mere notation of the figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. In authorship, the product has some likeness to the mind underneath it; in a work of mere notation, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity."

Corrections and additions.— Where a person simply makes corrections and additions to a work in which he had originally no interest, he acquires a copyright in them, and may bring an action if they are pirated. Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285. See also Sayre *v.* Moore, 1 East 361 note *b*, 6 Rev. Rep. 288.

The novelty of a design may consist in the form, outline, or grouping, or in the use, combination, arrangement, or harmony, of colors, or the combination of some or all of these attributes. Richardson *v.* Miller, 20 Fed. Cas. No. 11,791.

The novelty of a work on bookkeeping consists in the mode of keeping accounts, the names used in the items of debit and credit being of no importance. Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32.

A musical composition, to be the subject of a copyright, must be substantially a new and original work, not a copy of a piece already produced, with additions or variations which a writer of music with experience and skill might readily make. Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618.

Title of drama.— A person who deposits in the copyright office the title of a drama, which title is not original with himself, cannot secure such title to the exclusion of others who have applied such title to a dramatic composition founded on the same story before the date of such deposit. Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308.

It need not, however, be wholly original with himself, but in such case copyright is only acquired in that part of the work which is the result of the author's own labor, skill, and ingenuity.[66]

b. New Combinations of Old Materials. A new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old.[67]

66. **Test of originality.**— "The question is not whether the materials which are used are entirely new and have never been used before; or even that they have never been used before for the same purpose. The true question is whether the same plan, arrangement, and combination of materials have been used before for the same purpose or for any other purpose. If they have not then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before, and *a fortiori*, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement. It is true that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations, or combinations; for these are strictly his own." Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768, 778. If, instead of searching into the common sources and obtaining your subject-matter thence, you avail yourself of the labors of your predecessor, adopt his arrangement, and questions, or adopt them with a colorable variation, it is an illegitimate use. Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

Original matter in new editions.— The editor of a subsequent edition is entitled to a copyright on his notes and additions, where they can be clearly separated from those of a previous edition. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1. See also Black *v.* Murray, 9 Sc. Sess. Cas. (3d ser.) 341. And also cases cited *supra*, note 65.

67. Banker *v.* Caldwell, 3 Minn. 94; Egbert *v.* Greenberg, 100 Fed. 447; American Trotting Register Assoc. *v.* Gocher, 70 Fed. 237; Stover *v.* Lathrop, 33 Fed. 348; Hanson *v.* Jaccard Jewelry Co., 32 Fed. 202; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Bullinger *v.* Mackey, 4 Fed. Cas. No. 2,127, 15 Blatchf. 550; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,736, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Leslie *v.* Young, [1894] A. C. 335, 6 Reports 211; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Grace *v.* Newman, L. R. 19 Eq. 623, 44 L. J. Ch. 298, 23 Wkly. Rep. 517; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 163, 22 Wkly. Rep. 640; Mack *v.* Potter, L. R. 14 Eq. 431, 41 L. J. Ch. 781, 20 Wkly. Rep. 964; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405; Trusler *v.* Murray, 1 East 362 note, 6 Rev. Rep. 289 note; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Norton *v.* Nicholls, 1 E. & E. 761, 5 Jur. N. S. 1203, 28 L. J. Q. B. 225, 7 Wkly. Rep. 420, 101 E. C. L. 761; Harrison *v.* Taylor, 4 H. & N. 815, 5 Jur. N. S. 1219, 29 L. J. Exch. 3; Rex *v.* Firmin, 3 H. & N. 304, note *a*, 15 J. P. 570; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Longman *v.* Winchester, 16 Ves. Jr. 269; Matthewson *v.* Stockdale, 12 Ves. Jr. 270; Hogg *v.* Kirby, 8 Ves. Jr. 221, 7 Rev. Rep. 30; Cary *v.* Fader, 5 Ves. Jr. 24; Beauchemin *v.* Cabieux, 10 Quebec Q. B. 255. See also Mulloney *v.* Stevens, 10 L. T. Rep. N. S. 190.

A work partly of compilations and partly original may be the subject of copyright; and where part is clearly pirated, the court will grant an immediate injunction, although the entire amount of the pirated parts is unascertained. Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6.

Abstracts of title.— It seems that abstract books and books of indexes containing abstracts of title to lands, with the encumbrances and liens upon said lands condensed and prepared from public records may be subjects of copyright. Banker *v.* Caldwell, 3 Minn. 94. See also Stover *v.* Lathrop, 33 Fed. 348.

Arrangements of questions and answers.— Arrangements of questions and answers, however simple in themselves, and on subjects however common, may be the subject of copyright. Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

Court calendars.— An injunction was granted against pirating a court calendar, the

c. Effect of Similarity. The mere fact that two or more works upon the same subject are similar to one another is not sufficient of itself to deprive either of the protection of the statute. Each, if the result of independent labor and research, and not a servile copy or an evasive imitation of the other, is entitled to be copyrighted.[68]

3. Literary or Artistic Merit. While the original object of both the English and American copyright laws was the promotion and encouragement of learning and art, the courts have been exceedingly liberal in their interpretation of them. Literary or artistic merit is not essential in order that a work may be copyrighted. If it can be considered a substantial contribution to useful knowledge or to the arts it is entitled to protection. The work must, however, have some such value.[69]

4. Illegal or Immoral Works. Illegal or immoral works are not entitled to

individual work creating a copyright, although the general subject was common. Longman *v.* Winchester, 16 Ves. Jr. 269. See also Matthewson *v.* Stockdale, 12 Ves. Jr. 270.

Plan of book.— There may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials and the mode of displaying and illustrating the subject, although all the materials employed and the subject of the work may be common to all other writers. Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186. But see Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385.

Railway guide.— The mere publication in a particular order of time-tables which are to be found in the publications of the various railway companies is not sufficient to give rise to a claim to copyright. The right may, however, exist in a compilation of information as to coach routes, ferries, and steamers published in the form of an abstract for the use of a particular locality. Leslie *v.* Young, [1894] A. C. 335, 6 Reports 211.

Trade directory.— The headings of a trade directory under which trade advertisements are classified are the subject of copyright. Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405.

68. Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393; Bullinger *v.* Mackey, 4 Fed. Cas. No. 2,127, 15 Blatchf. 550; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Lawrence *v.* Cupples, 15 Fed. Cas. No. 8,135; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 4 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; McNeill *v.* Williams, 11 Jur. 344; Bailey *v.* Taylor, 3 L. J. Ch. O. S. 66, 8 L. J. Ch. O. S. 49, R. & M. 73, Taml. 295; Barfield *v.* Nicholson, 2 Sim. & St. 1, 1 Eng. Ch. 1; Longman *v.* Winchester, 16 Ves. Jr. 269; Matthewson *v.* Stockdale, 12 Ves. Jr. 270; Spiers *v.* Brown, 6 Wkly. Rep. 352.

69. Higgins *v.* Keuffel, 140 U. S. 428, 11 S. Ct. 731, 35 L. ed. 470; Baker *v.* Selden, 101 U. S. 99, 25 L. ed. 841; Courier Lithographing Co. *v.* Donaldson Lithographing Co., 104 Fed. 993, 44 C. C. A. 296; J. L. Mott Iron Works *v.* Clow, 82 Fed. 316, 27 C. C. A. 250 [*affirming* 72 Fed. 168]; Henderson *v.* Tompkins, 60 Fed. 758; Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. 474; Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373; Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452; Ehret *v.* Pierce, 10 Fed. 553, 18 Blatchf. 302; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Lawrence *v.* Cupples, 15 Fed. Cas. No. 8,135; Richardson *v.* Miller, 20 Fed. Cas. No. 11,791; Kenrick *v.* Lawrence, 25 Q. B. D. 99, 38 Wkly. Rep. 779; Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95; Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963; Church *v.* Linton, 25 Ont. 131 [*dissenting* from Griffin *v.* Kingston, etc., R. Co., 17 Ont. 660]. *Compare* Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382, where it was held that a daily newspaper or price current was not entitled to copyright.

Object of acts.— The act of May 31, 1790 (1 U. S. Stat. at L. 124), securing to authors and inventors the exclusive right to their respective writings and discoveries, was passed in execution of the power given by the constitution, and its object was the promotion of science and the useful arts. The act is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382.

The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright, if time, labor, and experience have been de-

the protection of the copyright acts.[70] But the illegality or immorality must be inherent in the work. The mere fact that the work may be used for an unlawful purpose will not deprive it of the statutory protection.[71]

D. Persons Entitled to Copyright — 1. In General. The author, inventor, or designer of a literary or artistic production, or his legal representatives, can by compliance with the statutory requirements obtain copyright therein.[72] No one else is entitled to the protection of the statutes.[73]

2. Authors, Inventors, or Designers — a. Who Are — (I) *In General.* To constitute a person an author, inventor, or designer, within the meaning of the copyright laws, he must by his own intellectual labor and skill produce a work new and original in itself.[74] It is not necessary, however, that one be the sole

voted to its production. Church *v.* Linton, 25 Ont. 131 [*dissenting* from Griffin *v.* Kingston, etc., R. Co., 17 Ont. 660].

70. Bleistein *v.* Donaldson Lithographing Co., 98 Fed. 608; Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74; Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, 1 Abb. 356, Deady 216; Stockdale *v.* Onwhyn, 5 B. & C. 173, 11 E. C. L. 416, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. N. S. 122, 29 Rev. Rep. 207; Southey *v.* Sherwood, 2 Meriv. 435; Lawrence *v.* Smith, Jac. 471, 23 Rev. Rep. 125, 4 Eng. Ch. 471; Walcot *v.* Walker, 7 Ves. Jr. 1. See also Shook *v.* Daly, 49 How. Pr. (N. Y.) 366.

Works contrary to morality.— No action can be maintained for pirating a work which professes to be the amours of a courtezan, and it is no answer to the objection that the party is also a wrong-doer in publishing them, and that he therefore ought not to set up their immorality. Stockdale *v.* Onwhyn, 5 B. & C. 173, 11 E. C. L. 416, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. O. S. 122, 29 Rev. Rep. 207.

Works contrary to religion.— An injunction to restrain the infringement of the copyright in a work, as to which it appeared doubtful whether it did not tend to impugn the doctrine of the scriptures, was refused by a court of equity. Lawrence *v.* Smith, Jac. 471, 23 Rev. Rep. 125, 4 Eng. Ch. 471.

Libelous works.— The author of a work of a libelous or of an immoral tendency can have no legal property in it. Stockdale *v.* Onwhyn, 5 B. & C. 173, 11 E. C. L. 416, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. O. S. 122, 29 Rev. Rep. 207.

Musical compositions of immoral character cannot be protected by copyright; but where a copyright is held invalid because of the use of a word of immoral significance, such as "hottest," the owners thereof may republish the song, omitting the objectionable matter, and obtain a valid copyright therefor. Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74.

71. Egbert *v.* Greenberg, 100 Fed. 447; Richardson *v.* Miller, 20 Fed. Cas. No. 11,791.

"Dope books."— An "official form chart," which consists of a list of race-horses, and a compilation of facts and statistics relating to the performances of such horses on the track, is a proper subject of protection by copyright, where it is shown to be purchased and used by persons engaged in breeding, training, and racing horses; and on a proper showing a court of equity will not refuse a preliminary injunction against infringement of such copyright on the ground that the chart is also used for betting purposes. Egbert *v.* Greenberg, 100 Fed. 447.

Playing cards.—The fact that playing cards may be used by persons to violate the laws against gambling does not of itself deprive them of the protection of the law. Richardson *v.* Miller, 20 Fed. Cas. No. 11,791.

72. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Press Pub. Co. *v.* Falk, 59 Fed. 324; Scribner *v.* Henry G. Allen Co., 49 Fed. 854; Gilmore *v.* Anderson, 38 Fed. 846.

One who does business under a conventional or fictitious partnership name may obtain a copyright under that name. Scribner *v.* Henry G. Allen Co., 49 Fed. 854.

73. Koppel *v.* Downing, 11 App. Cas. (D. C.) 93; Press Pub. Co. *v.* Falk, 59 Fed. 324; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Binns *v.* Woodruff, 3 Fed. Cas. No. 1,424, 4 Wash. 48; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976; Jefferys *v.* Baldwin, Amhl. 164, 27 Eng. Reprint 109; Shepherd *v.* Conquest, 17 C. B. 427, 25 L. J. C. P. 127, 2 Jur. N. S. 236, 4 Wkly. Rep. 283, 84 E. C. L. 427; Langlois *v.* Vincent, 18 L. C. Jur. 160.

A licensee can neither take out a copyright himself nor confer upon a third person the right to do so. Koppel *v.* Downing, 11 App. Cas. (D. C.) 93.

Official reporters cannot obtain a copyright in head-notes written by the judges delivering the opinion. Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306. See *supra*, I, B, 2, e, (II).

74. Blume *v.* Spear, 30 Fed. 629; De Witt *v.* Brooks, 7 Fed. Cas. No. 3,851; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Wood *v.* Boosey, L. R. 3 Q. B. 223, 9 B. & S. 175, 37 L. J. Q. B. 84, 18 L. T. Rep. N. S. 105, 16 Wkly. Rep. 485 [*affirming* L. R. 2 Q. B. 340, 7 B. & S. 869, 36 L. J. Q. B. 103, 15 L. T. Rep. N. S. 530, 15 Wkly. Rep. 309]; Boosey *v.* Fairlie, 7 Ch. D. 301.

Employer not author.— A person who hires another to write a book and gives him the description and scope of the work is not the

creator of the work for which protection is claimed. Labor bestowed on the production of another is enough to constitute a claim to copyright, if involving originality.[75] So too a work may be so far the product of the mind of its designer that he will be considered the author of it, although he has had no part in its execution;[76] but a mere suggestion of the subject, without share in the design or execution, is insufficient to warrant a claim of authorship.[77]

(II) *JOINT AUTHORS.* Copyright may vest in two or more persons as joint authors of a production, where it is the result of a preconcerted joint design.[78] So too there may be owners in common of copyright.[79] But mere alterations, additions, or improvements, whether with or without the sanction of the author, will not entitle the person making them to claim to be a joint author of the work.[80]

b. Effect of Citizenship or Residence[81] — (I) *ENGLAND.* In England, irrespective of the international copyright acts,[82] it is now settled after much controversy that not only a citizen, whether a resident or non-resident,[83] but also a foreigner, if within the British dominions at the time of publication in the United Kingdom,

author. The literary man who writes the book and prepares it for publication is the author, and the copyright is intended to protect him and not the person who employed him. De Witt *v.* Brooks, 7 Fed. Cas. No. 3,851. See also Jefferys *v.* Baldwin, Amhl. 164, 27 Eng. Reprint 109; Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976.

Piano score of opera.— The arranger, not the original composer, is the author of a piano score of an opera. Wood *v.* Boosey, L. R. 3 Q. R. 223, 9 B. & S. 175, 37 L. J. Q. B. 84, 18 L. T. Rep. N. S. 105, 16 Wkly. Rep. 485 [*affirming* L. R. 2 Q. B. 340, 7 B. & S. 869, 36 L. J. Q. B. 103, 15 L. T. Rep. N. S. 530, 15 Wkly. Rep. 309].

Similarity to previous production.— A person will be held to be the author of a song, although there is evidence that his song is similar to a song previously published, if the parts that seem to be alike are not continuous enough or sufficiently extended to indicate that he was guided or aided by the former song, and notwithstanding the fact that he was very young at the time he says the music was formed in his mind; especially since he had the music written out as soon as he was old enough to do so intelligently, and before any other person did so. Blume *v.* Spear, 30 Fed. 629.

75. Schuherth *v.* Shaw, 21 Fed. Cas. No. 12,482; Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95; Tree *v.* Bowkett, 74 L. T. Rep. N. S. 77.

The adapter of a play who introduces into his version material alterations is an "author of a dramatic piece" within the Dramatic Copyright Act of 1833. The author of such a dramatic piece, having assigned the provincial rights therein, cannot, without the concurrence of his assignee, maintain an action against an infringer of those rights. Tree *v.* Bowkett, 74 L. T. Rep. N. S. 77.

The reporter of a speech, in which the speaker claims no rights, is an "author," within the meaning of the copyright act of 1842, and has copyright in his own report. Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95.

76. Hatton *v.* Kean, 7 C. B. N. S. 268, 6 Jur. N. S. 226, 29 L. J. C. P. 20, 1 L. T. Rep. N. S. 10, 8 Wkly. Rep. 7, 97 E. C. L. 268.

77. Binns *v.* Woodruff, 3 Fed. Cas. No. 1,424, 4 Wash. 48; Shepherd *v.* Conquest, 17 C. B. 427, 2 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427.

The person who conceived the idea of an engraving, where neither the design nor general arrangement of the print was his invention, but employed others to compose and execute the print, who designed and arranged the print and the parts that composed it, and executed the same, is not entitled to a copyright, under the act of April 29, 1802. Binns *v.* Woodruff, 3 Fed. Cas. No. 1,424, 4 Wash. 48.

78. Marzials *v.* Gibbons, L. R. 9 Ch. 518, 43 L. J. Ch. 774, 30 L. T. Rep. N. S. 666, 22 Wkly. Rep. 637; Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976. See also Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Joint design.— "If two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other." Levy *v.* Rutley, L. R. 6 C. P. 523, 530, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976.

79. See Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

80. Shelley *v.* Ross, L. R. 6 C. P. 531 note; Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976.

81. See also, generally, CITIZENS; DOMICILE.

82. See *infra*, IV, A.

83. Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Boosey *v.* Jefferys, 6 Exch. 580, 15 Jur. 540, 20 L. J. Exch. 354.

is entitled to copyright. If not within the British dominions at the time of publication a foreigner cannot acquire copyright.[84]

(II) *UNITED STATES* — (A) *In General.* Prior to the passage of the International Copyright Act[85] residents of the United States as well as citizens were entitled to the protection of the copyright laws. Non-resident aliens were not protected.[86] Under that act, however, an alien can only obtain copyright when he is a citizen or subject of a foreign state which grants reciprocal privileges to citizens of the United States, or which is a party to an international copyright agreement to which the United States may become a party at pleasure.[87]

(B) *What Residence Required.* Residence entitling an alien to the benefit of the copyright laws is determined by the intention existing at the time of filing the title, and is unaffected by any change of intention.[88]

3. ASSIGNEES AND PROPRIETORS — a. In General. In both England and the United States the assignee of an author, inventor, or designer of a work entitled to copyright can claim the protection of the statutes, and this, whether the assignment is before or after publication.[89] Obviously, in order to entitle an assignee

84. Routledge *v.* Low, L. R. 3 H. L. 100, 37 L. J. Ch. 454, 18 L. T. Rep. N. S. 874, 16 Wkly. Rep. N. S. 1081; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81 [*reversing* 6 Exch. 580, 15 Jur. 540, 20 L. J. Exch. 354]; Novello *v.* James, 4 De G. M. & G. 876, 1 Jur. N. S. 217, 24 L. J. Ch. 111, 3 Wkly. Rep. 127, 54 Eng. Ch. 686; Ollendorff *v.* Black, 4 De G. & Sm. 209, 14 Jur. 1080, 20 L. J. Ch. 165; Boosey *v.* Purday, 4 Exch. 145, 18 Jur. 918, 18 L. J. Exch. 378; Chappell *v.* Purday, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303; Guichard *v.* Mori, 9 L. J. Ch. O. S. 227; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. 288.

The earlier cases held that an alien friend, although resident abroad, or his assignee, by first publishing in England, became entitled to copyright. Boosey *v.* Davidson, 13 Q. B. 257, 13 Jur. 678, 18 L. J. Q. B. 174, 66 E. C. L. 257; Cocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; Buxton *v.* James, 5 De G. & Sm. 80, 16 Jur. 15; Boosey *v.* Jefferys, 6 Exch. 580, 15 Jur. 540, 20 L. J. Exch. 354; Beatley *v.* Foster, 10 Sim. 329, 16 Eng. Ch. 329.

In the case of paintings, drawings, and photographs, it seems that "actual residence" within the dominions of the crown is necessary. 25 & 26 Vict. c. 68, § 1.

85. 26 U. S. Stat. at L. 1106. And see *infra*, IV, B.

86. Citizens and residents.— Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452; Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Carey *v.* Collier, 5 Fed. Cas. No. 2,400; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406].

Statute construed.— Congress, in the revision of the copyright act of 1870, did not intend any reversal or change of its inflexible policy, ever since the act of 1790, of protecting only native or resident authors and artists, and that the word "proprietor," in section 86 of the act of 1870, and in section 4952 of the Revised Statutes, must be construed in the limited and restricted sense in which it has been used in every act from that of 1790 downward, viz., as the legal representative of a right derived from a native resident author or artist. Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452.

A non-resident alien author cannot, by assignment of his work to a resident of the United States, give the latter a right therein, subject to the protection of the Copyright Act. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644.

A state cannot be properly called a citizen, within the meaning of U. S. Rev. Stat. (1878) §§ 4952, 4954 [U. S. Comp. Stat. (1901) pp. 3406, 3407], conferring the copyright upon any citizen who "shall be the author, inventor, designer, or proprietor of any book," and upon his representatives or assigns. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425.

87. 26 U. S. Stat. at L. 1110, c. 565, § 13 [U. S. Comp. Stat. (1901) p. 3417]. See also *infra*, IV, B.

88. Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Carey *v.* Collier, 5 Fed. Cas. No. 2,400.

Naturalization declaration.— An officer of the British navy, traveling through the United States, and considering himself a British subject, during his stay, filed a declaration of intention to become a citizen. It appeared that at the time when trouble with Canada seemed imminent he had offered his services to the province. It was held that he was not a resident of the United States within the meaning of the copyright act of 1831. Carey *v.* Collier, 5 Fed. Cas. No. 2,400.

89. Paige *v.* Banks, 13 Wall. (U. S.) 608, 20 L. ed. 709 [*affirming* 18 Fed. Cas. No. 10,671, 7 Blatchf. 152]; Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Cowen *v.* Banks, 6 Fed. Cas. No. 3,295, 24 How. Pr. (N. Y.) 72; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Lawrence

to the benefit of the statutes, the assignment must have been made by one himself entitled to copyright.[90]

b. Contracts of Employment — (i) *In General.* A person may become entitled to the copyright in the production of another by virtue of a contract of employment, either express or implied, whereby the copyright of the work of the employee is to vest in his employer.[91] There must, however, be such an agree

v. Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Little *v.* Gould, 15 Fed. Cas. Nos. 8,394, 8,395, 2 Blatchf. 165, 362; Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Cumberland *v.* Planche, 1 A. & E. 580, 3 L. J. K. B. O. S. 194, 3 N. & M. 537, 28 E. C. L. 276; Cocks *v.* Purday, 5 C. B. 860, 17 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Sweet *v.* Shaw, 3 Jur. 217; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288; Colburn *v.* Duncombe, 9 Sim. 151, 16 Eng. Ch. 151.

"The word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise." 5 & 6 Vict. c. 45.

Assignment before publication.—"The statute of Anne clearly contemplates a first publication by the assignee as sufficient to give him the monopoly,— and, in point of fact, I believe that nothing is more common than that the booksellers should take an assignment of the copyright, and publish themselves as proprietors, so as to vest the monopoly in them during the term. The words of the statute that the author or his assignee shall have the sole liberty, etc., from the day of the first publication, seem to me to show that the assignee may himself publish, so as to acquire the copyright, and I see no reason why an alien friend should not have this right." Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81, per Crompton, J.

Paintings.— Under 26 U. S. Stat. at L. p. 1107, c. 565, § 1 [U. S. Comp. Stat. (1901) p. 3406], providing that the proprietor of any painting, "and the assigns of any such person," shall, on compliance with the copyright provisions, have the sole liberty of publishing, one to whom a German artist gives the exclusive right of reproduction and publication is entitled to copyright, he being within the term "assigns." Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445.

90. Koppel *v.* Downing, 11 App. Cas. (D. C.) 93; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452.

Illustration.— The judge who, in his judicial capacity, prepares the head-notes, statement of the case, and opinion, cannot be regarded as their author or proprietor within the provisions of U. S. Rev. Stat. (1878) §§ 4952, 4954 [U. S. Comp. Stat. (1901) pp. 3406, 3407], so as to confer any title by assignment on the state or any other person sufficient to authorize a copyright to it or him as the assignee of the author or proprietor. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425.

91. Com. *v.* Desilver, 3 Phila. (Pa.) 31, 15 Leg. Int. (Pa.) 28; Dielman *v.* White, 102 Fed. 892; Colliery Engineer Co. *v.* United Correspondence Schools Co., 94 Fed. 152; Black *v.* Henry G. Allen Co., 56 Fed. 764; Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373; Heine *v.* Appleton, 4 Blatchf. 125, 11 Fed. Cas. No. 6,324; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362; Pierpoint *v.* Fowle, 2 Woodb. & M. 23, 19 Fed. Cas. No. 11,152; Marzials *v.* Gibbons, L. R. 9 Ch. 518, 43 L. J. Ch. 774, 30 L. T. Rep. N. S. 666, 22 Wkly. Rep. 637; Grace *v.* Newman, L. R. 19 Eq. 623, 44 L. J. Ch. 298, 23 Wkly. Rep. 517; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 518, 81 E. C. L. 459; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Hatton *v.* Kean, 7 C. B. N. S. 268, 6 Jur. N. S. 226, 29 L. J. C. P. 20, 1 L. T. Rep. N. S. 10, 8 Wkly. Rep. 7, 97 E. C. L. 268; Sweet *v.* Shaw, 3 Jur. 217; Barfield *v.* Nicholson, 2 L. J. Ch. O. S. 90, 3 Sim. & St. 1; Wallerstein *v.* Herbert, 16 L. T. Rep. N. S. 453, 15 Wkly. Rep. 838; Nicol *v.* Stockdale, 3 Swanst. 687; Wyatt *v.* Barnard, 3 Ves. & B. 77, 13 Rev. Rep. 141; Frowde *v.* Parrish, 27 Ont. 526 [*approving* Anglo-Canadian Music Publishers Assoc. *v.* Winnifrith, 15 Ont. 164]. *Compare* Binns *v.* Woodruff, 4 Wash. 48, 3 Fed. Cas. No. 1,424, which, however, was decided under the peculiar provisions of the act of April 29, 1802.

The literary product of a salaried employee, the result of complications made in the course of his employment, becomes the property of the employer, who may copyright it, and when so copyrighted the employee has no more right than a stranger to copy or reproduce it. Colliery Engineer Co. *v.* United Correspondence Schools Co., 94 Fed. 152.

Gratuitous services.— L gave his services gratuitously to W, the proprietor of a book, in preparing new editions with notes and other additions of his own composition. W took out a copyright of said editions. By the terms of a contract between them, W was to make a formal agreement not to use L's notes in a subsequent edition without his consent, and gave L the right to make any use of his notes he wished. It was held that L was the equitable owner of said notes; that W

ment or implied understanding. The mere fact of employment is not of itself sufficient to vest copyright in the employer,[92] but in some cases, where the publication is of a peculiar nature, or where there have been special circumstances in the terms of the employment of the contributor, it has been held by the court that it is not necessary that there should be an express agreement between publisher and author that copyright shall belong to the publisher.[93]

(11) *Cyclopedias and Periodicals.* In England the proprietor of any encyclopedia, review, magazine, or periodical work, or of a work published in a series of books or parts, who has employed any persons to compose any volumes, parts, essays, articles, or portions, on the terms that the copyright therein shall belong to such proprietor, shall be entitled to the copyright. The author may, however, by contract, express or implied, reserve to himself the right to publish his composition in a separate form, the copyright in which will vest in himself. In the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, the right of publishing the same in a separate form reverts to the author after the term of twenty-eight years for the remainder of the term given by the act.[94] It seems, however,

was the legal owner, and the proper person to take out the copyright. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

Equitable assignment.—Where an employer registered in his own name a compilation of designs made by his employee, he was held entitled to the copyright as the equitable assignee of the compiler. The court said: "The person remunerated has no claim to the copyright, but it is the property of the person who remunerates him, and in this Court the person who remunerates must he taken to be the equitable assignee, and the publisher within the meaning of the Act." Grace *v.* Newman, L. R. 19 Eq. 623, 626, 44 L. J. Ch. 298, 23 Wkly. Rep. 517.

Judicial reports.—A copyright in the original work of a state reporter of judicial decisions, who is paid a salary for such work, may be taken in the name of the secretary of state, for the benefit of the people, and the exclusive right of publishing such copyrighted matter may be vested in a publisher under contract with the state. Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165, 15 Fed. Cas. No. 8,395, 2 Blatchf. 362.

92. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Atwill *v.* Ferrett, 2 Blatchf. 39, 2 Fed. Cas. No. 640; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698; Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976; Jefferys *v.* Baldwin, Ambl. 164, 27 Eng. Reprint 109; Shepherd *v.* Conquest, 17 C. B. 427, 2 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Hereford *v.* Griffin, 12 Jur. 255, 17 L. J. Ch. 210, 16 Sim. 190, 39 Eng. Ch. 190.

Necessity of contract.—"The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another." Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

A court reporter, although a sworn public officer, receiving a fixed salary for his labors, is not, in the absence of statute, deprived of any privilege of taking out a copyright which he would otherwise have. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547.

An agreement to write a play for another, and to act in it, with a share in the profits as compensation, does not create a legal or equitable title in the latter which will prevent the author taking out a copyright. Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87. See also Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunner Col. Cas. 698.

A person who employs another to adapt a foreign dramatic piece for representation upon the English stage, and who has no other share in the design or execution of the work than that of suggesting the subject, is not the author of such adaptation within the meaning of 3 & 4 Wm. IV, c. 15; and therefore, when such employment is by parol, the employer has not the right of representing it without an assignment in writing from the author. Shepherd *v.* Conquest, 17 C. B. 427, 2 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427.

93. Aflalo *v.* Lawrence, [1902] 1 Ch. 264, 70 L. J. Ch. 797, 85 L. T. Rep. N. S. 342, 50 Wkly. Rep. 24.

94. 5 & 6 Vict. c. 45, § 18; Aflalo *v.* Lawrence, [1902] 1 Ch. 264, 70 L. J. Ch. 797, 85 L. T. Rep. N. S. 342, 50 Wkly. Rep. 24; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Trade Auxiliary Co. *v.* Middlesborough, etc., Tradesmen's Protection Assoc., 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337; Smith *v.* Johnson, 4 Giff. 632, 9 Jur. N. S. 1223, 33 L. J. Ch. 137, 9 L. T. Rep. N. S. 437, 12 Wkly. Rep. 122; Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118, 1 Wkly. Rep. 345, 45 Eng. Ch. 118; Mayhew *v.* Maxwell, 1 Johns. & H. 312, 3 L. T. Rep. N. S. 466, 8 Wkly.

that where the publishers of a periodical employ and pay an editor, and he employs and pays persons for writing articles for the publication, the copyright does not vest in the publishers under the statute;[95] and in all cases actual payment for an article written for a periodical work is a condition precedent to the vesting of the copyright. A contract for payment is not sufficient.[96]

4. LICENSEES. A person who owns a copyright of a book, or a work of art, or a dramatic or musical composition does not lose that copyright by reason of the grant of a partial license or of a full license to use it, and he is not prevented from suing an infringer, if before action brought he has taken the necessary steps to perfect his copyright.[97]

Rep. 118; Hereford *v.* Griffin, 12 Jur. 255, 17 L. J. Ch. 210, 16 Sim. 190, 39 Eng. Ch. 190; Delf *v.* Delamotte, 3 Jur. N. S. 933, 3 Kay & J. 581; Strahan *v.* Graham, 16 L. T. Rep. N. S. 87, 15 Wkly. Rep. 487 [*affirmed* in 17 L. T. Rep. N. S. 457].

Implied consent.— Although no express words to that effect are used, where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances or in the course of dealing between the parties to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer — subject to the limitation pointed out in the eighteenth section of the act. Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459, per Maule, J. *Compare* Hereford *v.* Griffin, 12 Jur. 255, 17 L. J. Ch. 210, 16 Sim. 190, 39 Eng. Ch. 190.

By the effect of 5 & 6 Vict. c. 45, § 18, the proprietor of a periodical is precluded from republishing, without the consent of the author, articles written by the latter for and published in such periodicals in any other form than as reprints of the entire numbers of the periodicals in which the articles appeared. Smith *v.* Johnson, 4 Giff. 632, 9 Jur. N. S. 1223, 33 L. J. Ch. 137, 9 L. T. Rep. N. S. 437, 12 Wkly. Rep. 122.

Necessity of contract reserving copyright.— It seems that in the absence of a contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118, 1 Wkly. Rep. 345, 45 Eng. Ch. 118. See also Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459.

What constitutes separate publication.— A republication in supplemental numbers of a selection of various tales previously published in a periodical is a separate publication within the section. Smith *v.* Johnson, 4 Giff. 632, 9 Jur. N. S. 1223, 33 L. J. Ch. 137, 9 L. T. Rep. N. S. 437, 12 Wkly. Rep. 122. See also Mayhew *v.* Maxwell, 1 Johns. & H. 312, 3 L. T. Rep. N. S. 466, 8 Wkly. Rep. 118, where it was held that the republication of a number of a periodical under a different title and price is a separate publication of an article contained in the number, which the author is entitled to restrain.

The author's right to restrain a separate publication is not copyright within the meaning of 5 & 6 Vict. c. 45, § 24, and it is no objection to a motion for an injunction in such a case that the author has not entered his work at Stationers' Hall. Mayhew *v.* Maxwell, 1 Johns. & H. 312, 3 L. T. Rep. N. S. 466, 8 Wkly. Rep. 118.

Articles composed at joint expense of proprietors of several newspapers.— The three several proprietors of three periodicals jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the three proprietors. The three periodicals were registered under the Copyright Act. The compiling these lists required skill, and involved a good deal of labor and expense. The defendant association copied and circulated among their own members so much of these lists as related to their own neighborhood, which was a very small part of the whole. The three proprietors sued to restrain this proceeding. It was held that the statute 5 & 6 Vict. c. 45, § 18, was not to be construed as confining the copyright of a proprietor of a newspaper to articles composed on the term that the copyright should belong to and be paid for by him alone, that each of the three proprietors had an interest in the copyright of the lists, that having registered his periodical he had a right to sue to restrain infringement, and that the defendant association could not escape on the ground that it had only copied a small portion of the lists. Trade Auxiliary Co. *v.* Middlesborough, etc., Tradesmen's Protection Assoc., 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337.

95. Brown *v.* Cooke, 11 Jur. 77, 16 L. J. Ch. 140.

96. Trade Auxiliary Co. *v.* Middlesborough, etc., Tradesmen's Protection Assoc., L. R. 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337; Walter *v.* Howe, 17 Ch. D. 708, 50 L. J. Ch. 621, 44 L. T. Rep. N. S. 727, 29 Wkly. Rep. 776; Richardson *v.* Gilbert, 15 Jur. 389, 20 L. J. Ch. 553, 1 Sim. N. S. 336; Brown *v.* Cooke, 11 Jur. 77, 16 L. J. Ch. 140; Collingridge *v.* Emmott, 57 L. T. Rep. N. S. 864; Trade Auxiliary Co. *v.* Jackson, 4 T. L. R. 130.

97. Marshall *v.* Bull, 85 L. T. Rep. N. S. 77.

5. Executors and Administrators. Copyright is personal property, and descends on the death of an owner to his personal representatives.[98] It is also transmissible by will.[99]

6. Trustee in Bankruptcy. Copyright comes within the vesting section of the English Bankruptcy Act and passes to the trustee of a bankrupt owner;[1] but it is probable that an assignee in bankruptcy cannot publish unpublished works of a bankrupt without his consent.[2]

E. Proceedings to Obtain Copyright — 1. England — a. In General. Under the general copyright statutes of England, the only prerequisite to the vesting of copyright is that the work must be first or contemporaneously published in the United Kingdom.[3] Statutory provisions as to registration, deposit of copies, and notice are either merely directory, or at most prerequisite only to a right of action.[4]

b. Registration — (i) *Subjects of Registration* — (A) *Books* — (1) In General — (a) Necessity of Entry. Books are required to be registered at Stationers' Hall,[5] but such registration is not necessary to the existence of the copyright. It is only necessary in order to perfect the right to sue, and it need not be made before the alleged infringement.[6]

(b) Form and Requisites. While entry under the above statute is not essential to the vesting of copyright,[7] a strict compliance with its provisions is essential to a right of action at law or in equity for infringement. A false or erroneous entry of any of the prescribed facts will vitiate the registration;[8] but while a

98. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]; 5 & 6 Vict. c. 45, § 25; Latour *v.* Bland, 2 Stark. 382, 3 E. C. L. 455.

99. Willis *v.* Curtois, 1 Beav. 189, 8 L. J. Ch. 105, 17 Eng. Ch. 189, in which it was held that a bequest of "all my books" included valuable manuscript notes left by the testator.

1. Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 2 Eng. Ch. 385.

2. MacGillivray Copyright 83.

3. See *infra*, I, E, 1, e, (III).

4. See *infra*, I, E, 1, b.

5. 5 & 6 Vict. c. 45, § 13.

6. Stannard *v.* Lee, L. R. 6 Ch. 346, 40 L. J. Ch. 489, 24 L. T. Rep. N. S. 459, 19 Wkly. Rep. 615; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 3 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Thomas *v.* Turner, 33 Ch. D. 292, 56 L. J. Ch. 56, 55 L. T. Rep. N. S. 534, 35 Wkly. Rep. 177; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Warne *v.* Lawrence, 54 L. T. Rep. N. S. 371, 34 Wkly. Rep. 452; Goubaud *v.* Wallace, 36 L. T. Rep. N. S. 704, 25 Wkly. Rep. 604.

Before 5 & 6 Vict. c. 45, registration was only necessary where suit was brought for the penalty. An action for damages might be maintained without registration. Fairlie *v.* Boosey, 4 App. Cas. 711, 48 L. J. Ch. 697, 41 L. T. Rep. N. S. 73, 28 Wkly. Rep. 4; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Cambridge University *v.* Bryer, 16 East 317; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; Beckford *v.* Hood, 7 T. R. 620, 4 Rev. Rep. 527; Tonson *v.* Collins, 1 W. Bl. 301. But see Blackwell *v.* Harper, 2 Atk. 93, 95, 26 Eng. Reprint 458, where Lord Hardwicke said that "the property cannot vest without such entry."

Issue of writ on day of registration.— The issue of a writ in an action for the infringement of a copyright on the same day, but subsequently to the registration of such copyright under the copyright act of 1842, sufficiently complies with section 24 of the statute, so as to enable the person making the registration to sue in respect of the infringement. Warne *v.* Lawrence, 54 L. T. Rep. N. S. 371, 34 Wkly. Rep. 452. See also Goubaud *v.* Wallace, 36 L. T. Rep. N. S. 704, 25 Wkly. Rep. 604.

7. See *supra*, I, E, 1, b, (I), (A), (1), (a).

8. Low *v.* Routledge, L. R. 1 Ch. 42, 10 Jur. N. S. 922, 33 L. J. Ch. 717, 10 L. T. Rep. N. S. 838, 12 Wkly. Rep. 1069 (error in date of publication); Mathieson *v.* Harrod, L. R. 7 Eq. 270, 38 L. J. Ch. 139, 19 L. T. Rep. N. S. 639, 17 Wkly. Rep. 99 (day of month of publication must be stated); Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182 (place of abode of proprietor); Petty *v.* Taylor, [1897] 1 Ch. 465, 66 L. J. Ch. 209, 75 L. T. Rep. N. S. 545, 45 Wkly. Rep. 299 (only name of legal owner can be registered); Coote *v.* Judd, 23 Ch. D. 727, 48 L. T. Rep. N. S. 405, 31 Wkly. Rep. 423 (name of publisher must be that of first publisher); Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639 (sufficient to enter first publisher under trade-name of firm, and actual proprietor at time of registration, without stating who first proprietor was, or devolution of title); Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504 (false date of publication); Collingridge *v.* Emmott, 57 L. T. Rep.

false or erroneous registration will defeat a pending suit, a new suit may be brought after a correction of the entry.[9]

(c) WHO MAY REGISTER. Only one in whom the property in the copyright is legally vested is entitled to be registered as the proprietor.[10]

(d) TIME OF REGISTRATION. As the act gives copyright merely from the date of first publication, and provides for the entry of that date, registration can only be made after publication.[11]

(2) CYCLOPEDIAS AND PERIODICALS. Encyclopedias and periodicals must be registered, but the registration of the first number or part gives a right of action for the infringement of subsequent issues.[12] As in the case of books generally

N. S. 864 (day of month of publication, as well as year, must be stated); Page *v.* Wisden, 20 L. T. Rep. N. S. 435, 17 Wkly. Rep. 483 (error in date of publication); Hazlitt *v.* Templeman, 13 L. T. Rep. N. S. 593 (registration must be in name of proprietor).

Name and abode of proprietor.—The author and proprietor of copyright in a song, in the entry at Stationers' Hall, describing his place of abode as 65 Oxford street, he being in America at the time of the publication and having no place of abode in England, but 65 Oxford street being the address of his publishers, is a sufficient description. Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182.

Non-registration of first edition—Registration of reprint.— The plaintiff in an action for infringement of copyright in a book, the first edition of which was published in November, 1881, had not, before commencing such action, registered at Stationers' Hall either the first or a second edition which he had subsequently published, but he had registered a third edition which was in fact a reprint of the first edition, describing it in the entry as a third edition and giving the time of the first publication as April 22, 1885, which was the date at which the third edition was published. It was held that the plaintiff had not truly stated the time of the first publication of his books within the meaning of section 13 of the copyright act of 1842, and consequently had not caused entry to be made of his book pursuant to the act, and was precluded by section 24 from maintaining an action for infringement of copyright until he had made due and correct entry pursuant to section 13. Thomas *v.* Turner, 33 Ch. D. 292, 56 L. J. Ch. 56, 55 L. T. Rep. N. S. 534, 35 Wkly. Rep. 177.

Reprint with additions.— Where the date of the first publication of an illustrated catalogue, being a reprint with additions of catalogues duly registered in 1880 and 1882, was given on registration as June 22, 1885, it was held that it was a correct statement as to the first publication of the new pages, and that the description in the catalogue of the articles as the "patent" subsequent to the expiration of the patent, on July 31, 1885, did not take away the plaintiff's copyright in the part of the catalogue which was correctly stated, and that the plaintiff was entitled to an injunction to prevent any further publication of books by the defendant, so far as they contained an infringement of the copyright of the plaintiff in his illustrated catalogue of August, 1880, or in the additions made to that catalogue in the edition of 1885. Hayward *v.* Lely, 56 L. T. Rep. N. S. 418.

Effect of false registration on assignment. — Where in registering the proprietorship of a copyright, either the date of the first publication or the name of the publisher is correctly entered, a subsequent assignment by entry in the book of registry is valid. Low *v.* Routledge, L. R. 1 Ch. 42, 10 Jur. N. S. 922, 33 L. J. Ch. 717, 10 L. T. Rep. N. S. 838, 12 Wkly. Rep. 1069.

9. Drone Copyright 279.

For form of requiring entry of proprietorship see 5 & 6 Vict. c. 45, schedule No. 2.

For form of original entry of proprietorship of copyright of a book see 5 & 6 Vict. c. 45, schedule No. 3.

10. *Ex p.* Bastow, 14 C. B. 631, 78 E. C. L. 631; Petty *v.* Taylor, [1897] 1 Ch. 465, 66 L. J. Ch. 209, 75 L. T. Rep. N. S. 545, 45 Wkly. Rep. 299 [*following* London Printing, etc., Alliance *v.* Cox, [1891] 3 Ch. 291, 60 L. J. Ch. 707, 65 L. T. Rep. N. S. 60]. See also Hazlitt *v.* Templeman, 13 L. T. Rep. N. S. 593.

Whose name must be registered.— Where copyright belongs to A it cannot be properly registered in the name of his nominee or agent unless the property is actually vested in such person as trustee for A. The conjunction in such case of the unregistered proprietor as co-plaintiff with the improperly registered nominee or agent will not render an action for infringement sustainable. Petty *v.* Taylor, [1897] 1 Ch. 465, 66 L. J. Ch. 209, 75 L. T. Rep. N. S. 545, 45 Wkly. Rep. 299.

11. Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467; Henderson *v.* Maxwell, 5 Ch. D. 892, 46 L. J. Ch. 891, 25 Wkly. Rep. 455; Correspondent Newspaper Co. *v.* Saunders, 11 Jur. N. S. 540, 12 L. T. Rep. N. S. 540, 13 Wkly. Rep. 804.

12. Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467; Cate *v.* Devon, etc., Newspaper Co., 40 Ch. D. 500, 58 L. J. Ch. 288, 60 L. T. Rep. N. S. 672, 37 Wkly. Rep. 487; Walter *v.* Howe, 17 Ch. D. 708, 50 L. J. Ch. 621, 44 L. T. Rep. N. S. 727, 29 Wkly. Rep. 776; Henderson *v.* Maxwell, 4 Ch. D. 163, 46 L. J. Ch. 59, 25 Wkly. Rep. 66.

Extent of protection.— A periodical or magazine is a book within the meaning of 5 & 6 Vict. c. 45, § 24, and its proprietor, if

registration must be after publication,[13] and a false or erroneous registration is wholly ineffective.[14]

(B) *Dramatic or Musical Compositions.* Dramatic or musical compositions need not be registered in order to secure and protect the exclusive right of representing them.[15]

(C) *Engravings, Prints, and Lithographs.* Engravings, prints, and lithographs are not required to be registered under the statutes relating to them.[16]

(D) *Paintings, Drawings, and Photographs.* Registration is required of a painting, drawing, or photograph in order to entitle the proprietor to the benefit of the act; and no action can be sustained nor any penalty recovered in respect of anything done before registration.[17]

he has, pursuant to section 19, registered the first number at Stationers' Hall, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under section 18, although neither the serial nor the first number containing it has been separately registered. Henderson *v.* Maxwell, 4 Ch. D. 163, 46 L. J. Ch. 59, 25 Wkly. Rep. 66.

Every part of a published volume which is separate and distinguishable from the other parts and distinguished in the volume itself is a "division or part of a volume separately published" within the meaning of the copyright act of 1842. Johnson *v.* Newnes, [1894] 3 Ch. 663, 63 L. J. Ch. 786, 71 L. T. Rep. N. S. 230, 8 Reports 500.

Newspapers.— A newspaper is within 5 & 6 Vict. c. 45, and requires registration under that act in order to give the proprietor the copyright in its contents and so enable him to sue in respect of a piracy. Walter *v.* Howe, 17 Ch. D. 708, 50 L. J. Ch. 621, 44 L. T. Rep. N. S. 727, 29 Wkly. Rep. 776 [*disapproving* Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206]. The proprietor of a newspaper registered as a serial publication under the copyright act of 1842 can sue in respect of his copyright in matter published in his newspaper, although neither the name of the proprietor nor the title of the paper is registered under the newspaper libel and registration act of 1881. Cate *v.* Devon, etc., Newspaper Co., 40 Ch. D. 500, 58 L. J. Ch. 288, 60 L. T. Rep. N. S. 672, 37 Wkly. Rep. 487.

For form of registration of periodicals see Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459.

13. Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660.

Registration before publication.— Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467 [*affirming* 12 Jur. N. S. 916, 15 L. T. Rep. N. S. 204, 15 Wkly. Rep. 84]; Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660; Henderson *v.* Maxwell, 4 Ch. D. 163, 46 L. J. Ch. 59, 25 Wkly. Rep. 66; Correspondent Newspaper Co. *v.* Saunders, 11 Jur. N. S. 540, 12 L. T. Rep. N. S. 540, 13 Wkly. Rep. 804.

14. Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467 [*affirming* 12 Jur. N. S. 916, 15 L. T. Rep. N. S. 204, 15 Wkly. Rep. 84].

15. 5 & 6 Vict. c. 45, § 24; Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217; Clark *v.* Bishop, 25 L. T. Rep. N. S. 908.

16. 8 Geo. II, c. 13; 7 Geo. III, c. 38; 17 Geo. III, c. 57; 6 & 7 Wm. IV, c. 59; 15 & 16 Vict. c. 12, § 14.

Landscapes.— A party may be the designer and inventor of a plan within the 7 Geo. III, c. 38, although he may not himself be able to execute it; and a bird's-eye view of a locality is a landscape within that act, and as such does not require to be registered at Stationers' Hall under 5 & 6 Vict. c. 45. Stannard *v.* Harrison, 24 L. T. Rep. N. S. 570, 19 Wkly. Rep. 811.

17. 25 & 26 Vict. c. 68; Matter of Copyright Acts, L. R. 4 Q. B. 715, 20 L. T. Rep. N. S. 877, 17 Wkly. Rep. 1018; *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852; Dupuy *v.* Dilkes, 48 L. J. Ch. 682; Hildesheimer *v.* Dunn, 64 L. T. Rep. N. S. 452.

The object of the 25 & 26 Vict. c. 68 is that enough should be stated in the register of copyright to identify the picture, etc., and whether the description of the subject-matter is sufficient for this purpose is a question of fact for the tribunal. *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852.

Right of action before registration.— 25 & 26 Vict. c. 68 provides for registration of proprietorship and assignments of copyright in paintings, and enacts that no proprietor of any such copyright shall be entitled to the benefit of the act until registration, and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration. *Semble* a registered proprietor cannot sue for offenses under the act committed when an earlier proprietor was on the register. Dupuy *v.* Dilkes, 48 L. J. Ch. 682.

Registration of assignment.— A person to whom the copyright in a picture has been assigned by the author, of which assignment a memorandum has been duly registered, has a good title under the act, although the original copyright of the author has not been

(II) *Effect of Entry.* Registration not only perfects the right of action for infringement, but a properly certified copy of the entry is receivable in evidence in all courts and in all summary proceedings as *prima facie* proof of the proprietorship or assignment of copyright or license as therein expressed.[18]

(III) *Amending or Expunging Entry.* If any person deem himself aggrieved by any entry made under color of the act, he may apply by motion to the king's bench division in term time, or apply by summons to any judge of such court in vacation for an order that such entry may be expunged or varied; and such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as such court or judge shall deem just — such order to be carried into effect by the officer of the Stationers' company appointed for the purposes of the act.[19] It seems that the court has no power to restore an entry when once it has been expunged.[20]

c. Deposit of Copies of Book. A printed copy of the whole of every book, together with all maps, prints, or other engravings belonging thereto, is required to be delivered to the British museum in the mode and within the periods prescribed by the act.[21] The act further provides for a like delivery to certain named libraries upon demand made.[22]

d. Inscribing Notice. No action can be maintained for pirating an engraving, cut, print, or lithograph, unless the date of first publication and the name of the proprietor is inscribed upon the production claimed to have been infringed;[23] but

registered. Matter of Copyright Acts, L. R. 4 Q. B. 715, 20 L. T. Rep. N. S. 877, 17 Wkly. Rep. 1018.

18. 5 & 6 Vict. c. 45, § 11. See also Chappell *v.* Purday, 1 D. & L. 458, 13 L. J. Exch. 7, 12 M. & W. 303; *Ex p.* Davidson, 2 E. & B. 577, 18 Jur. 57, 75 E. C. L. 577; Hildesheimer *v.* Dunn, 64 L. T. Rep. N. S. 452.

19. 5 & 6 Vict. c. 45, § 14; *Re* Musical Compositions, etc., 4 Q. B. D. 483, 48 L. J. Q. B. 505, 41 L. T. Rep. N. S. 144, 27 Wkly. Rep. 857 [*affirming* 4 Q. B. D. 90, 48 L. J. Q. B. 29, 39 L. T. Rep. N. S. 396, 27 Wkly. Rep. 261]; Matter of Copyright Acts, L. R. 4 Q. B. 715, 20 L. T. Rep. N. S. 877, 17 Wkly. Rep. 1018; *Ex p.* Davidson, 18 C. B. 297, 2 Jur. N. S. 1024, 25 L. J. C. P. 237, 4 Wkly. Rep. 593, 86 E. C. L. 297; *Ex p.* Bastow, 14 C. B. 631, 78 E. C. L. 631; *Ex p.* Poulton, 53 L. J. Q. B. 320, 32 Wkly. Rep. 648; *Ex p.* Walker, 39 L. J. Q. B. 31.

When court will exercise power.—The court will not exercise its power to expunge an entry of proprietorship of copyright in the registry, unless it is clearly and unequivocally shown that it is false, or vary it, unless satisfied by affidavit that in so doing the court would make a true entry. *Ex p.* Davidson, 18 C. B. 297, 2 Jur. N. S. 1024, 25 L. J. C. P. 237, 4 Wkly. Rep. 593, 86 E. C. L. 297.

Application of person who caused entry.— The court may make an order varying the entry in a register of copyright upon the application of the person who has caused the entry to be made. *Ex p.* Poulton, 53 L. J. Q. B. 320, 32 Wkly. Rep. 648.

20. Chappell *v.* Purday, 1 D. & L. 458, 13 L. J. Exch. 7, 12 M. & W. 303.

21. 5 & 6 Vict. c. 45, §§ 6, 7. See also British Museum *v.* Payne, 4 Bing. 540, 1 M. & P. 415, 2 Y. & J. 166, 29 Rev. Rep. 617, 13 E. C. L. 625.

The object of 5 & 6 Vict. c. 45, § 6, was to obtain for the British museum a copy of every book whether published under British rule or not. Routledge *v.* Low, L. R. 3 H. L. 100, 37 L. J. Ch. 454, 18 L. T. Rep. N. S. 874, 16 Wkly. Rep. 1081.

Canada.— Depositing in the office of the minister of agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same. Garland *v.* Gemmill, 14 Can. Supreme Ct. 321. See also Griffin *v.* Kingston, etc., R. Co., 17 Dak. 660, in which it was held that Can. Con. Stat. c. 81, § 5, is merely directory.

22. 5 & 6 Vict. c. 45, § 8. See also Cambridge University *v.* Bryer, 16 East 317.

23. 8 Geo. II, c. 13; 17 Geo. III, c. 57; Graves *v.* Ashford, L. R. 2 C. P. 410, 36 L. J. C. P. 139, 16 L. T. Rep. N. S. 98, 15 Wkly. Rep. 498; Rock *v.* Lazarus, L. R. 15 Eq. 104, 42 L. J. Ch. 105, 27 L. T. Rep. N. S. 744, 21 Wkly. Rep. 215; Brooks *v.* Cock, 3 A. & E. 138, 1 Hurl. & W. 129, 4 L. J. K. B. 144, 4 N. & M. 652, 30 E. C. L. 83; Newton *v.* Cowe, 4 Bing. 234, 5 L. J. C. P. O. S. 159, 12 Moore C. P. 457, 29 Rev. Rep. 541, 13 E. C. L. 482; Avanzo *v.* Mudie, 10 Exch. 203; Colnaghi *v.* Ward, 6 Jur. 969, 12 L. J. Q. B. 1; Thompson *v.* Symonds, 5 T. R. 41, 2 Rev. Rep. 526; Harrison *v.* Hogg, 2 Ves. Jr. 323.

Designation as proprietor.— It is not necessary that the designation of proprietor should be added to the name. Graves *v.* Ashford, L. R. 2 C. P. 410, 36 L. J. C. P. 139, 16 L. T. Rep. N. S. 98, 15 Wkly. Rep. 498; Newton *v.* Cowe, 4 Bing. 234, 5 L. J. C. P. O. S. 159, 12 Moore C. P. 457, 29 Rev. Rep. 541, 13 E. C. L. 482.

Trading name of firm.— Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of 8 Geo. II, c. 13, by

where prints, cuts, engravings, or lithographs are published as illustrations of a book, the copyright of the latter protects them without the inscription of date of publication and name of proprietor.[24]

e. Publication — (I) *In General.* Publication is essential to statutory copyright; it is the commencement and foundation of the right, the *terminus a quo* the period of the existence of the right is to run, and a condition precedent to the existence of the right.[25]

(II) *What Constitutes* — (A) *In General.* Publication is the act of offering a book, map, print, piece of music, or the like, to the public by sale or by gratuitous distribution.[26] It may be of a part as well as of the whole of a production.[27]

(B) *Dramatic or Musical Composition.* In the case of a dramatic or musical composition its first public representation or performance is equivalent to publication, so far at least as regards the exclusive right of representation or performance. It is not a publication so far as the literary copyright is concerned.[28]

(C) *Works of Art.* Neither the publication of an engraving of a work of art, its sale, nor its public exhibition, where copying it would not be permitted, is a publication of it.[29]

(III) *Place of Publication.* While the statutes make no provision as to the place of publication, the courts have uniformly held that save in the case of international copyright first or contemporaneous publication must be in the United Kingdom.[30]

printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business. Rock *v.* Lazarus, L. R. 15 Eq. 104, 42 L. J. Ch. 105, 27 L. T. Rep. N. S. 744, 21 Wkly. Rep. 215.

Whether on assignment the name of the inventor or assignee should appear *quære.* Thompson *v.* Symonds, 5 T. R. 41, 2 Rev. Rep. 526.

24. Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Bogue *v.* Houlston, 5 De G. & Sm. 267, 16 Jur. 372, 21 L. J. Ch. 470. See also De la Branchardiere *v.* Elvery, 4 Exch. 380, 18 L. J. Exch. 381.

25. Donaldson *v.* Beckett, 2 Bro. P. C. 129 [*cited* in Millar *v.* Taylor, 4 Burr. 2303, 2408]; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Beckford *v.* Hood, 7 T. R. 620, 4 Rev. Rep. 427.

26. Century Dict. And see Novello *v.* Sudlow, 12 C. B. 177, 16 Jur. 689, 21 L. J. C. P. 169, 74 E. C. L. 177; Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. (2d ser.) 748.

To publish a production is to make it public by those means which are appropriate to the particular article or particular thing. Boucicault *v.* Chatterton, 5 Ch. D. 267, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287.

Private circulation is not publication. Prince Albert *v.* Strange, 2 De G. & Sm. 652, 1 Hall & T. 1, 13 Jur. 109, 507, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19.

Printing not necessary.— 8 Anne, c. 19, did not impose upon authors as a condition precedent to their deriving any benefit under it that the composition should be first printed. White *v.* Geroch, 2 B. & Ald. 298, 1 Chit. 24, 22 Rev. Rep. 786, 18 E. C. L. 28.

27. Low *v.* Ward, L. R. 6 Eq. 415, 37 L. J. Ch. 841, 16 Wkly. Rep. 1114; Boosey *v.* Fairlie, 7 Ch. D. 301.

28. 5 & 6 Vict. c. 45, § 20; Chappell *v.* Boosey, 21 Ch. D. 232, 51 L. J. Ch. 625, 46 L. T. Rep. N. S. 854, 30 Wkly. Rep. 733; Boucicault *v.* Chatterton, 5 Ch. D. 267, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287; Boucicault *v.* Delafield, 1 Hem. & M. 597, 9 Jur. N. S. 1282, 33 L. J. Ch. 38, 9 L. T. Rep. N. S. 709, 12 Wkly. Rep. 101; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288; Clark *v.* Bishop, 25 L. T. Rep. N. S. 908. *Compare* Coleman *v.* Wathen, 5 T. R. 245.

Published but not represented.— The publication in this country of a dramatic piece or musical composition as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece or musical composition, or his assignee of the exclusive right of representing or performing it. Chappell *v.* Boosey, 21 Ch. D. 232, 51 L. J. Ch. 625, 46 L. T. Rep. N. S. 854, 30 Wkly. Rep. 733.

29. Turner *v.* Robinson, 10 Ir. Ch. 510 [*affirming* 10 Ir. Ch. 121].

30. Boosey *v.* Davidson, 13 Q. B. 257, 13 Jur. 678, 18 L. J. Q. B. 174, 66 E. C. L. 257; Low *v.* Ward, L. R. 6 Eq. 415, 37 L. J. Ch. 841, 16 Wkly. Rep. 1114; Routledge *v* Low, L. R. 3 H. L. 100, 37 L. J. Ch. 454, 18 L. T. Rep. N. S. 874, 16 Wkly. Rep. 1081; Clementi *v.* Walker, 2 B. & C. 861, 4 D. & R. 598, 2 L. J. K. B. O. S. 176, 26 Rev. Rep. 596, 9 E. C. L. 371; Cocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; Boucicault *v.* Chatterton, 5 Ch. D. 267, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81; Buxton *v.*

2. United States — a. In General. In the United States there are certain requirements of law as to depositing the title or a description of the work, the delivery of copies or photograph of the work to the librarian of congress, and the insertion or inscription of a notice in or upon the work, a compliance with which is essential to the existence and protection of copyright.[31]

b. Deposit of Title or Description of Work — (i) *In General.* No person is entitled to copyright unless he shall on or before the day of publication in this or any foreign country deliver at the office of the librarian of congress or deposit in the mail within the United States, addressed to the librarian of congress, at

James, 5 De G. & Sm. 80, 16 Jur. 15; Boosey *v.* Purday, 4 Exch. 145, 13 Jur. 918, 18 L. J. Exch. 378; Boucicault *v.* Delafield, 1 Hem. & M. 597, 9 Jur. N. S. 1282, 33 L. J. Ch. 38, 9 L. T. Rep. N. S. 709, 12 Wkly. Rep. 101; Chappell *v.* Purday, 9 Jur. 495, 14 L. J. Exch. 258, 14 M. & W. 303, 4 Y. & C. Exch. 485; Guichard *v.* Mori, 9 L. J. Ch. O. S. 227.

Contemporaneous publication.— With regard to the sufficiency of contemporaneous publication in the United Kingdom and abroad, Wilde, C. J., said: "If it be correct to say that a foreigner, the author of a work composed abroad, and published by him in this country, is, by the municipal law of his country, entitled to a copyright in the work, how can such right be defeated by a contemporaneous publication abroad? In the popular sense of the word, each would be the first publication. But, if neither could be so called, we think the result would be the same; for, that, in order to defeat the claim of copyright, a prior publication in some place, or by some other party, should be proved." Cocks *v.* Purday, 5 C. B. 860, 884, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860.

Canada.— Printing and publishing a book in Canada from stereoptyped plates imported from England is a sufficient printing within the meaning of Can. Rev. Stat. c. 62, although no typographical work is done in the preparation of the copies. Frowde *v.* Parrish, 27 Ont. 526. Section 33 of the Copyright Act (Can. Rev. Stat. c. 62) does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition who has the work printed abroad and inserts notification of the existence of such copyright on copies published in Canada. Lancefield *v.* Anglo-Canadian Music Publishing Assoc., 26 Ont. 457.

31. Compliance with statute essential.— Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Bennett *v.* Carr, 96 Fed. 213, 37 C. C. A. 453; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. 758; Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Benn *v.* Leclercq, 4 Fed. Cas. No. 1,308; Carillo *v.* Shook, 5 Fed. Cas. No. 2,407; Centennial Catalogue Co. *v.* Porter, 5 Fed. Cas. No. 2,546; Ewer *v.* Coxe, 8 Fed. Cas. No. 4,585, 4 Wash. 487; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Marsh *v.* Warren, 16 Fed. Cas. No. 9,121, 14 Blatchf. 263; Parkinson *v.* Laselle, 18 Fed. Cas. No. 10,762, 3 Sawy. 330; Struve *v.* Schwedler, 23 Fed. Cas. No. 13,551, 4 Blatchf. 23.

Power of congress.— Congress, in making provision to vest an exclusive right in an author, has the power to prescribe the conditions on which such right shall be enjoyed; and no one can avail himself of such right who does not substantially comply with the requisitions of the law. Wheaton *v.* Peters, 8 Pet. 591, 8 L. ed. 1055.

Act construed.— "Under sections 4952 and 4956 of the United States revised statutes [U. S. Comp. Stat. (1901) pp. 3406, 3407], the plaintiff can have no copyright till he has performed the prescribed conditions, and until he has acquired his copyright there can be no violation of that right at all which can afford a ground of action. Instead of section 4962 being a limitation of the acts to be performed, or alleged in order to entitle a party to maintain an action, it imposes an additional duty upon him as a prerequisite to its maintenance. He must first acquire a copyright under the other provisions of the act, and then in order to enforce his right against infringers he must, also, give notice of his right by the means prescribed by section 4962, so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision." Parkinson *v.* Laselle, 18 Fed. Cas. No. 10,762, 3 Sawy. 330, per Sawyer, J., at page 1212.

"All the conditions clearly imposed by congress are important, and their performance is essential to a perfect title." Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47, at page 984. "Until these things are done, the copyright is not perfect; although, by taking the incipient step, a right is acquired, which chancery will protect, until the other acts may be done." Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, at page 52, 5 McLean 328.

As to the specific construction of the acts of congress of 1790, 1802, and 1831 see Nichols *v.* Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Clayton *v.* Stone, 5 Fed. Cas. No. 2,872, 2 Paine 382; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618 (construing the act of 1846 as to delivery to Smithsonian Institute); King *v.* Force, 14 Fed. Cas. No. 7,791, 2 Cranch C. C. 208; Lawrence *v.* Dana, 15 Fed. Cas.

Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the printing, drawing, statue, statuary, or a model or design for a work of the fine arts for which he desires a copyright.[32]

(II) *Variation Between Title Deposited and Title Published.* If the published title of a book is sufficient to identify it with substantial certainty with the registered copyright, the copyright will not be forfeited on account of immaterial variations between the two.[33]

c. Deposit of Copies or Photograph of Work — (I) *In General.* No person is entitled to copyright unless he shall, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the librarian of congress, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the librarian of congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in the case of the fine arts, a photograph of the same.[34]

No. 8,136, 4 Cliff. 1; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, Holmes 185; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Rossiter *v.* Hall, 20 Fed. Cas. No. 12,082, 5 Blatchf. 362; Struve *v.* Schwedler, 23 Fed. Cas. No. 13,551, 4 Blatchf. 23.

32. U. S. Rev. Stat. (1878) § 4956, as amended 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3407]; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*affirming* 5 Fed. 726, 10 Biss. 139]; Bennett *v.* Carr, 96 Fed. 213, 37 C. C. A. 453; Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 395; Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82.

Presumption as to time of deposit.— In the absence of evidence to the contrary, it will be presumed that the deposit of title was made before publication, and that, where the work purports to have been deposited within three months after the title, it was deposited within three months after publication. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547. See *infra*, I, E, 2, c, (III).

Although the title and the work were deposited on the same day, it will be presumed, in the absence of evidence to the contrary, that the former was deposited before and the latter after publication. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*affirming* 5 Fed. 726, 10 Biss. 139]. *Compare* Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82.

The "printed" copy of the title of a book or other article, required by U. S. Rev. Stat. (1878) § 4956 [U. S. Comp. Stat. (1901) p. 3407], to be delivered or mailed to the librarian of congress, may be "printed" with a pen as well as type, with or without the aid of tracing paper. Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 395.

A change of title, and the filing of such changed title after the filing of the original title, and before the publication of the book, do not render the copyright invalid. Black *v.* Henry G. Allen Co., 56 Fed. 764.

33. Black *v.* Henry G. Allen Co., 56 Fed. 764; Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10 [*reversing* 39 Fed. 265, 47 Fed. 903]; Carte *v.* Evans, 27 Fed. 861; Donnelley *v.* Ivers, 18 Fed. 592, 20 Blatchf. 381.

Illustration.— The copy of the title of a play, filed under the act of Feb. 3, 1891, to obtain a copyright, was, "Under the Gaslight, A Romantic Panorama of the Streets and Homes of New York." The title of the play published was, "Under the Gaslight, A Totally Original and Picturesque Drama of Life and Love in these Times, in Five Acts." It was held that there was no material variance. The title of the play, within the meaning of the act, being the name to be given to it by the public, and by those who might buy and sell it, was "Under the Gaslight," the remaining words being mere description of the general character of the work, apparently not intended, and not in fact used as any part of the title. Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10 [*reversing* 39 Fed. 265, 47 Fed. 903].

34. U. S. Rev. Stat. (1878) § 4956, as amended 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3407]; Ladd *v.* Oxnard, 75 Fed. 703; Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291. See also under earlier statutes Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Merrell *v.* Tice, 104 U. S. 557, 26 L. ed. 854; Wheaton *v.* Peters, 8 Pet. 591, 8 L. ed. 1055 [*reversing* on other grounds 29 Fed. Cas. No. 17,486, 8 Pet. 725, 8 L. ed. 1106]; Black *v.* Henry G. Allen Co., 56 Fed. 764; Blume *v.* Spear, 30 Fed. 629; Parkinson *v.* Laselle, 18 Fed. Cas. No. 10,762, 3 Sawy. 330.

Proof of deposit.— The court will not require direct proof that advance copies of complainant's publication were seasonably deposited in the mail for the purposes of the copyright statute, where it appears beyond a doubt that complainant forwarded them so early that respondent could not possibly have been prejudiced by any delay therein. Ladd *v.* Oxnard, 75 Fed. 703. Similarly where it is proved that the party claiming a copyright for a song deposited two copies in the mail and got a receipt from the librarian of congress acknowledging the receipt of two copies of the publication by its title in full, with the

(II) *NEW EDITIONS.* The proprietor of every copyright book or other article shall deliver at the office of the librarian of congress, or deposit in the mail, addressed to the librarian of congress, at Washington, District of Columbia, a copy of every subsequent edition wherein any substantial changes shall be made;[35] and the copyrighting of the volumes of a particular edition of an author's works which have been previously published, some with and some without copyright, protects only what is original in the new edition, and does not enlarge the rights of the owner of the copyright as to any matter previously published.[36]

(III) *TIME OF DEPOSIT.* The statutory requirement as to the time of deposit must be complied with.[37] Under the present statute the deposit must be made not later than the day of publication.[38]

(IV) *PENALTY FOR OMISSION TO DEPOSIT.* For every failure of the proprietor to deliver or deposit in the mail the required copies or photograph he shall be liable to a penalty of twenty-five dollars, to be recovered by the librarian of congress, in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found.[39]

d. Inserting or Inscribing Notice — (I) *IN GENERAL.* No person can maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page following, if it be a book, or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing on the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress, in the year ——, by A B, in the office of the Librarian of Congress, at Washington;" or at his option the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A B."[40]

date over the official signature of the librarian, this will be considered evidence that two copies were delivered to the librarian as required by the act of congress. Blume *v.* Spear, 30 Fed. 629.

Character of copies deposited.— It is necessary to a valid copyright under U. S. Rev. Stat. (1878) § 4956, as amended 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3407], that the copies deposited with the librarian of congress shall be printed from type set in the United States, or from plates made therefrom, but not that they shall contain notice of the copyright. Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291. *Compare* Oliver Ditson Co. *v.* Littleton, 67 Fed. 905, 15 C. C. A. 61 [*affirming* 62 Fed. 597], where it was held that the requirement that the two copies required to be deposited shall be manufactured in the United States does not apply to musical compositions, although published in book form or made by lithographic process.

"Best edition."— The copyright law requiring a deposit of two copies of the best (U. S. Rev. Stat. (1878) § 4959 [U. S. Comp. Stat. (1901) p. 3410]) edition of the work to complete the copyright is sufficiently complied with in the case of a separate article of an American author published in a foreign encyclopedia by the deposit of the sheets or pages containing the article taken out of the bound volume. Black *v.* Henry G. Allen Co., 56 Fed. 764. Under the act of March 3, 1891, amending the copyright law as contained in the Revised Statutes the provision as to the deposit of two copies of the "best edition" is stricken out. 26 U. S. Stat. at L. 1108 [U. S. Comp. Stat. (1901) p. 3410].

35. U. S. Rev. Stat. (1878) § 4959, as amended 26 U. S. Stat. at L. 1108 [U. S. Comp. Stat. (1901) p. 3410].

36. Kipling *v.* Putnam, 120 Fed. 631.

37. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Falk *v.* Donaldson, 57 Fed. 32; Black *v.* Henry G. Allen Co., 56 Fed. 764; Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 395; Dwight *v.* Appleton, 8 Fed. Cas. No. 4,215.

Deposit before publication.— The copies of a copyright work required by section 4959 of the Revised Statutes to be deposited with the librarian of congress within ten days after publication may be so deposited after the printing of the work and before its formal publication. Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 191. See also Bedford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514; Falk *v.* Donaldson, 57 Fed. 32.

38. 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3408].

39. U. S. Rev. Stat. (1878) § 4960 [U. S. Comp. Stat. (1901) p. 3411].

40. 18 U. S. Stat. at L. 78 [U. S. Comp. Stat. (1901) p. 3411]; Pierce, etc., Mfg. Co.

(II) *Work Published in Several Volumes.* Where an entire work is published in several volumes at different times, the insertion of the notice of copyright in the first volume of the work is a sufficient compliance with the provisions of the statute to secure the whole work.[41]

(III) *New Editions.* New editions containing material alterations and additions to be protected must be copyrighted and a notice of the new copyright inserted therein,[42] but it is not necessary that the original notice be inserted in such new editions.[43]

(IV) *Sufficiency of Notice.* The notice of copyright required by the statute is sufficiently given if it clearly shows the claim of copyright, the date at which the right was obtained, and the name of the proprietor. But a substantial compliance with the statutory forms is required.[44]

v. Werckmeister, 72 Fed. 54, 18 C. C. A. 431 [*reversing* 63 Fed. 445]; Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. 591; Dwight *v.* Appleton, 8 Fed. Cas. No. 4,215; Rossiter *v.* Hall, 20 Fed. Cas. No. 12,082, 5 Blatchf. 362. See also Wheaton *v.* Peters, 8 Pet. 591, 8 L. ed. 1055.

The word "copies," in 18 U. S. Stat. at L. 78 [U. S. Comp. Stat. (1901) p. 3411] requiring a notice of copyright to be inserted in the several copies of the edition of a copyrighted book, or, if the copyrighted article be a map, painting, etc., to be inscribed upon some visible portion thereof, refers not to reproductions of an original, but to the individual copyrighted things whether one or many. Accordingly it was held that in order to maintain an action for the infringement of a copyright of a painting, a notice of copyright must have been inscribed upon some visible portion thereof when it was published. Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 18 C. C. A. 431 [*reversing* 63 Fed. 445].

The object of inscribing upon copyright articles the word "copyright," with the year when the copyright was taken out and the name of the party taking it out, is to give notice of the copyright to the public, to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of protecting copyright. Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. 591, construing 18 U. S. Stat. at L. 78 [U. S. Comp. Stat. (1901) p. 3411].

Penalty for impressing false notice.— The penalty imposed by statute is not retroactive in effect and does not apply to a case where the infringement was committed before its passage. McLoughlin *v.* Raphael Tuck & Sons Co., 115 Fed. 85, 53 C. C. A. 508, construing 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3412].

41. Dwight *v.* Appleton, 8 Fed. Cas. No. 4,215.

42. Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

43. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

44. Higgins *v.* Keuffel, 140 U. S. 428, 11 S. Ct. 731, 35 L. ed. 470 [*affirming* 30 Fed. 627]; Thompson *v.* Hubbard, 131 U. S. 123, 9 S. Ct. 710, 33 L. ed. 76; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 710, 32 L. ed. 547 [*affirming* 5 Fed. 726]; Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349 [*affirming* 17 Fed. 591]; Mifflin *v.* Dutton, 107 Fed. 708; Bolles *v.* Outing Co., 77 Fed. 966, 23 C. C. A. 594; Osgood *v.* U. S. Aloe Instrument Co., 69 Fed. 291, 83 Fed. 470; Snow *v.* Mast, 65 Fed. 995; Werckmeister *v.* Springer Lithographing Co., 63 Fed. 808; Hefel *v.* Whitely Land Co., 54 Fed. 179; Falk *v.* Seidenberg, 48 Fed. 224; Falk *v.* Schumacher, 48 Fed. 222; Blume *v.* Spear, 30 Fed. 629; Jackson *v.* Walkie, 29 Fed. 15; Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82; Flint *v.* Jones, 9 Fed. Cas. No. 4,872; King *v.* Force, 14 Fed. Cas. No. 7,791, 2 Cranch C. C. 208; Rossiter *v.* Hall, 20 Fed. Cas. No. 12,082, 5 Blatchf. 362; Tompkins *v.* Rankin, 24 Fed. Cas. No. 14,090.

Sufficiency of notice.— A copyright of a book, obtained by an author in her own name, is vitiated for failure to comply with the requirement of the act of Feb. 3, 1831, that notice of copyright be inserted in each copy of the work, by its subsequent publication, with her consent, in a magazine with no other notice of copyright than that of the entry of the magazine in the name of its publishers. Mifflin *v.* Dutton, 190 U. S. 265, 23 S. Ct. 771, 47 L. ed. —— [*affirming* 112 Fed. 1004, 50 C. C. A. 661], construing 4 U. S. Stat. at L. 436.

On series of pictures.— A series of four thousand five hundred pictures, representing the launching of a vessel, were marked as copyrighted by attaching a plate at one end bearing the notice of copyright, and it was held that this was sufficient. Edison *v.* Lubin, 122 Fed. 240.

Variance between date of deposit and notice.— Where the title had been deposited in 1867, it was held immaterial as to third persons that the notice of copyright printed in the work stated that the copyright had been entered in 1866, the proprietor being concluded by such notice as to the time when his copyright expired. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*affirming* 5 Fed. 726, 10 Biss. 139]. *Compare* Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82, in which the title-page of the book was deposited in 1846, and the notice of

(v) *Penalties For Inserting or Impressing False Notice* — (a) *In General.* The false insertion or impression of a notice of copyright in or upon any article, whether such article be subject to copyright or otherwise, or knowingly to issue, sell, or import any article bearing such false notice of copyright, is prohibited under a penalty of one hundred dollars, recoverable one half for the person who shall sue for such penalty and one half to the use of the United States. The circuit courts of the United States sitting in equity are authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the copyright laws.[45]

(b) *Actions For Recovery* — (1) Who May Recover. The penalty imposed by the statute cannot be recovered in the name of more than one person.[46]

entry as printed in the copies of the book stated the entry to have been made in 1847. It was held that the error, whether arising from mistake or not, was fatal to the title, under section 5 of the act of Feb. 3, 1831. See also Schumacher *v.* Wogram, 35 Fed. 210.

Abbreviation of date.— The words "Copyright 93, by Bolles, Brooklyn," printed on the face of a photograph, are sufficient as the notice of copyright required by 18 U. S. Stat. at L. 78 [U. S. Comp. Stat. (1901) p. 3411]. Bolles *v.* Outing Co., 77 Fed. 966, 23 C. C. A. 594. See also Snow *v.* Mast, 65 Fed. 995.

Initials of name sufficient.— The inserting into a copyright notice required by 18 U. S. Stat. at L. 78 [U. S. Comp. Stat. (1901) p. 3411], of the initial of the christian name and the full surname is a sufficient compliance with the law. Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. 591 [*affirmed* in 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349].

Name of proprietor of serial.— A copyright of a book is invalid where the notice printed therein gives the name of the author as having taken such copyright, while the serial numbers of a magazine in which the contents of the book were first published were copyrighted by the publishers, and the notices printed therein showed such copyright in their name. Mifflin *v.* Dutton, 107 Fed. 708.

Use of trade-name.— The name "Photographische Gesellshaft," being the trade-name created by the owner of a copyright, and extensively used by him for many years in his business, is a sufficient designation of the party by whom the copyright is taken out. Werckmeister *v.* Springer Lithographing Co., 63 Fed. 808.

Surplusage.— A notice on a map: "Copyright entered according to act of Congress 1889, by T. C. Hefel, Civil Engineer," is sufficient, since it differs from the prescribed formula only by including words which are surplusage. Hefel *v.* Whitely Land Co., 54 Fed. 179.

The residence of the party taking out a copyright, although a foreigner, need not be stated in the notice. Werckmeister *v.* Springer Lithographing Co., 63 Fed. 808.

Effect of omission of notice by licensee.— The owner of a copyrighted literary production does not lose the exclusive property therein given by the copyright because a licensee authorized to publish the article on the express condition that he print therewith the usual copyright notice inadvertently omits to do so, and any one who copies and republishes the article so published, although without actual knowledge of the copyright, does so at his peril. American Press Assoc. *v.* Daily Story Pub. Co., 120 Fed. 766.

In Canada a substantial compliance with the statutory requirements is sufficient. Garland *v.* Gemmill, 14 Can. Supreme Ct. 321; Bernard *v.* Bertoni, 14 Quebec 219.

45. U. S. Rev. Stat. (1878) § 4963, as amended 29 U. S. Stat. at L. 694 [U. S. Comp. Stat. (1901) p. 3413]; Hoertel *v.* Raphael Tuck, etc., Co., 94 Fed. 844; Rigney *v.* Dutton, 77 Fed. 173; Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. 173; Taft *v.* Stephens Lithograph, etc., Co., 39 Fed. 781; Rosenbach *v.* Dreyfuss, 2 Fed. 217; Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151.

Construction.— The language of the act authorizing the recovery of the penalty for putting the imprint of a copyright upon a work not legally copyrighted is to be particularly adhered to in the construction thereof. Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151.

Requisites of notice.— A false copyright notice, impressed on a book or other publication, to subject the person so impressing it to the penalty imposed by statute must contain all the essentials of a valid notice, as prescribed by section 4962, and a notice which omits the date of the alleged copyright will not sustain an action for the penalty. Hoertel *v.* Raphael Tuck, etc., Co., 94 Fed. 844. *Compare* Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. 173, where it was held that the notice need not be inserted on one of the pages named in section 4962 of the Revised Statutes.

Personal insertion unnecessary.— The penalty is incurred by one who causes the publication in a trade paper of an uncopyrighted print or cut, with a notice of copyright attached, although he does not himself insert or impress such notice. Rigney *v.* Dutton, 77 Fed. 176.

Cut or print of copyrighted picture.— It is not a violation of the statute to impress, upon an imperfect miniature, cut, or print of a copyrighted picture, a notice of copyright, although such cut or print is not separately copyrighted. Rigney *v.* Dutton, 77 Fed. 176.

46. Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151.

(2) JURISDICTION. The circuit courts of the United States as well as the district courts have jurisdiction of actions to recover penalties under the statute.[47]

(3) SUMMONS. The summons, in an action to recover penalties under the statute, should be indorsed with a reference to the statute;[48] but serving a declaration referring to the statute at the same time process is served on the defendant will be sufficient.[49]

(4) PLEADING. The petition or complaint must allege all the facts necessary to show that the defendant is liable under the statute, if the petition or complaint is true, not merely that he may be liable.[50]

e. Publication — (I) *WHAT CONSTITUTES.* Except in the case of dramatic or musical compositions,[51] the acts which will constitute publication are the same in the United States as in England.[52]

(II) *TIME OF PUBLICATION.* Publication must be made within a reasonable time after the deposit of title with the librarian of congress.[53]

47. Taft *v.* Stephens Lithographing, etc., Co., 37 Fed. 726.

48. Brown *v.* Church, 5 Fed. 41; Brown *v.* Pond, 5 Fed. 31.

49. Brown *v.* Pond, 5 Fed. 31.

50. Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. 173; Taft *v.* Stephens Lithograph, etc., Co., 38 Fed. 28; Rosenbach *v.* Dreyfuss, 2 Fed. 217.

An averment that the book was not copyrighted by defendant is not equivalent to an allegation that he had not obtained a copyright and is demurrable. Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. 173.

51. **A public representation** of a dramatic piece at a theater is not such a publication as to deprive the author or his assignee of his right to copyright. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480. See also Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698.

52. See *supra*, I, E, 1, e, (II); Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12, 32 N. Y. Suppl. 41, 65 N. Y. St. 198; Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*overruling* 5 Fed. 726, 10 Biss. 139]; Snow *v.* Laird, 98 Fed. 813, 39 C. C. A. 311; Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896; Ladd *v.* Oxnard, 75 Fed. 703; Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 18 C. C. A. 431 [*overruling* 63 Fed. 445]; Black *v.* Henry G. Allen Co., 56 Fed. 764; Falk *v.* Gast Lithograph, etc., Co., 54 Fed. 890, 4 C. C. A. 648; Gottsberger *v.* Aldine Book Pub. Co., 33 Fed. 381.

A publication, literary or dramatic, may be limited or general. It is general whenever the communication effecting it is not restricted both as to the persons to whom and the purposes for which it is made. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644.

The issuance to subscribers, without count as a number of a book of credit ratings and the financial standing of persons and firms engaged in a particular line of business, upon a stipulation that the same is merely loaned to the subscriber, and not sold, and that if found in any hands other than those entitled to use it by permission of the publishers the latter may take possession of it and annul all rights of the subscriber, is a publication sufficient to give the compilers a right to protection if they have taken necessary steps to secure a copyright. Ladd *v.* Oxnard, 75 Fed. 703.

Contract not to communicate contents.— The selling of copies of a book by the author to all persons paying him for a course of instruction connected therewith, during a number of years, constitutes a publication which deprives him of the right to subsequently obtain a copyright, although each purchaser was bound by contract not to communicate the contents of the book to any one else. Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896.

Leaving copies of a musical composition with a dealer for sale, but with instructions not to sell any before a specified time, constitutes a publication and dedication to the public of such composition, although a copyright was in fact obtained before the date on which the dealer was authorized to sell. Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349.

Delivering to the secretary of state, for the use of the state, the number of copies of a volume of law reports required by law to be delivered is a publication of that volume. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547.

A painting which is publicly exhibited is "published," within the meaning of the copyright laws. Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 18 C. C. A. 431.

Sale of replica.— The right of copyright in a painting is not destroyed by a sale of replica or original study or model differing from the painting in size and style. Werckmeister *v.* Springer Lithographing Co., 63 Fed. 808.

53. Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12, 32 N. Y. Suppl. 41, 65 N. Y. St. 198; Falk *v.* Gast Lithograph, etc., Co., 48 Fed. 262; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Carillo *v.* Shook, 5 Fed. Cas. No. 2,407.

Delay of two months.—A delay of the publication of a photograph for two months and eighteen days after the title was filed with the librarian of congress, as required by the copyright law, is not unreasonable. Falk *v.* Gast Lithograph, etc., Co., 48 Fed. 262.

(III) *PLACE OF PUBLICATION.* While the law is silent upon the question, it is apprehended that, following the construction given by the courts to the English statutes,[54] and in accordance with the evident intent of the present law,[55] the courts will hold that first or contemporaneous publication must be made within the United States.[56]

F. Dedication or Abandonment — 1. PUBLICATION BEFORE DEPOSIT OF TITLE OR COPIES. The publication of a work before the deposit of its title or description, or before the deposit of the copies or photographs required to be deposited with the librarian of congress, renders a subsequent copyright ineffectual.[57]

2. ABANDONMENT. Any clear, unequivocal, and decisive act of the proprietor of a copyright[58] showing an intention not to maintain and exercise his right will

54. See *supra*, I, E, 1, e, (III).

55. U. S. Rev. Stat. (1878) § 4956, as amended 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3407]; Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291.

Musical compositions, although published in book form or made by lithographic process, are not included in the requirement as to manufacture in the United States. Oliver Ditson Co. *v.* Littleton, 67 Fed. 905, 15 C. C. A. 61 [*affirming* 62 Fed. 597].

56. See Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

57. Jewelers' Mercantile Agency Co. *v.* Jewellers' Weekly Pub. Co., 155 N. Y. 241, 49 N. E. 872, 63 Am. St. Rep. 666, 41 L. R. A. 846 [*reversing* 84 Hun (N. Y.) 12, 32 N. Y. Suppl. 41, 65 N. Y. St. 198]; Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349; Holmes *v.* Hurst, 174 U. S. 82, 19 S. Ct. 606, 43 L. ed. 904 [*affirming* 80 Fed. 514, 25 C. C. A. 610 (*affirming* 76 Fed. 757)]; D'Ole *v.* Kansas City Star Co., 94 Fed. 840; Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896; Holmes *v.* Donohue, 77 Fed. 179; Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 18 C. C. A. 431; Werckmeister *v.* Springer Lithographing Co., 63 Fed. 808; Black *v.* Henry G. Allen Co., 56 Fed. 764; Gottsberger *v.* Aldine Book Pub. Co., 33 Fed. 381; The Mikado, etc., Case, 25 Fed. 183, 23 Blatchf. 347; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Langlois *v.* Vincent, 18 L. C. Jur. 160.

As to what constitutes publication generally see *supra*, I, E, 2, e, (II).

As to the effect of publication upon common-law rights of literary property see LITERARY PROPERTY.

58. Consent of the author to publication abroad places him in the position of a foreign author and is an abandonment of his rights to a copyright here. Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

Publication without notice.— An injunction was refused where the author had published the pirated parts of his work in a public newspaper. Miller *v.* McElroy, 17 Fed. Cas. No. 9,581. *Compare* Schumacher *v.* Schwencke, 30 Fed. 690, where it was held that the owner of a copyrighted painting by publishing lithographic copies thereof did not lose the right to restrain others from copying these copies, although themselves uncopyrighted.

Defective notice.— Publication of a copyrighted work containing a defective notice is an abandonment of the copyright. Mifflin *v.* Dutton, 112 Fed. 1004, 50 C. C. A. 661; Higgins *v.* Keuffel, 30 Fed. 627.

Miniature samples.— The proprietor of a copyrighted photograph may, without losing his copyright, use a card containing one hundred miniature samples of different copyrighted photographs which has not the word "copyright" impressed thereon, for the sole purpose of enabling dealers to give orders. Such a use is not a publication within the meaning of the copyright laws. Falk *v.* Gast Lithograph, etc., Co., 54 Fed. 890, 4 C. C. A. 648.

A copyright of a single article bound up in a volume, the bulk of which is *publici juris*, is valid against an unpermitted reprint of the copyrighted article. Black *v.* Henry G. Allen Co., 56 Fed. 764.

The publication of a novel founded upon a copyrighted drama, by authority of the owner of the drama, is not a dedication of the drama to the public. Shook *v.* Rankin, 21 Fed. Cas. No. 12,805.

The performance with the author's consent, and for his benefit, of a play which has not been printed by him, is not an abandonment to the public nor a publication within the Copyright Act. Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

Use for instruction.— It is not an abandonment to use one's copyrighted work to instruct others who are permitted to take copies. Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32, 2 Fed. Cas. No. 1,082, 4 McLean 300.

Serial publication.— Where a literary work has been published serially with the consent of the author, and a copyright secured in the name of the publisher, whether it be for the publisher alone or in the interests of the publisher and the author, the author cannot subsequently copyright the work; and if subsequently the author republishes it in book form, with a notice of a copyright in his own name, such republication, with such a notice, effects, under the statute, an abandonment of the copyright. Mifflin *v.* Dutton, 112 Fed. 1004, 50 C. C. A. 661.

Evidence insufficient to show.— In a suit

constitute an abandonment, and warrant any person in the free and unrestricted use of the work.[59]

G. Extent and Duration of Rights Acquired — 1. Extent — a. In General. The right secured by the copyright laws is the property in the literary or artistic production — the exclusive right of multiplying and vending copies — and this right is only infringed when other persons produce a substantial copy of the whole or of a material part of the book or thing for which he has secured copyright.[60]

b. Title of Work. The copyright law affords no protection to the mere title as distinguished from the body of the work,[61] although there may be instances where a title is made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use or to compensate one who has in consequence sustained an injury.[62]

c. Subject-Matter. The protection afforded by the copyright laws only

for an infringement of a copyright it appeared that the author had type set up, plates taken therefrom, and sheets to the number of two thousand impressions struck off, and some of these were bound, distributed, and sold. A judgment was rendered against him, execution issued, and the plates were levied on and sold to a third person. It was held that the author, as against a purchaser of the plates from the third person, had not abandoned his copyright of the book. Patterson *v.* J. S. Ogilvie Pub. Co., 119 Fed. 451.

59. Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349; Mifflin *v.* Dutton, 112 Fed. 1004, 50 C. C. A. 661; Higgins *v.* Keuffel, 30 Fed. 627; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Miller *v.* McElroy, 17 Fed. Cas. No. 9,581. See also Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433, 56 Fed. 764; Falk *v.* Gast Lithograph, etc., Co., 54 Fed. 890, 4 C. C. A. 648; Schumacher *v.* Schwencke, 30 Fed. 690; Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139; Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32, 17 Fed. Cas. No. 1,082, 4 McLean 300; Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Shook *v.* Rankin, 21 Fed. Cas. 12,805, in none of which were the facts held sufficient to show an abandonment. And see Abandonment; Literary Property.

60. **Nature of right secured.**— Baker *v.* Selden, 101 U. S. 99, 25 L. ed. 841; Perris *v.* Hexamer, 99 U. S. 674, 25 L. ed. 308; Corbett *v.* Purdy, 80 Fed. 901; Griggs *v.* Perrin, 49 Fed. 15; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

The copyright of a book describing a new system of stenography does not protect the system, when considered simply as a system apart from the language by which it is explained, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement. Griggs *v.* Perrin, 49 Fed. 15. See also Baker *v.* Selden, 101 U. S. 99, 25 L. ed. 841, where it was held that a peculiar system of bookkeeping was not protected by the copyright of the book in which it was explained.

61. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511; Corbett *v.* Purdy, 80 Fed. 901; Harper *v.* Ranous, 67 Fed. 904; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Black *v.* Ehrich, 44 Fed. 793; Donnelley *v.* Ivers, 18 Fed. 592, 20 Blatchf. 381; Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, 1 Holmes 185; Kelly *v.* Hutton, L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. Rep. N. S. 228, 16 Wkly. Rep. 1182; Maxwell *v.* Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433, 16 L. T. Rep. N. S. 130, 15 Wkly. Rep. 467; Dicks *v.* Yates, 18 Ch. D. 76, 50 L. J. Ch. 809, 44 L. T. Rep. N. S. 660; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639; Kelly *v.* Byles, 48 L. J. Ch. 569, 40 L. T. Rep. N. S. 623 [*affirmed* in 13 Ch. D. 682, 49 L. J. Ch. 181, 28 Wkly. Rep. 585]. And see Munroe *v.* Smith, 42 Fed. 266; Jarrold *v.* Houlston, 3 Jur. N. S. 1051.

The title is an appendage to the work, and where the latter is not protected by a copyright the former is not. Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618.

After expiration of copyright.— The words "Webster's Dictionary," which appeared on the title-page of the edition of 1847, are now public property, by reason of the expiration of the copyright; and any one may reprint that edition and entitle the reprint "Webster's Dictionary." Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

Words denoting the virtues.—Words which, in their ordinary and universal use, denote the virtues, such as "charity," "faith," cannot ordinarily be appropriated by any one as a title of designation for a book, play, etc., written by him. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511.

62. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511; Matsell *v.* Flanagan, 2 Abb. Pr. N. S. (N. Y.) 459; Shook *v.* Wood, 10 Phila. (Pa.) 373, 32 Leg. Int. (Pa.) 264; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Estes *v.* Williams, 21 Fed. 189; Benn *v.* Leclercq, 3 Fed. Cas. No. 1,308; Osgood *v.* Allen, 18 Fed. Cas. No. 10,603, 1 Holmes 185; Kelly *v.* Hutton, L. R. 3 Ch. 703, 37 L. J. Ch. 917, 19 L. T. Rep. N. S. 228, 16 Wkly. Rep. 1182; Mack *v.* Petter, L. R. 14 Eq. 431, 41 L. J.

extends to the original work of the author, inventor, designer, or proprietor which is properly subject to copyright. It may be of a part as well as of the whole of a production, but does not include mere method, form, size, or arrangement. Each and every part that may be copyrighted is protected by the copyright of the whole.[63]

2. Duration — a. England. In England the duration of copyright in the various subjects is regulated by the different statutes granting the right. Copyright commences to run from the date of first publication.[64]

b. United States. In the United States copyrights are granted for the term of twenty-eight years from the time of recording the title;[65] and the author, inventor, or designer if he be still living, or his widow or children if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term; and such persons shall, within two months from the date of said renewal, cause a copy of the record

Ch. 781, 20 Wkly. Rep. 964; Chappell *v.* Davidson, 18 C. B. 194, 2 Jur. N. S. 544, 2 Kay & J. 123, 25 L. J. C. P. 225, 4 Wkly. Rep. 559, 86 E. C. L. 194; Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577; Clement *v.* Maddick, 1 Giff. 98, 5 Jur. N. S. 592; Ingram *v.* Stiff, 5 Jur. N. S. 947; Prowett *v.* Mortimer, 2 Jur. N. S. 414, 4 Wkly. Rep. 519; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30. See also Bradbury *v.* Beeton, 39 L. J. Ch. 57, 21 L. T. Rep. N. S. 323, 18 Wkly. Rep. 33. And see also, generally, in this connection EQUITY; LITERARY PROPERTY; TRADE-MARKS AND TRADE-NAMES.

63. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425 [*affirming* 23 Fed. 143]; Perris *v.* Hexamer, 99 U. S. 674, 25 L. ed. 308; Burnell *v.* Chown, 69 Fed. 993; Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411; Banks *v.* West Pub. Co., 27 Fed. 50; Low *v.* Ward, L. R. 6 Eq. 415, 37 L. J. Ch. 841, 16 Wkly. Rep. 1114; Petty *v.* Taylor, [1897] 1 Ch. 465, 66 L. J. Ch. 209, 75 L. T. Rep. N. S. 545, 45 Wkly. Rep. 299.

The right of an author or a publisher is infringed only when other persons produce a substantial copy of the whole or of a material part of the book or other thing for which he secured a copyright. Where therefore the owner of a copyright for maps of certain wards of "the City of New York, surveyed under the direction of insurance companies of said city, . . . exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference," brought his bill to restrain the publication of similar maps of Philadelphia, it was held that the bill could not be sustained. Perris *v.* Hexamer, 99 U. S. 674, 25 L. ed. 308.

Form and method.— Complainant conceived and put in operation a scheme for collecting, classifying, and putting in convenient form information as to the financial standing of business men in towns or counties, with a key thereto, the same being intended for the use of business men in the same locality. It was held that it was no infringement that defendant by the same method obtained by his own efforts like information as to the standing of parties in a different county, and published the same for the same purpose. Burnell *v.* Chown, 69 Fed. 993. See also Merriam *v.* Famous Shoe, etc., Co., 47 Fed. 411.

64. Books.— Forty-two years from publication, and if the author is then living for the remainder of his life and seven years thereafter. 5 & 6 Vict. c. 45, § 3. See also Marzials *v.* Gibbons, L. R. 9 Ch. 518, 43 L. J. Ch. 774, 30 L. T. Rep. N. S. 666, 22 Wkly. Rep. 637, where section 4 of the statute respecting copyrights subsisting at the time of its passage was construed. And see Brooke *v.* Clarke, 1 B. & Ald. 396, construing 54 Geo. III, c. 156.

Engravings, prints, and lithographs.— Twenty-eight years from first publication. 7 Geo. III, c. 38, § 6.

Dramatic and musical compositions — Right of representation and performance.— Forty-two years, or the life of author plus seven years, whichever shall be the longer term. 5 & 6 Vict. c. 45, § 20.

Paintings, drawings, and photographs.— The natural life of the author and seven years after his death. 25 & 26 Vict. c. 68, § 1.

Sculptures, models, copies, or casts.— Fourteen years from the first putting forth or publishing the sculpture in question, with a further term of fourteen years if the maker of the original sculpture shall be living at the end of the first fourteen years. 54 Geo. III, c. 56, §§ 1, 6.

Right to republish.— The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete and of little or no value for any number of years. Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639.

65. U. S. Rev. Stat. (1878) § 4953 [U. S. Comp. Stat. (1901) p. 3407].

thereof to be published in one or more newspapers printed in the United States for four weeks.[66]

II. TITLE AND NATURE OF OWNERSHIP.

A. Title to Copyright — 1. In General. The legal title to a copyright vests in the person in whose name the copyright is taken out. It may, however, be held by him in trust for the real owner, and the question of true ownership is one of fact depending upon the circumstances of each case.[67]

2. To Renewals. The title to the additional term given by the United States statutes is in the author, if living, or if he be dead in his widow or children.[68]

3. Owner's Right to Prevent Unauthorized Sales. The owner of a copyright is entitled to restrain the unauthorized sale of genuinely printed copies of his work.[69] So too he may maintain an action at law for the injury to his reputation as an author arising from false representations as to his authorship of a work[70] or from the publication of his work in a mutilated form.[71] Where, however, the owner of a copyright has transferred the title to copyrighted books under an agreement restricting their use, he cannot restrain, by virtue of the copyright statutes, sales of such books in violation of the agreement, but must rely upon the ordinary remedies for breach of contract.[72]

4. Seizure For Debt. Since a copyright has no corporeal, tangible existence, it cannot be seized on execution, but it may be reached by a creditor's bill.[73]

66. U. S. Rev. Stat. (1878) § 4954, as amended 26 U. S. Stat. at L. 1107 [U. S. Comp. Stat. (1901) p. 3407].

67. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Press Pub. Co. *v.* Falk, 59 Fed. 324; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433, 56 Fed. 764; Mackaye *v.* Mallory, 12 Fed. 328; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Hazlitt *v.* Templeman, 13 L. T. Rep. N. S. 593. See also Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572

"A trustee in whom a copyright is vested may be registered as the owner and may sue in that character; but it is impossible for one person to be the owner and another person be on the register, and for these two persons successfully to sue." London Printing, etc., Alliance *v.* Cox, [1891] 3 Ch. 291, 303, 60 L. J. Ch. 707, 65 L. T. Rep. N. S. 60.

Where a publisher takes a copyright in his own name, with the knowledge and acquiesence of the author, he is the lawful owner, subject to the condition of accounting to the author pursuant to the contract. Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328.

Title of assignee.— The party to whom an assignment is made, whether for the benefit of another or not, holds the legal interest in the work as assignee of the author, and comes therefore within the very words of the law entitling him to the copyright. Whether a third person has an equitable interest in the work, derived from the author or from the legal assignment, is a question between those parties, in respect to which the public interest or policy is not at all concerned. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

68. U. S. Rev. Stat. (1878) § 4954 [U. S. Comp. Stat. (1901) p. 3407].

Right of author as against employer.— A person employed to complete a book for a certain sum, who is credited as author on the title-page, the employer giving some suggestions as to the character and form of the work, and taking a conveyance of the copyright, has the sole interest in the additional term allowed to authors. Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

69. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528; Henry Bill Pub. Co. *v.* Smythe, 27 Fed. 914. See also Clemens *v.* Estes, 22 Fed. 899. But see Lee *v.* Gibbings, 67 L. T. Rep. N. S. 263, where an injunction against publishing and selling an author's work in mutilated form was refused, and it was held that plaintiff's remedy in law was libel.

"This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property,— copyrighted articles like any other — is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved." Per Hammond, J., in Henry Bill Pub. Co. *v.* Smythe, 27 Fed. 914, 925.

70. Archbold *v.* Sweet, 5 C. & P. 219, 1 M. & Rob. 62, 24 E. C. L. 535.

71. Lee *v.* Gibbings, 67 L. T. Rep. N. S. 263.

72. Harrison *v.* Maynard, 61 Fed. 689, 10 C. C. A. 17; Clemens *v.* Estes, 22 Fed. 899. See also Doan *v.* American Book Co., 105 Fed. 772, 45 C. C. A. 42; Henry Bill Pub. Co. *v.* Smythe, 27 Fed. 914.

73. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528. See also Cooper

B. Transfers, Licenses, and Contracts — 1. Assignments — a. In General. Copyrights are freely assignable under the statutes of both England and the United States. An assignment may be of the whole right or of a specified interest therein,[74] and it may as well be to one not entitled himself to the benefit of the statutes as to one within their purview.[75] Where an assignment is made to more than one they hold as owners in common and not as partners.[76]

b. Requisites and Validity — (I) *Form of Assignment Generally.* No particular form of words is necessary to create a valid assignment of copyright.[77]

(II) *Necessity of Writing* — (A) *England.* Under the now existing English statutes[78] an assignment of copyright must be in writing, unless made by registry at Stationers' Hall.[79] Such registration is required in case of dramatic

v. Gunn, 4 B. Mon. (Ky.) 594, in which it was held that although an author who has obtained a copyright according to the acts of congress cannot be deprived, against his will, and in favor of any of his creditors, of any of the rights secured him by said acts, this protection does not extend, and was not intended to extend, to the proceeds of the sale of his copyright, whether existing in his own hands, in the shape of visible property or choses in action, or held by another for his use.

Mode of procedure.— "In case of such remedy [by a creditor's bill], we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the Copyright Act, in order to vest him with a complete title to the property." Per Nelson, J., in Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528.

Unpublished manuscripts are not subject to execution. Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544. And see Literary Property.

74. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433, 56 Fed. 764. See also Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

Assignment for specific purpose.— When the owner of the copyright of a painting assigns the copyright for the purpose of producing an engraving of one size, the right of producing copies of the painting in other ways, or by engraving of other sizes, remains in him and can be assigned by him to any other person. Lucas *v.* Cooke, 13 Ch. D. 872, 42 L. T. Rep. N. S. 180, 28 Wkly. Rep. 439.

Assignment of less than full term.— In Davidson *v.* Bohn, 6 C. B. 456, 12 Jur. 922, 18 L. J. C. P. 15, 60 E. C. L. 456, it was held, under 5 & 6 Vict. c. 45, § 13, that the registered proprietor of a copyright may assign his right for less than the full term. See also Howitt *v.* Hall, 6 L. T. Rep. N. S. 348, 10 Wkly. Rep. 381. *Compare* Drone Copyright 337, where it is said to be doubtful whether such an assignment can be regarded as other than a mere license.

Limitation as to territory.— The owner of a copyright may assign the exclusive right to sell the copyrighted work in a specified territory. Davis *v.* Vories, 141 Mo. 234, 42 S. W. 707. Similarly an assignment may be made of the exclusive right of acting and representing a drama in a specified territory for a limited period. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698. But such assignments are regarded as mere licenses (Davis *v.* Vories, 141 Mo. 234, 42 S. W. 707; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644; Drone Copyright 335), except in the case of an assignment of the whole right for one or more of several countries (Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81). See also Low *v.* Ward, L. R. 6 Eq. 415, 37 L. J. Ch. 841, 16 Wkly. Rep. 1114; Routledge *v.* Low, L. R. 3 H. L. 100, 37 L. J. Ch. 454, 18 L. T. Rep. N. S. 874, 16 Wkly. Rep. 1081; Cocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288.

75. A copyright may be assigned to a non-resident foreigner. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433, 56 Fed. 764; Carte *v.* Evans, 27 Fed. 861; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

76. When an assignment is made to more than one the ownership is not that of partners, although they may enter into any contract of partnership *inter sese,* or between themselves and publishers of their works. Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Stevens *v.* Benning, 6 De G. M. & G. 223, 3 Eq. Rep. 457, 1 Jur. N. S. 74, 24 L. J. Ch. 153, 3 Wkly. Rep. 149, 55 Eng. Ch. 175. In the absence of any contract modifying their relations, they are simply owners in common, each owning a distinct but undivided part, which or any part of which alone he can sell, as in the case of personal chattels. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

77. U. S. Rev. Stat. (1878) § 4955 [U. S. Comp. Stat. (1901) p. 3407]. See also Cocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; Strahan *v.* Graham, 17 L. T. Rep. N. S. 457 [*affirming* 16 L. T. Rep. N. S. 87, 15 Wkly. Rep. 487]; Lacy *v.* Toole, 15 L. T. Rep. N. S. 512. But see Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182; Latour *v.* Bland, 2 Stark. 382, 3 E. C. L. 455.

78. 5 & 6 Vict. c. 45; 25 & 26 Vict. c. 68.

79. Low *v.* Rutledge, L. R. 1 Ch. 42, 10 Jur. N. S. 922, 33 L. J. Ch. 717, 10 L. T. Rep. N. S. 838, 12 Wkly. Rep. 1069; Eaton *v.* Lake, 20 Q. B. D. 378, 57 L. J. Q. B. 227, 59 L. T. Rep. N. S. 100, 36 Wkly. Rep. 277; Shepherd

or musical compositions,[80] and of paintings, drawings, and photographs,[81] whether the assignment is made in writing or not. It is also in the case of books a prerequisite to the maintenance of an action for infringement by an assignee.[82]

(B) *United States* — (1) BEFORE PUBLICATION. Since under the United States statutes a proprietor as well as an author, inventor, or designer is permitted to copyright a work,[83] the rights of an author before publication may be transferred by parol.[84]

(2) AFTER PUBLICATION. In an early case in New York[85] it was held that an assignment under the copyright act of 1790 must be in writing. A similar construction was subsequently given to the act of 1831[86] and to the act of 1834.[87] Under the present law[88] copyrights are assignable by any instrument in writing, and such assignment must be recorded in the office of the librarian of congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.[89]

c. Construction and Operation — (1) *IN GENERAL.* The law governing the construction of assignments of copyright is similar to that which obtains in any other case of contract.[90] An assignment of copyright differs, how-

v. Conquest, 17 C. B. 427, 4 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427; Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 18 L. J. C. P. 97, 12 Jur. 1091, 62 E. C. L. 4; Leyland *v.* Stewart, 4 Ch. D. 419, 46 L. J. Ch. 103, 25 Wkly. Rep. 225; Strahan *v.* Graham, 17 L. T. Rep. N. S. 457 [*affirming* 16 L. T. Rep. N. S. 87, 15 Wkly. Rep. 487]. But see Cocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860, which, however, was a case of an assignment before publication and in a foreign country, under the laws of which no writing was required in the assignment of copyrights. And see Kyle *v.* Jefferys, 3 Macq. 611, in which the question at issue was as to the necessity of attestation. The *dicta* of the judges of the lower court (Jefferys *v.* Kyle, 9 Sc. Sess. Cas. (2d ser.) 906) to the effect that a writing is unnecessary, under 5 & 6 Vict. c. 45, consequently lacks authority. The actual point decided was that a receipt in writing for the price of the copyright operates as an effectual assignment. See also Hazlitt *v.* Templeman, 13 L. T. Rep. N. S. 593.

Engravings and prints.— Mr. Drone, in considering the provisions of 8 Geo. II, c. 13, and of 17 Geo. III, c. 57, comes to the conclusion that an assignment of the copyright in an engraving or print need not be in writing. Drone Copyright 317.

80. 5 & 6 Vict. c. 45, § 22.

Registration not necessary in assignment of right of representation.— In Lacy *v.* Rhys, 4 B. & S. 873, 10 Jur. N. S. 612, 33 L. J. Q. B. 157, 9 L. T. Rep. N. S. 607, 12 Wkly. Rep. 309, 116 E. C. L. 873, it was held that in case of an assignment of the right of representing a dramatic composition registration is unnecessary See also Marsh *v.* Conquest, 17 C. B. N. S. 418, 10 Jur. N. S. 989, 33 L. J. C. P. 319, 10 L. T. Rep. N. S. 717, 12 Wkly. Rep. 1006, 112 E. C. L. 418.

81. 25 & 26 Vict. c. 68, § 4; Matter of Copyright Acts, L. R. 4 Q. B. 715, 20 L. T. Rep. N. S. 877, 17 Wkly. Rep. 1018.

82. Liverpool General Brokers' Assoc. *v.* Commercial Press Tel. Bureaux, [1897] 2 Q. B. 1, 66 L. J. Q. B. 405, 76 L. T. Rep. N. S. 292.

83. U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406].

84. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. (U. S.) 1.

85. Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90.

86. "An assignment, therefore, that would vest the assignee with the property of the copyright, according to the Act of Congress, must be in writing, and signed in the presence of two witnesses." Per Nelson, J., in Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528.

87. "A formal transfer of the copyright by the supplementary act of the 30th June, 1834, is required to be proved and recorded as deeds for the conveyance of land, and such record operates as notice." Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328.

88. U. S. Rev. Stat. (1878) § 4955 [U. S. Comp. Stat. (1901) p. 3407].

89. **An unrecorded assignment** is valid as between the parties, and as to all persons not claiming under the assignor. Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

An oral agreement to assign or relinquish is a valid consideration for a promise. Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90.

90. Hubbard *v.* Thompson, 25 Fed. 188. See also *Re* Musical Compositions, etc., 4 Q. B. D. 483, 48 L. J. Q. B. 505, 41 L. T. Rep. N. S. 144, 27 Wkly. Rep. 857; Rippon *v.* Norton, 2 Beav. 63, 17 Eng. Ch. 63; Taylor *v.* Neville, 47 L. J. Q. B. 254, 38 L. T. Rep. N. S. 50, 26 Wkly. Rep. 255.

As to assignments generally see ASSIGNMENTS, 4 Cyc. 1.

ever, from other contracts in that it will be liberally construed in favor of the assignor.[91]

(II) *Sale of Plates.* The mere ownership of plates from which a copyrighted work is printed by the owner of the copyright does not attach to the plates the exclusive right of printing and publishing the work or any part thereof. The incorporeal right subsists wholly separate from and independent of the plates and does not pass with them by a sale thereof.[92]

(III) *Assignment of Dramatic Composition.* The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an express intention that it should do so, pass the right of representing or performing it. This latter right may be the subject of a subsequent assignment to a third person.[93] Conversely the assignment of the exclusive right of acting and representing a dramatic composition does not carry with it the copyright of the book.[94]

(IV) *Work Done in Official Capacity.* An assignment of work done or to be done by an author in an official capacity as a state reporter is only operative so long as he may remain in office. Consequently the copyright in work done by him after the expiration of his term does not pass to his assignee by virtue of the contract.[95]

(V) *With Regard to Right to Renewal.* As has been previously stated,[96] the right to renew for the additional term provided by statute is in the author, his widow, or children. Whether an assignment by an author, either before or after publication, will be construed to convey his whole interest or only his interest for the first term, will depend upon the terms of the contract.[97]

(VI) *Rights of Sale*—(A) *Of Assignor After Assignment.* In England it has been held, under the statutory definition of copyright,[98] that in the absence of a special contract to the contrary the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession.[99] Under the

91. Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

92. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528.

93. Marsh *v.* Conquest, 17 C. B. N. S. 418, 10 Jur. N. S. 989, 33 L. J. C. P. 319, 10 L. T. Rep. N. S. 717, 12 Wkly. Rep. 1006, 112 E. C. L. 418.

94. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698.

95. Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328.

96. See *supra*, II, A, 2, as to the persons who may renew.

97. A court reporter furnishing reports to certain publishers under an agreement "to furnish, in manuscript, the reports of a court for publication," and that the publishers "shall have the copyright of said reports to them and their assigns forever" vests the absolute right of property of the manuscripts in the publishers, and does not merely assign a copyright of fourteen years. Paige *v.* Banks, 13 Wall. (U. S.) 608, 20 L. ed. 709 [*affirming* 18 Fed. Cas. No. 10,671, 7 Blatchf. (U. S.) 152]. So where, in an action for the infringement of a copyright brought by the assignees, an issue of ownership was raised on the trial, upon which the author and assignor testified that "the intention was to convey deponent's whole interest in the copyright of the work; I supposed the book belong to my assignees, as soon as made, including all that was in it," the legal representatives of the author are estopped from subsequently claiming that the agreement was intended to be confined to the first term of the copyright, especially since the testimony was given after the expiration of such term as to the portion of the work. Cowen *v.* Banks, 6 Fed. Cas. No. 3,295, 24 How. Pr. (N. Y.) 72.

Limited assignment after publication.— Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

Absolute assignment carries future rights. — In Cumberland *v.* Planche, 1 A. & E. 580, 3 L. J. K. B. O. S. 194, 3 N. & M. 537, 28 E. C. L. 276, it was held that a person to whom a copyright of a dramatic piece had been assigned previously to and within ten years of the passage of 3 & 4 Wm. IV, c. 15, was an assignee within that clause of the act which gives to the author's assignee in the case of a dramatic work published within ten years the sole liberty of representing it. See also Carnan *v.* Bowles, 2 Bro. Ch. 80, 29 Eng. Reprint 45, 1 Cox Ch. 283, 29 Eng. Reprint 1168; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311.

98. 5 & 6 Vict. c. 45, § 2.

99. Taylor *v.* Pillow, L. R. 7 Eq. 418.

statutory definition in the United States it would seem that the assignor has no such right.[1]

(B) *Of Assignee After Determination of Assignment.* The same doctrines apply both in England[2] and in the United States[3] as to the right of an assignee after the determination of a limited assignment.

(VII) *Right to Produce Rival Work.* After assignment the assignor has no right to reproduce the work assigned or to bring out a rival work.[4]

(VIII) *Warranty of Copyright.* Whether the law will imply a warranty of title on the sale of a copyright seems doubtful; but there is no question that an assignor may bind himself by an express warranty.[5]

2. Contracts For Sale or Use of Copyrighted Works — a. Licenses Generally — (I) *As Distinguished From Assignments.* As distinguished from an assignment, which vests the copyright in the assignee, a license merely confers the privilege of publication and passes no proprietary interest.[6]

(II) *Formal Requisites* — (A) *England.* By the English statutes the consent in writing of the owner, whether author or assignee, is necessary to the validity of a license.[7]

(B) *United States.* In the United States a license must be evidenced by writing, signed by the proprietor in the presence of two or more witnesses,[8] except in the case of dramatic or musical compositions, which may be performed or

1. U. S. Rev. Stat. (1878) § 4959 [U. S. Comp. Stat. (1901) p. 3410]. And see Drone Copyright 339.

2. Howitt *v.* Hall, 6 L. T. Rep. N. S. 348, 10 Wkly. Rep. 381.

3. Drone Copyright 341.

4. Ward *v.* Beeton, L. R. 19 Eq. 207, 23 Wkly. Rep. 533; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Drone Copyright [*citing* Rooney *v.* Kelley, 14 Ir. C. L. 158]. See also 25 & 26 Vict. c. 68, § 6, by which an artist is prohibited from reproducing a painting or photograph after the sale of the original.

5. Sims *v.* Marryat, 17 Q. B. 281, 20 L. J. Q. B. 454, 79 E. C. L. 281.

6. Drone Copyright 305; MacGillivray Copyright 81. See also Black *v.* Henry G. Allen Co., 56 Fed. 764; Reade *v.* Bentley, 4 Jur. N. S. 82, 4 Kay & J. 656, 3 Kay & J. 271, 27 L. J. Ch. 254, 6 Wkly. Rep. 240; Tuck *v.* Canton, 51 L. J. Q. B. 363.

A license is not equal to an assignment.— London Printing, etc., Alliance *v.* Cox, [1891] 3 Ch. 291, 60 L. J. Ch. 707, 65 L. T. Rep. N. S. 60; Reade *v.* Bentley, 4 Jur. N. S. 82, 3 Kay & J. 271, 27 L. J. Ch. 254, 6 Wkly. Rep. 240; Stevens *v.* Benning, 1 Kay & J. 168.

"In determining whether a particular transaction is an assignment of a license, the first question is whether, on a true construction of the statute, the right purported to be given can be given by assignment or only by license. If the right is one so limited that it cannot legally be the object of assignment, the transaction must necessarily be a license; but if it can legally be the object of assignment, the further question arises as to what was the intention of the parties as evidenced by what they have said and done. . . . The principal test in such cases is to examine the contract and the circumstances under which it was made, and see whether or not it bears the impress of a reliance by grantor on the personal skill or reputation of the grantee; if it does a license will be presumed rather than an assignment." MacGillivray Copyright 81 [*citing* Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39; *Ex p.* Bastow, 14 C. B. 631, 78 E. C. L. 631; Cooper *v.* Stephens, [1895] 1 Ch. 567; Reade *v.* Bentley, 4 Jur. N. S. 82, 3 Kay & J. 271, 27 L. J. Ch. 254, 6 Wkly. Rep. 240; Stevens *v.* Benning, 1 Kay & J. 168].

7. 25 & 26 Vict. c. 68, § 3; 5 & 6 Vict. c. 45, § 15. See also 3 & 4 Wm. IV, c. 15; 54 Geo. III, c. 156; 8 Anne, c. 19.

The part owner of a dramatic entertainment cannot grant a license for its representation without the consent of all the other owners. Powell *v.* Head, 12 Ch. D. 686, 48 L. J. Ch. 731, 41 L. T. Rep. N. S. 70.

Consent given by agent.—The written consent required by 3 & 4 Wm. IV, c. 15, § 2, need not be under the hand of the author or proprietor himself, but may be given by an agent. Morton *v.* Copeland, 16 C. B. 517, 1 Jur. N. S. 979, 24 L. J. C. P. 169, 3 Wkly. Rep. 593, 81 E. C. L. 517.

Registration not required.—Tuck *v.* Canton, 51 L. J. Q. B. 363 which was decided under 25 & 26 Vict. c. 68.

8. U. S. Rev. Stat. (1878) § 4964, as amended 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3413]; U. S. Rev. Stat. (1878) § 4965, as amended 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3414]. See also Press Pub. Co. *v.* Falk, 59 Fed. 324, in which it was held that although a photograph be taken under such circumstances as to give the person photographed an equitable interest in it and in the copyright, such person cannot permit another to make copies for his own benefit without the written consent of the owner of the copyright.

represented by a licensee, although the consent of the proprietor or his heirs or assigns is not evidenced by writing.[9]

b. Contracts of Authors and Publishers — (1) *In General.* The most frequent instances of licenses occur in the case of contracts between authors and publishers. While sometimes loosely called assignments, such contracts are in fact merely licenses,[10] the construction of which is wholly dependent upon their terms. They may be limited or unlimited as to editions, duration, or extent;[11] may be revocable or irrevocable during an ascertained period;[12] may or may not be exclusive[13] — in short, may contain any limitations or conditions which the

9. U. S. Rev. Stat. (1878) § 4966, as amended 29 U. S. Stat. at L. 481 [U. S. Comp. Stat. (1901) p. 3415].

10. See *supra*, II, B, 2, a.

11. By an agreement between the author and a bookseller, after reciting that the author had prepared a new edition of one of his works and that the bookseller was desirous of purchasing it, it was agreed that a named printer should print two thousand five hundred copies of the work of a certain type and style at the sole cost of the bookseller and that the latter should pay to the author, for the said edition, a certain sum by installments, the first to be paid as soon as the edition was ready for publication, the work to be divided into three volumes and to be sold to the public at a specified sum. It was held that the bookseller was not merely a purchaser of the two thousand five hundred copies of the work, but was in equity a licensee to the extent that he was to be the sole publisher of it until the whole edition, consisting of two thousand five hundred copies, should be sold. Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572.

By licensing the use of his song in a general compilation, the author, in the absence of an explicit declaration to the contrary, consents that future editions may be issued containing his song, which may be characterized by omissions and additions of other matter within fair limits. Gabriel *v.* McCabe, 74 Fed. 743.

Restricted use of annotations.— Under an agreement between the holder of the legal title to copyrights and the editor of a new edition that the former should make no use of the notes in the new edition without the written consent of the editor, and that he should be given the right to make any use of the same that he might see fit, it was held that neither the holder of the legal title nor any one claiming under her had the right to use such notes without the required consent of the editor. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

Limited first and unlimited second edition. — An author of a work in manuscript contracted with a publisher in writing but not under seal, or attestation, or acknowledgment, that he might publish a first edition of one thousand copies paying the author fifteen cents for each copy sold; and if a second edition should be called for, the author would revise and correct the first edition and the publisher should stereotype it, and might print as many copies as he could sell, paying the author twenty cents for each copy sold. The publisher took out a copyright in his own name, with the knowledge and consent of the author, and the first edition being exhausted stereotyped the corrected manuscript of the second edition, but only printed one thousand five hundred copies of the first impression, and when these were sold proceeded to print more, called a third edition, accounting to the author according to the contract. He then sold the plates to a publisher in another state to account to himself on the same terms. The author thereupon revised a third edition and caused it to be stereotyped and printed, and took out a copyright in his own name, and then sought an injunction against the publishers, who filed their cross bills against him, praying an injunction. It was held that the author had no right to print an edition for himself, and take out a copyright, so long as his licensee complied with his contract. Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328.

12. In Reade *v.* Bentley, 4 Jur. N. S. 82, 3 Kay & J. 271, 27 L. J. Ch. 254, 6 Wkly. Rep. 240, an agreement between an author and publisher that the latter should publish at his own expense and risk a work of the former, and after deducting from the produce of the sale the expenses, including a commission on the gross receipts, the profits remaining of every edition should be divided equally, was held not to be an irrevocable license to publish, but a joint adventure, which the author might put an end to at any time after the publication of the first or any subsequent edition. See also Holt *v.* Silver, 169 Mass. 435, 48 N. E. 837.

13. Where an authoress entered into a verbal agreement with a publisher that he should publish a work at his own expense and pay her a royalty, and the work was accordingly published, but before all the copies were sold, she arranged with another publisher to bring out a second edition of her work, it was held that no agreement could be implied on the part of the authoress not to bring out a new edition until all the first edition was sold, and that a suit against her and the second publisher to restrain such publication could not be sustained. There may, however, be an express agreement giving the licensee an exclusive right during a definite period. Warne *v.* Routledge, L. R. 18 Eq. 497, 42 L. J. Ch. 604, 30 L. T. Rep. N. S. 857, 22 Wkly. Rep. 750. See also Willis *v.* Tibbals, 33 N. Y. Super. Ct. 220, in which it

parties may see fit to insert, and which are not in contravention of the policy of the law as being in restraint of trade.[14]

(II) *ASSIGNABILITY.* The rights acquired under contracts between authors and publishers are not assignable.[15]

(III) *ENFORCEMENT.* An express negative covenant in a contract between an author and publisher may be enforced by injunction,[16] but an agreement to write a book cannot be enforced by specific performance.[17] The only remedy is an

was held that in the absence of an established usage a contract whereby a publisher agrees to publish a copyrighted work and pay the author a fixed sum for each copy published does not give an exclusive right of publication.

Exclusive rights in defined territory.— By contract between the owner of a copyright and a firm of publishers, the territory was divided by specified boundaries between them, and the latter were given the exclusive privilege of printing and manufacturing, and were bound to furnish the author at cost price with such copies as he might need to supply the territory allotted to him. A dispute arose as to what was a fair cost price, and the publishers refused to supply the copies required. The owner of the copyright proceeded to reprint the work and to sell it in the territory of complainants as well as in his own. It was held that the breach of contract by complainants did not justify the owner of the copyright in assuming that the contract was canceled. His proper remedy was an action for damages. Baldwin *v.* Baird, 25 Fed. 293. See also Hudson *v.* Patten, 1 Root (Conn.) 133.

Exclusive license to perform.— Where a copyrighted play was conveyed on the condition, among others, that the transferee should perform such play at least fifty times within one year from the date of the agreement, the transferee is entitled to an injunction restraining the transferrers from assigning the right to a third person, although the transferee has not produced the play and has refused to produce it in connection with a certain other actor, where time still remains within which the transferee may produce the play the requisite number of times. Widmer *v.* Greene, 56 How. Pr. (N. Y.) 91.

14. An agreement between an author and publisher that a copyrighted work shall not be sold below a certain price is not within the principle of contracts in restraint of trade and will bind a subsequent licensee. Murphy *v.* Christian Press Assoc. Pub. Co., 38 N. Y. App. Div. 426, 56 N. Y. Suppl. 597. See also Benning *r.* Dove, 5 C. & P. 427, 24 E. C. L. 638.

Agreement not to publish particular class of work.— An agreement by a publisher not to publish in the future a magazine of a particular description is analogous to an agreement by a tradesman not to deal in a particular article, and like this latter agreement is not void as a too general restraint on trade. Ainsworth *r.* Bentley, 14 Wkly. Rep. 630. Similarly it is not illegal for an author to agree to write only for a certain publisher or theatrical manager. Stiff *r.* Cassell, 2 Jur. N. S. 348; Morris *v.* Colman, 18 Ves. Jr. 437, 11 Rev. Rep. 230.

15. Pulte *r.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Reade *v.* Bentley, 4 Jur. N. S. 82, 3 Kay & J. 271, 27 L. J. Ch. 254, 6 Wkly. Rep. 240; Stevens *r.* Benning, 1 Kay & J. 168 [*affirmed* in 6 De G. M. & G. 223, 3 Eq. Rep. 457, 1 Jur. N. S. 74, 24 L. J. Ch. 153, 3 Wkly. Rep. 149, 55 Eng. Ch. 175]; Hole *r.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39; Griffeth *v.* Tower Pub. Co., [1897] 1 Ch. 21, 66 L. J. Ch. 12, 75 L. T. Rep. N. S. 330, 45 Wkly. Rep. 73. See also Gibson *r.* Carruthers, 11 L. J. Exch. 138, 8 M. & W. 321, in which it was said that the death or bankruptcy of a publisher will terminate a publishing agreement.

A half-profit agreement cannot be assigned by a publisher's firm to a firm which has succeeded to their business, but which contains none of the partners of the original firm. Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39. See also Griffeth *r.* Tower Pub. Co., [1897] 1 Ch. 21, 66 L. J. Ch. 12, 75 L. T. Rep. N. S. 330, 45 Wkly. Rep. 73, in which the same principle was applied in the case of a limited company carrying on a publishing business.

16. Ward *v.* Beeton, L. R. 19 Eq. 207, 23 Wkly. Rep. 533; Warne *r.* Routledge, L. R. 18 Eq. 497, 42 L. J. Ch. 604, 30 L. T. Rep. N. S. 857, 22 Wkly. Rep. 750; Brooks *r.* Chitty, 2 Coopt. Cott. 216; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Stiff *r.* Cassell, 2 Jur. N. S. 348; Warfield *r.* Nicholson, 2 L. J. Ch. O. S. 90, 2 Sim. & St. 1; Morris *v.* Colman, 18 Ves. Jr. 437, 11 Rev. Rep. 230; Ainsworth *r.* Bentley, 14 Wkly. Rep. 630.

17. Clarke *v.* Price, 2 Wils. Ch. 157, 18 Rev. Rep. 159. See also Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433; and SPECIFIC PERFORMANCE.

Agreement to report.— The court of chancery cannot specifically enforce an agreement, whereby A agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration, nor interfere by an injunction to restrain the party from permitting the reports written by him to be published by another person; the remedy if any is at law. Clarke *v.* Price, 2 Wils. C. C. 157, 18 Rev. Rep. 159 [*cited* in Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 431, 60 L. J. Ch. 428,

action for breach of contract to which it is not a tenable objection that it is an action by one partner against another to recover partnership property.[18]

c. Agreements Between Joint Owners. Joint owners of a copyright may make a contract among themselves as to printing and publishing their work, and one of them cannot set up, as against another, his original rights as a joint owner in violation of such contract.[19]

3. Executory Contracts. An executory contract to assign a copyright is insufficient to pass the right,[20] nor will it invalidate a subsequent regular assignment to others.[21]

C. Determination of Title to Copyright or Right to Use Works — 1. Jurisdiction — a. In General. Originally in England courts of equity had no jurisdiction to determine the title to copyright, but in case of doubt, either required the title to be established at law before granting relief,[22] or else would grant relief, conditioned upon plaintiff's establishing his title at law.[23] Now, however, in both England and the United States, courts of equity have jurisdiction to determine the title to copyright, or right to use copyrighted works.[24]

b. State Courts. Where no question of copyright is involved, a state court has jurisdiction of an action to determine the rights of parties to an agreement for the use of copyrighted matter.[25]

64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433; Drone Copyright 542; MacGillivray Copyright 139].

18. Gale *v.* Leckie, 2 Stark. 107, 19 Rev. Rep. 692, 3 E. C. L. 337.

19. Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90.

20. Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 54 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976; Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 12 Jur. 1091, 18 L. J. C. P. 97, 62 E. C. L. 4; London Printing, etc., Alliance *v.* Cox, [1891] 3 Ch. 291, 60 L. J. Ch. 707, 65 L. T. Rep. N. S. 60; Colburn *v.* Duncombe, 9 Sim. 151, 9 Eng. Ch. 151. *Compare* Thombleson *v.* Black, 1 Jur. 198, in which it was held that an agreement to assign a copyright might be specifically enforced.

21. Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 12 Jur. 1091, 18 L. J. C. P. 97, 62 E. C. L. 4.

22. Lawrence *v.* Smith, Jac. 471, 23 Rev. Rep. 125, 4 Eng. Ch. 471; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; McNeill *v.* Williams, 11 Jur. 344; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Lowndes *v.* Duncombe, 1 L. J. Ch. O. S. 51; Southey *v.* Sherwood, 2 Meriv. 435; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; King *v.* Reed, 8 Ves. Jr. 223 note; Wolcot *v.* Walker, 7 Ves. Jr. 1. See also Robinson *v.* Wilkins, 8 Ves. Jr. 224 note.

23. Bogue *v.* Houlston, 5 De G. & Sm. 267, 16 Jur. 372, 21 L. J. Ch. 470; Dickens *v.* Lee, 8 Jur. 183; Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572; Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30.

"The court always exercises its discretion as to whether it shall interfere by injunction before the establishment of the legal title." Per Cottenham, L. C., in Saunders *v.* Smith, 2 Jur. 491, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711.

Considerations governing equitable relief — In cases of contested copyright, a court of equity is disposed rather to restrict than to increase the number of cases in which it interferes by injunction before the establishment of the legal title, and it will give great weight to the consideration of the questions, as to which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action. McNeill *v.* Williams, 11 Jur. 344.

Where a plaintiff has a good equitable title a court of equity will interfere to protect his copyright from piracy even though it should not be quite clear that his legal title is complete. Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385. See also Sweet *v.* Shaw, 3 Jur. 217.

24. Worthington *v.* Batty, 40 Fed. 479; Hubbard *v.* Thompson, 25 Fed. 188; Yuengling *v.* Schile, 17 Fed. 97, 20 Blatchf. 452; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82; Binns *v.* Woodruff, 3 Fed. Cas. No. 1,424, 4 Wash. 48; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Gould *v.* Hastings, 10 Fed. Cas. No. 5,639; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; Paige *v.* Banks, 18 Fed. Cas. No. 10,671, 7 Blatchf. 152 [*affirmed* in 13 Wall. (U. S.) 608, 20 L. ed. 709]; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

25. Widmer *v.* Greene, 56 How. Pr. (N. Y.) 91, in which the state court took jurisdiction of a controversy to determine the rights of the parties to an agreement to have and perform a copyrighted play. See also Middlebrook *v.* Broadbent, 47 N. Y. 443, 7 Am. Rep. 457; Burrall *v.* Jewett, 2 Paige (N. Y.) 134.

2. EVIDENCE — a. Admissibility. On the trial of an issue out of chancery to determine the title to a copyright, the bill and answer cannot be read in evidence to the jury, unless it be so ordered by the court of chancery when the issue is ordered.[26]

b. Sufficiency. Mere acquiescence in the publication of a copyrighted work is no proof of an assignment of the copyright.[27]

III. INFRINGEMENT.

A. What Constitutes — 1. GENERAL PRINCIPLES — a. Term Defined. Infringement is the use of literary property in violation of the legal rights of the owner, and is applied to the unlawful taking of any kind of intellectual property, whether literary, dramatic, or artistic.[28]

b. Intent or Purpose. When the infringement of a copyright is once established, the question of intent or purpose is immaterial. No *animus furandi* need be proved,[29] nor need the taking be necessarily for profit.[30] Where, however, an intent to pirate is shown, actual piracy will be more readily presumed,[31] and similarly evidence of innocent intention may have a bearing upon the question of "fair use," [32] but it cannot be admitted as a defense where it appears that

in each of which the state court took jurisdiction of a controversy arising out of a contract concerning patent rights.

26. King *v.* Force, 14 Fed. Cas. No. 7,791, 2 Cranch C. C. 208.

27. Latour *v.* Bland, 2 Stark. 382, 3 E. C. L. 455. See also Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639.

28. Drone Copyright 383.

To infringe a copyright defendant must have actually copied or "pirated" the production of plaintiff, and not merely, while ignorant of it, have made something similar. S. S. White Dental Co. *v.* Sibley, 38 Fed. 751.

"A substantial copy of the whole or of a material part must be produced" to constitute infringement. Perris *v.* Hexamer, 99 U. S. 674, 676, 25 L. ed. 308. See also Morrison *v.* Pettibone, 87 Fed. 330; Roworth *v.* Wilkes, 1 Camph. 94, 10 Rev. Rep. 642.

Each infringing copy constitutes a separate offense under section 6 of the English Copyright Act. Hildesheimer *v.* Faulkner, [1901] 2 Ch. 552, 70 L. J. Ch. 800, 85 L. T. Rep. N. S. 322, 49 Wkly. Rep. 708.

29. Morrison *v.* Pettibone, 87 Fed. 330; Fishel *v.* Lueckel, 53 Fed. 499; Harper *v.* Shoppell, 26 Fed. 519, 23 Blatchf. 431; Reed *v.* Holliday, 19 Fed. 325; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Millett *v.* Snowden, 17 Fed. Cas. No. 9,600; Parker *v.* Hulme, 18 Fed. Cas. No. 10,740; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Worris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Bradbury *v.* Hotter, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846; Clement *v.* Maddick, 1 Giff. 98, 5 Jur. N. S. 592; Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Smith *v.* Chatto, 31 L. T. Rep. N. S. 775, 23 Wkly. Rep. 290. *Compare* Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 106; Moffatt *v.* Gill, 84 L. T. Rep. N. S. 452, 49 Wkly. Rep. 438.

The result is the true test of the act, and full acknowledgment of the original, and the absence of any dishonest intention will not excuse the appropriator where the effect of his appropriation is of necessity to injure and supersede the sale of the original work. Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757. See also Morrison *v.* Pettibone, 87 Fed. 330.

"Infringement, for the purposes of forfeiture, must be an accomplished fact,— must appear from the face of the production, and not be inferred from what was intended if it has been completed." Morrison *v.* Pettibone, 87 Fed. 330, 332. See also Falk *v.* Donaldson, 57 Fed. 32; Fishel *v.* Lueckel, 53 Fed. 499; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540.

30. Novello *v.* Sudlow, 12 C. B. 177, 16 Jur. 689, 21 L. J. C. P. 169, 74 E. C. L. 177; Ager *v.* Peninsular, etc., Steam Nav. Co., 26 Ch. D. 637, 53 L. J. Ch. 589, 50 L. T. Rep. N. S. 477, 33 Wkly. Rep. 116; Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934 [*cited* in MacGillivray Copyright 161]. See also Oxford *v.* Gill, 43 Sol. J. 570 [*cited* in MacGillivray Copyright 102].

31. Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Spiers *v.* Brown, 6 Wkly. Rep. 352; Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255.

32. See *infra*, III, A, 1, c.

the party setting it up has invaded a copyright;[33] nor where copyright has been infringed will ignorance protect the infringer.[34]

c. Fair and Unfair Use. While a fair use of the copyrighted work of a previous author is allowed by law, this privilege accorded to a subsequent author must be such, and such only, as will not cause substantial injury to the proprietor of the original publication.[35]

d. Copying as Constituting Infringement — (i) *In General.* Copying the whole or a substantial part of a copyrighted work constitutes and is an essential element of infringement.[36] It is not confined to literal repetition or reproduction,

33. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

34. Millett *v.* Snowden, 17 Fed. Cas. No. 9,600; West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 490, 24 Rev. Rep. 541, 7 E. C. L. 402; Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871; Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479; Leader *v.* Strange, 2 C. & K. 1010, 61 E. C. L. 1010; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Gambart *v.* Sumner, 5 H. & N. 5, 5 Jur. N. S. 1109, 29 L. J. Exch. 98, 8 Wkly. Rep. 27. But see Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531.

35. Simms *v.* Stanton, 75 Fed. 6; Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846; Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Spiers *v.* Brown, 6 Wkly. Rep. 352.

What constitutes a "fair use" is often a very difficult question to answer. What would be a "fair use" in one case might not be in another. In determining this question courts often look more to the value of the matter pirated than to the quantity. Simms *v.* Stanton, 75 Fed. 6 [*citing* Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11].

The true principle is "that the Defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work — that is, in fact, merely to take the result of another man's labour, or, in other words, his property." Per Hall, V. C., in Hogg *v.* Scott, L. R. 18 Eq. 444, 458, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640. In Cary *v.* Kearsley, 4 Esp. 168, 170, 6 Rev. Rep. 846, Lord Ellenborough said: "That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I term the *animus furandi*? . . . Look through the book, and find any part that is a transcript of the other; if there is none such; if the subject of the book is that which is subject to every man's observation; such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when, in the defendant's book, there are additional observations, and in some parts of the book I find corrections of misprinting . . while I shall think myself bound to secure every man in the enjoyment of his copyright, we must not put manacles upon science."

Examination of previous works.—In Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163, 166, Shipman, J., said: "I do not understand that the rule prohibits an examination of previous works by the compiler before he has finished his own book, or the mere obtaining of ideas from such previous works, but it does prohibit a use of any part of the previous book, *animo furandi*, 'with an intention to take for the purpose of saving himself labor'" [*citing* Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708]. Thus a later writer on an art or science, like physiognomy, although consulting and using the works of an earlier writer on the subject will be held not to have pirated, but to have made a fair use of them, it not appearing that they have been drawn from to a substantial degree, notwithstanding there are some errors common to both, and they have a similar division of systems as a basis, such division being only a somewhat altered form of a division in a work of a previous writer, from which they both had a right to draw material. Simms *v.* Stanton, 75 Fed. 6.

36. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Stephens *v.* Cady, 14 How. (U. S.) 528, 19 L. ed. 528; Springer Lithographing Co. *v.* Falk, 59 Fed. 707, 8 C. C. A. 224; Brightley *v.* Littleton, 37 Fed. 103; Reed *v.* Holliday, 19 Fed. 325; Gray *v.* Rus-

but includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy.[37] But on the principle of *de minimis non curat lex* it is necessary that a substantial part of the copyrighted work be taken.[38] The

sell, 10 Fed. Cas. No. 5,728, 1 Story 11; Lawrence *v.* Cupples, 15 Fed. Cas. No. 8,135; Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Chatterton *v.* Cave, 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Nichols *v.* Loder, 2 Coop. t. Cott. 217; Garland *v.* Gemmill, 14 Can. Supreme Ct. 321.

A copy is that which will provide a substitute for the whole or for a substantial part of the original work. Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642.

Any mode of copying, "whether by printing, writing, photographing or by some other method not yet invented would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from." Boosey *v.* Whight, [1900] 1 Ch. 122, 123, 69 L. J. Ch. 66, 81 L. T. Rep. N. S. 571, 48 Wkly. Rep. 228. See also Novello *v.* Sudlow, 12 C. B. 177, 16 Jur. 689, 21 L. J. C. P. 169, 74 E. C. L. 177 (lithography); Wrane *v.* Seebohm, 39 Ch. D. 73, 57 L. J. Q. B. 689, 58 L. T. Rep. N. S. 928, 36 Wkly. Rep. 689 (typewriting). And see D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288.

Incorporation in larger work.— It makes no difference in law whether the piracy is a simple reprint of an original work or an incorporation thereof into a larger work. Gray *v.* Russell, 14 Fed. Cas. No. 5,728, 1 Story 11.

Where the variations are more than colorable and sufficient to make the copyrighted work and that alleged to infringe it very different there is no piracy. Munro *v.* Smith, 42 Fed. 266.

37. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*affirming* 24 Fed. 636, 20 Fed. 441, 5 Fed. 726, 10 Biss. 139]; Springer Lithographing Co. *v.* Falk, 59 Fed. 707, 8 C. C. A. 224; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Lawrence *v.* Cupples, 15 Fed. Cas. No. 8,135; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Trusler *v.* Murray, 1 East 362 note, 6 Rev. Rep. 289 note; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Sayre *v.* Moore, 1 East 361, note *b*; Barfield *v.* Nicholson, 2 L. J. Ch. O. S. 90, 2 Sim. & St. 1; Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118; Longman *v.* Winchester, 16 Ves. Jr. 269; Matthewson *v.* Stockdale, 12 Ves. Jr. 270; Jarrold *v.* Heywood, 18 Wkly. Rep. 279.

"**The true test of piracy or not** is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, *quoad hoc*, a servile or evasive imitation of the plaintiff's work, or a *bona fide* original compilation from other common or independent sources." Per Story, J., in Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768, 793. See also Roworth *v.* Wilkes, 1 Campb. 94, 98, 10 Rev. Rep. 642, in which Lord Ellenborough said that "it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced." So an instruction which makes the test of infringement the taking of the "substantial ideas — the distinctive characteristics"— of the original, regardless of intentional variations in minor particulars, is all that defendant is entitled to, and he cannot complain of a refusal to charge that the original and copy must be "substantially identical." Springer Lithographing Co. *v.* Falk, 59 Fed. 707, 8 C. C. A. 224.

Illustration.— The paging of defendant's volumes of law reports and complainant's was substantially the same throughout. The list of cases preceding each report was the same. Defendant's editors testified that their work was independent of that of complainant's editors, but complainant's volumes were all used in editing and annotating, in some instances words and sentences being followed without change, in others changed only in form. Although there was a considerable difference between the head-notes, it was evident that complainant's had been freely used. There were errors common to both sets of reports. These circumstances were held to constitute an infringement. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547.

38. Harper *v.* Shoppell, 26 Fed. 519, 23 Blatchf. 431; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72; Chatterton *v.* Cave, L. R. 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Bohn *v.* Bogue, 10 Jur. 420; Jarrold *v.* Heywood, 18 Wkly. Rep. 279.

Substantial part.— The words in the statute, "production or any part thereof," must receive a reasonable construction, and are to

question, however, is one of quality rather than quantity, and is to be determined by the character of the work and the relative value of the material taken.[39] If the matter taken is claimed to be taken as of right a very small amount will suffice.[40]

(II) *Reprints.* A reprint, whether of the whole or of a substantial part of a copyrighted work, is a manifest infringement.[41]

(III) *Copies Permitted For Specific Purpose.* Copies taken from copyrighted works by permission of the author for a specific purpose cannot be applied to any other purpose.[42]

e. Restoration to Original Condition. It is no infringement of the copyright of a book for a purchaser of it to restore it to its original condition, or as nearly so as can be done, for the purpose of himself selling it.[43]

be treated as implying some part that is substantial and material. Chatterton *v.* Cave, 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498.

39. Simms *v.* Stanton, 75 Fed. 6; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Storey *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Leslie *v.* Young, [1894] A. C. 335, 6 Reports 211; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Cooper *v.* Stephens, [1895] 1 Ch. 567; Cate *v.* Devon, etc., Newspaper Co., 40 Ch. D. 500, 58 L. J. Ch. 288, 60 L. T. Rep. N. S. 672, 37 Wkly. Rep. 487; Trade Auxiliary Co. *v.* Middlesborough, etc., Tradesmen's Protection Assoc., 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876.

The principle of the cases is that "where one man for his own profit puts into his work an essential part of another man's work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy." Per Kelley, C. B., in Bradbury *v.* Hotten, L. R. 8 Exch. 1, 6, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126.

"The quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work." Per Wood, V. C., in Tinsley *v.* Lacy, 1 Hem. & M. 747, 753, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Rev. Rep. 876. See also Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1, in which it was held that while a limited use of a copyrighted work may be made by a subsequent writer, yet it is not necessary that the larger part of the book should be copied to constitute an infringement.

A part of a book may be an infringement and the other parts not. Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306.

Copying uncopyrightable matter in a copyrighted book is not piracy. Mutual Advertising Co. *v.* Refo, 76 Fed. 961. See also Broder *v.* Zeno, etc., Music Co., 88 Fed. 74.

40. Cate *v.* Devon, etc., Newspaper Co., 40 Ch. D. 500, 58 L. J. Ch. 288, 60 L. T. Rep. N. S. 672, 37 Wkly. Rep. 487; Trade Auxiliary Co. *v.* Middlesborough, etc., Tradesmen's Protection Assoc., 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337.

41. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100 (in which it was held that an abridgment consisting of extracts of the essential or most valuable portions of an original work was piracy); Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642 (in which it was held that if an article in a general compilation of literature and science copies so much of a book as to serve as a substitute for it, it is piracy); Maxwell *v.* Somerton, 30 L. T. Rep. N. S. 11, 22 Wkly. Rep. 313 (in which defendant reprinted in his newspaper an entire story contained in plaintiff's magazine); Mawman *v.* Tegg, 3 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385 (in which the reprint of articles that had appeared in an encyclopedia was held to be piracy). See also Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Nicols *v.* Pitman, 26 Ch. D. 374, 48 J. P. 549, 53 L. J. Ch. 552, 50 L. T. Rep. N. S. 254, 32 Wkly. Rep. 631; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Matthewson *v.* Stockdale, 12 Ves. Jr. 270.

42. Copies taken from copyrighted works by permission of the author for purposes of instruction cannot be applied to any other purpose. Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32, 10 Fed. Cas. No. 1,082, 4 McLean 300.

43. Doan *v.* American Book Co., 105 Fed. 772, 45 C. C. A. 42. See also Harrison *v.* Maynard, 61 Fed. 689, 10 C. C. A. 17.

A dealer who purchases second-hand schoolbooks, cleans, trims, and rebinds the same, using covers in exact imitation of the originals, and places them in the market to be sold in competition with those of the publisher, although at a reduced price, is guilty of unfair competition, where, by reason of their new appearance, they are likely to be purchased by children in the belief that they are new books, and the product of the original publisher, including the cover and binding;

f. Improvements and Additions. It is of no importance that a work infringing on prior copyrighted work is an improvement on the earlier work and contains additional information, as such improvements do not remove the offense.[44]

2. Of Manuscripts. The right of property in manuscripts and private letters is protected by the United States statutes;[45] and if the whole or an important part of a work be taken and printed chancery will enjoin publication on the application of the author or his legal representatives.[46]

3. Of Books or Other Literary Works — a. In General. Under the English statute to print or cause to be printed, either for sale or exportation, any copyrighted book, or to import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowingly to sell, publish, or expose for sale or hire, or cause to be sold, published, or exposed for sale or hire, or to have in one's possession for sale or hire, any such book so unlawfully printed or imported is forbidden.[47] In the United States a book is infringed by printing, publishing, dramatizing, translating, or importing, or by knowingly selling or exposing for sale any copy of such book, without the written consent of the proprietor of the copyright, signed in the presence of two or more witnesses.[48]

b. Extracts and Quotations. Quotations and extracts, acknowledged or unacknowledged, if they are fairly made, either for the purpose of criticism or of illustration, are not infringements of copyright.[49] But if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by

and a court may properly require a notice to be plainly stamped upon the cover sufficient to prevent such deception. Doan *v.* American Book Co., 105 Fed. 772, 45 C. C. A. 42.

44. Ladd *v.* Oxnard, 75 Fed. 703; Lawrence *v.* Dana, 5 Fed. Cas. No. 8,136, 4 Cliff. 1; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Pike *v.* Nicholas, L. R. 5 Ch. 260 note, 38 L. J. Ch. 529, 20 L. T. Rep. N. S. 906, 17 Wkly. Rep. 842; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Cary *v.* Faden, 5 Ves. Jr. 24; Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255. But see Sayre *v.* Moore, 1 East 361 note, 6 Rev. Rep. 288 note; Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846; Martin *v.* Wright, 6 Sim. 297, 9 Eng. Ch. 297; Matthewson *v.* Stockdale, 12 Ves. Jr. 270.

45. U. S. Rev. Stat. (1878) § 4967, as amended 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3416].

46. Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32.

47. 5 & 6 Vict. c. 45, § 15. See also Frowde *v.* Parrish, 27 Ont. 526, in which it was held that the importation into Canada of American reprints of a copyrighted book, added as an appendix to American reprints of the bible, is an infringement. And see Morgan *v.* Publishers' Syndicate, 32 Ont. 393, which held that section 17 of the Imperial Act, amending 5 & 6 Vict. c. 45, is in force in Canada.

48. U. S. Rev. Stat. (1878) § 4964, as amended 26 U. S. Stat. at L. 1109 [U. S. Comp. Stat. (1901) p. 3413]. See also Harper *v.* Shoppell, 26 Fed. 519, 23 Blatchf. 431.

As to copying as constituting infringement see *supra*, III, A, 1, d.

49. Williams *v.* Smythe, 110 Fed. 961; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Pike *v.* Nicholas, L. R. 5 Ch. 260 note, 38 L. J. Ch. 529, 20 L. T. Rep. N. S. 906, 17 Wkly. Rep. 842; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846; Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141; Chilton *v.* Progress Printing, etc., Co., 71 L. T. Rep. N. S. 664, 43 Wkly. Rep. 136; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Whittingham *v.* Wooler, 2 Swanst. 428; Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118; Moffatt *v.* Gill, 84 L. T. Rep. N. S. 452, 49 Wkly. Rep. 438. See also Stephen Dig. "Report of Copyright Commission."

"Quotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy fixed to it; but quotation may be carried to the extent of manifesting piratical intention." Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385.

"Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed." This language was used by Clifford, J., in

another, such taking is sufficient to constitute an infringement of the copyrighted work.[50]

c. Compilations — (1) *In General.* The author of a compilation is restricted in the use that he may make of other works upon the same subject. The only "fair use" that he can make of another's book is as a guide to authorities;[51] for supplying suggestions as to the treatment of the subject;[52] and for the purpose of checking the accuracy of his work and supplying omissions therein.[53] In all

Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136 (at page 61), 4 Cliff. 1.

50. Gilmore *v.* Anderson, 38 Fed. 846; Reed *v.* Holliday, 19 Fed. 325; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Greene *v.* Bishop, 10 Fed. Cas. No. 5,736, 1 Cliff. 186; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Bohn *v.* Bogue, 10 Jur. 420; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & Coll. Ch. 197, 20 Eng. Ch. 197; Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141; Smith *v.* Chatto, 31 L. T. Rep. N. S. 775, 23 Wkly. Rep. 290; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Tonson *v.* Walker, 3 Swanst. 672.

Difference of object.— It is no justification of a piracy that plaintiff's work was written for a presidential campaign, while defendant's was written for young people. Gilmore *v.* Anderson, 58 Fed. 846.

Previous use by others.— It is no defense that some of the appropriated parts had been previously used by others, from whose works they were taken by defendant. Gilmore *v.* Anderson, 58 Fed. 846.

Illustrations.— In Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31, defendant published "The Book of Poets," containing among other things an essay and biographical notice of the poet Campbell and, as defendant said, by way of illustrating the poet's works, a large number of his poems and extracts therefrom were appended to the biographical notice without any particular observations in the way of notes to individual pieces or extracts. It was held an infringement of the poet's copyright. F published a "Life of Washington," containing eight hundred and sixty-six pages, of which three hundred and fifty-three pages were copied from Sparks' "Life and Writings of Washington," sixty-four pages being official letters and documents, and two hundred and fifty-five pages being private letters of Washington, originally published by Sparks, under a contract with the owners of the original papers of Washington. It was held that the work by F was an invasion of the copyright of Sparks. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100. In Smith *v.* Chatto, 31 L. T. Rep. N. S. 775, 23 Wkly. Rep. 290, where defendants published a book entitled "Thackerayana," which purported to be a critical essay on the life and works of Thackeray, and contained extensive quotations from his writings prefaced and interspersed with comments by the writer of the book, it was held that defendant had inserted the extracts for the purpose of increasing and enhancing the value of their book; and that they had therefore infringed the copyright in Thackeray's books. In Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 28, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126, nine cartoons illustrative of the career of Napoleon III were published in Punch in nine separate weekly numbers. Defendants published a volume entitled "Story of the Life of Napoleon, . . . as told by popular Caricaturists of the last Thirty Years," which contained among numerous other illustrations taken from French and English comic journals, the nine cartoons first produced in Punch. This was held to be an infringement of the copyright in Punch.

51. Mead *v.* West Pub. Co., 80 Fed. 380; List Pub. Co. *v.* Keller, 30 Fed. 772; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

Illustration.—Where new compilations have been made by two different authors of an unprotected law-book by a third party with some additional matter, notes, and citations, the mere fact that the second compiler has reproduced, in connection with the same subjects, some of the new citations found in the first compilation, will not be held an infringement of the copyright thereon, where in nearly all such cases it appears from internal evidence that he made an independent examination of the authorities so cited. Mead *v.* West Pub. Co., 80 Fed. 380.

52. Mead *v.* West Pub. Co., 80 Fed. 380; Simms *v.* Stanton, 75 Fed. 6; List Pub. Co. *v.* Keller, 30 Fed. 772.

The rule restricting compilers of books which are not original in their character, but are compilations of facts from common and universal sources of information, of which books, directories, maps, guide-books, road-books, statistical tables, and digests are familiar examples, from copying the results of a previous compiler's study, is not to be applied to prohibit an examination of the previous works by the compiler before he has finished his own book, or the mere obtaining of ideas from such previous works. Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163.

53. List Pub. Co. *v.* Keller, 30 Fed. 772; Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Kelly *v.* Morris, L. R. 1 Eq.

cases, however, the author must do his own work and go to the common sources of information. That by a little additional labor he would have arrived at the same results is no defense.[54]

(II) *Directories.* Where the publication in controversy is a general directory, the only legitimate use which a subsequent compiler can make of a copyrighted directory already published is for the purpose of directing himself to the persons from whom such information is obtained, and of verifying the correctness of the results reached by his own independent efforts in obtaining information. The compiler is not at liberty to copy any part, however small, of a previous directory, to save himself the trouble of collecting the materials from original sources.[55]

697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

54. American Trotting Register Assoc. *v.* Gocher, 70 Fed. 237; Chils *v.* Gronlund, 41 Fed. 145; List Pub. Co. *v.* Keller, 30 Fed. 772; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Ager *v.* Peninsular, etc., Steam Nav. Co., 26 Ch. D. 637, 53 L. J. Ch. 589, 50 L. T. Rep. N. S. 477, 33 Wkly. Rep. 116; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Cary *v.* Longman, 1 East 358, 3 Esp. 273, 6 Rev. Rep. 285; Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 936; Mayhew *v.* Maxwell, 1 Johns. & H. 312, 3 L. T. Rep. N. S. 466, 8 Wkly. Rep. 118; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Baily *v.* Taylor, 8 L. J. Ch. O. S. 49, 1 Russ. & M. 73, Taml. 295, 5 Eng. Ch. 73; Longman *v.* Winchester, 16 Ves. Jr. 269; Jarrold *v.* Heywood, 18 Wkly. Rep. 279; Spiers *v.* Brown, 6 Wkly. Rep. 352; Garland *v.* Gemmill, 14 Can. Supreme Ct. 321.

The rights and duties of compilers of books which are not original in their character, but are compilations of facts from common and universal sources of information, of which books, directories, maps, guide-books, road-books, statistical tables, and digests are the most familiar examples, are well settled. No compiler of such a book has the monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But the subsequent investigator must investigate for himself from the original sources, which are open to all. He cannot use the labors of a previous compiler, *animo furandi*, and save his own time by copying the results of the previous compiler's study, although the same results could have been obtained by independent labor. The compiler of a digest, a road-book, a directory, or a map may search and survey for himself in fields which all laborers are permitted to occupy, but cannot adopt as his own, the products of another's toil. Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163. While on the one hand a prior compiler is not permitted to monopolize what was not original in himself, and what must be nearly identical in all such works on a like subject, yet he who uses it subsequently to another must not employ so much of the prior arrangement and materials as to show that the last work is a substantial invasion of the other, and is not characterized by enough new or improved to indicate new toil and talent and new property and rights in the last compiler. Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

Some similarities, and some use of prior works, even to copying of small parts, are tolerated in some kinds of books, such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopedias, itineraries, guide-books, and similar publications. Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

55. List Pub. Co. *v.* Keller, 30 Fed. 772; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496.

Use of cut slips.— Although the compiler of a new directory is not justified in using slips cut from one previously published for the purpose of deriving information from them for his own work, yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained. Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327.

Verification of names and addresses.— The later compiler of a directory may use the first compiler's book for the purpose of verifying the orthography of the names or the correctness of the addresses of the persons selected. List Pub. Co. *v.* Keller, 30 Fed. 772.

(III) *DICTIONARIES.* The compiler of a dictionary, or a work in which absolute originality is of necessity excluded, is entitled without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colorably made.[56]

d. Abridgments. An abridgment in which there is a substantial condensation of the materials of the original work and which requires intellectual labor and judgment does not constitute a piracy of copyright; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy.[57]

e. Law-Books. Where the author of a law-book collects all the citations available on his subject, including those found in a previously copyrighted work on the same subject, and after examining the reports of the cases cited cites such authorities as he considers applicable in support of his own text — such text being original and in no part copied from the earlier work — such a use is not unfair and will not constitute an infringement.[58]

f. Digests. The opinions of the court can be digested from copyrighted reports, but the compiler is not at liberty to use, either directly or indirectly, the original work of the reporter except for the purpose of testing the accuracy of the digested paragraphs after they have been formulated.[59]

The duplication of erroneous names and addresses in a directory is sufficient to entitle the complainant to a preliminary injunction, and to affect defendant's whole book in the absence of a clear showing to overcome such *prima facie* case. Trow Directory Printing, etc., Co. *v.* U. S. Directory Co., 122 Fed. 191.

56. Spiers *v.* Brown, 6 Wkly. Rep. 352. See also Sayre *v.* Moore, 1 East 361, note *b*, 6 Rev. Rep. 288 note.

57. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497; Dodsley *v.* Kinnersley, Ambl. 403, 27 Eng. Reprint 270; Gyles *v.* Wilcox, 2 Atk. 141, 26 Eng. Reprint 489; Murray *v.* Elliston, 5 B. & Ald. 657, 1 D. & R. 299, 24 Rev. Rep. 519, 7 E. C. L. 358; Bell *v.* Walker, 1 Bro. Ch. 451, 28 Eng. Reprint 1235; Millar *v.* Taylor, 4 Burr. 2303; Anonymous, Lofft. 775; Tonson *v.* Walker, 3 Swanst. 672; Butterworth *v.* Robinson, 5 Ves. Jr. 709; D'Almaine *v.* Boosey, 4 L. J. Exch. Eq. 21, 1 Y. & C. Exch. 288. *Compare* Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Spiers *v.* Brown, 6 Wkly. Rep. 352.

A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages. It must be in good faith an abridgment and not a treatise interloaded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306.

In ascertaining what is a bona fide abridgment and what is an invasion of copyright, the value of the selections made and the probable effect on the original work are elements of inquiry. Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11. "What constitutes a fair and *bona fide* abridgment in the sense of the law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass, will not be held to be such an abridgment." Per Clifford, J., in Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

If the leading design of a subsequent work is to abridge an earlier one and cheapen its price, and that by mental labor is faithfully done, it is no ground for prosecution by the owner of the copyright of the earlier work; but it is otherwise if the abridgment or similar work be colorable and a mere substitute. Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

58. Edward Thompson Co. *v.* American Law Book Co., 122 Fed. 922 [*reversing* 121 Fed. 907].

59. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, 64 Fed. 360, 25 L. R. A. 441; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459. See also Saunders *v.* Smith, 2 Jur. 491, 536, 3 Myl. & C. 711, 7 L. J. Ch. 227, 14 Eng. Ch. 711, in which, however, the court refused to decide whether "Smith's

g. Translations — (I) *England.* Independently of the International Copyright Act, which gives the exclusive right of translation to foreign authors, under certain limitations,[60] it seems that a *bona fide* translation of a copyrighted book is not an infringement,[61] although this has been doubted and controverted by eminent text-writers.[62]

(II) *United States.* It is now expressly provided by statute in the United States that authors or their assigns shall have the exclusive right to translate their copyrighted works.[63] Before 1870 there was no exclusive right of translation in the author.[64]

h. Dramatizations — (I) *England.* The dramatization and representation on the stage of a copyrighted work is not an infringement of the copyright in the work,[65] but the publication of a dramatized version containing substantial passages from the original work does not constitute an infringement.[66]

(II) *United States.* In the United States authors or their assigns have the exclusive right to dramatize any of their works for which copyright shall have been obtained.[67]

4. Of Maps or Charts. The copyright in a map or chart is violated when another substantially copies therefrom and avails himself of the labor and skill of the author.[68] The subsequent maker must go to the original sources of information.[69]

Leading Cases" constituted an infringement of the original reports, judgment going for defendants on the ground of acquiescence.

Reproduction of language not essential.— A copyrighted syllabus to a legal opinion is infringed by an unfair appropriation of the compiler's labor, although his language is not reproduced. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400.

60. 49 & 50 Vict. c. 33, § 5 (I); Additional Act of Paris, art. 1, § 3. See also *infra*, IV.

61. See Millar *v.* Taylor, 4 Burr. 2303; Prince Albert *v.* Strange, 2 De G. & Sm. 652; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Burnett *v.* Chetwood, 2 Meriv. 441; Wyatt *v.* Barnard, 3 Ves. & B. 77, 13 Rev. Rep. 141.

In India it has been held that the translation of an English book into an Indian language is not an infringement of the author's copyright. MacGillivray Copyright 116 [*citing* Macmillan *v.* Shamsal, Indian L. R. 19 Bomb. 557; Munshi *v.* Mirza, Indian L. R. 14 Bomb. 586].

Retranslation.— If a foreigner translates an English work, and then an Englishman retranslates that foreign work into English it is an infringement of the original copyright. Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109.

62. Drone Copyright 450; MacGillivray Copyright 116.

63. 26 U. S. Stat. at L. 1106, amending U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406].

64. See also Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768; Stowe *v.* Thomas, 23 Fed. Cas. No. 13,514, 2 Wall. Jr. 547.

65. Toole *v.* Young, L. R. 9 Q. B. 523, 43 L. J. Q. B. 170, 30 L. T. Rep. N. S. 599, 22 Wkly. Rep. 694; Murray *v.* Elliston, 5 B. & Ald. 657, 1 D. & R. 299, 24 Rev. Rep. 519, 7 E. C. L. 358; Reade *v.* Conquest, 9 C. B. N. S. 755, 7 Jur. N. S. 265, 30 L. J. C. P. 209, 3 L. T. Rep. N. S. 888, 9 Wkly. Rep. 434, 99 E. C. L. 755; Tinsley *v.* Lacy, 1 Hem. & M. 747, 22 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531.

66. Warne *v.* Seebohm, 39 Ch. D. 73, 57 L. J. Q. B. 689, 58 L. T. Rep. N. S. 928, 36 Wkly. Rep. 686; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876.

67. 26 U. S. Stat. at L. 1106, amending U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406].

68. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Sanborn Map, etc., Pub. Co. *v.* Dakin Pub. Co., 39 Fed. 266; S. S. White Dental Co. *v.* Sibley, 38 Fed. 751; Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 395; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

Use of surveys.— The unauthorized use by a map-maker of the surveys upon which a copyrighted map is based is an infringement of the copyright. Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393; 3 Fed. Cas. No. 1,580, 2 Paine 397.

Change of scale is no defense, where the subsequent map appears to have been substantially copied from the prior one. Chapman *v.* Ferry, 18 Fed. 539, 9 Sawy. 395.

Question for jury.— Where the first and subsequent charts are in all respects alike, it is a proper subject of inquiry for a jury whether the latter is a copy of the former, or if there is a slight variance whether that is colorable or not. Blunt *v.* Patten, 3 Fed. Cas. No. 1,580, 2 Paine 397.

69. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228, 7 Am. L. Rev. 365.

5. Of Dramatic or Musical Compositions — a. In General. Dramatic or musical compositions may be infringed in either of two ways — by the unauthorized multiplication and sale of copies,[70] or by the unauthorized representation or performance of such compositions.[71]

b. Test of Piracy. As in the case of copyright in books or other literary works, the part taken must be material, and there must be a substantial identity with the original composition in order to constitute piracy.[72] But a substantial similarity, founded upon coincidence, and not the result of piracy, direct or indirect, is insufficient to establish infringement;[73] nor is the taking of a general idea or scheme sufficient.[74] An indirect as well as a direct taking constitutes an infringement,[75] and as in cases of literary piracy when the infringement of a

70. See *supra*, III, A, 1, a. See also Warne *v.* Seebohm, 39 Ch. D. 73, 57 L. J. Q. B. 689, 58 L. T. Rep. N. S. 928, 36 Wkly. Rep. 686.

71. England.— The representation or performance of any dramatic or musical composition without the consent in writing of the author or proprietor first had and obtained, at any place of dramatic entertainment in any part of the British dominions, constitutes infringement. 3 & 4 Wm. IV, c. 15, § 2; 5 & 6 Vict. c. 45, § 21.

United States.— The public performance of any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, is an infringement of the exclusive right of representation or performance. 29 U. S. Stat. at L. 481, amending U. S. Rev. Stat. (1878) § 4966 [U. S. Comp. Stat. (1901) p. 3415].

Before 3 & 4 Wm. IV, c. 15, a proprietor of the copyright of a tragedy, which had been printed and published for sale, could not maintain an action against the manager of a theater for publicly acting and representing such tragedy in an unabridged form for profit. Murray *v.* Elliston, 5 B. & Ald. 657, 1 D. & R. 299, 24 Rev. Rep. 519, 7 E. C. L. 358.

72. Brady *v.* Daly, 83 Fed. 1007, 28 C. C. A. 253; Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10; Blume *v.* Spear, 30 Fed. 629; Thomas *v.* Lennon, 14 Fed. 849; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, 1 Abb. 356, Deady 216; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Chatterton *v.* Cave, 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498; Planche *v.* Braham, 4 Bing. N. Cas. 17, 33 E. C. L. 574, 8 C. & P. 68, 34 E. C. L. 614, 3 Hodges 288, 1 Jur. 823, 8 L. J. C. P. 25, 5 Scott 242; Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479; Boosey *v.* Fairlie, 7 Ch. D. 301; Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531; Schlesinger *v.* Turner, 63 L. T. Rep. N. S. 764; Beere *v.* Ellis, 5 T. L. R. 330.

The unauthorized performance of a single scene in a copyrighted play may constitute an infringement of the copyright. Brady *v.* Daly, 83 Fed. 1007, 28 C. C. A. 253; Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10.

Substantial identity.—Defendant is chargeable with infringement of a dramatic composition, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through the medium of the senses, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order as the original. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256. See also Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, 2 Abb. 356, Deady 216. So where the theme or melody of music is substantially the same in the copyrighted and the alleged infringing pieces, the measure of the former being followed in the latter, and being somewhat peculiar, and the pieces are so much alike that when played by a competent musician they appear to be the same, the infringement is established, although there are variations in the infringing piece. Blume *v.* Spear, 30 Fed. 629.

An opera is more like a patented invention than a common book, as to the rule that he who obtains similar results, better or worse, by similar means, although the opportunity is furnished by an unprotected book, should be held to infringe the rights of the composer. Thomas *v.* Lennon, 14 Fed. 849.

73. Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72; Reichardt *v.* Sapte, [1893] 2 Q. B. 308.

74. Chatterton *v.* Cave, 3 App. Cas. 483, 47 L. J. C. P. 545, 33 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498.

75. Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479; Schlesinger *v.* Turner, 63 L. T. Rep. N. S. 764.

Dramatization of novel founded on play.— An action was brought by the executors of A to restrain defendant from representing a certain drama in infringement of plaintiffs' stage copyright. A had first published a drama and afterward a novel founded on it. Defendant's drama was dramatized directly from the novel, and not with the help of A's drama. It was held that A having published the drama before the novel, no person had a right to infringe the stage copyright in the

dramatic or musical copyright is once shown, the intent or purpose of the infringer is immaterial, and no proof of *animus furandi* is required.[76]

c. Place of Performance. While the statutes of England and the United States vary in expression,[77] their meaning is the same. Although the word "public" is not used in the English statute, it has been held that "place of dramatic entertainment" clearly means a place to which the public is admitted.[78]

d. Scenery and Costumes. A public representation will be none the less an infringement by reason of the absence of scenery and appropriate costumes.[79]

e. Causing Representation or Performance — (i) *In General.* In order to hold a person liable for causing or permitting[80] a dramatic or musical composition to be represented or performed he must be shown either to have actually taken part as an actor or performer,[81] or to have had some initiative in, or control over, the performance.[82] Whether a mere agent who causes a representation or performance will be held liable seems doubtful.[83]

(ii) *Sale For Purpose of Representation.* The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.[84]

f. Reproduction by Means of Mechanical Agency. Reproduction through the

drama, even though the passages complained of were taken from the novel and not from the drama of the author, and therefore that plaintiffs were entitled to a perpetual injunction. Schlesinger *v.* Turner, 63 L. T. Rep. N. S. 764. See also Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479. *Compare* Schlesinger *v.* Bedford, 63 L. T. Rep. N. S. 762, in which the novel having been published before the drama, it was held that defendant who had dramatized directly from the novel, and without the aid of plaintiff's dramatized version, was not guilty of piracy.

76. Brady *v.* Daly, 83 Fed. 1007, 28 C. C. A. 253; Reade *v.* Conquest, 11 C. B. N. S. 479, 8 Jur. N. S. 764, 31 L. J. C. P. 153, 5 L. T. Rep. N. S. 677, 10 Wkly. Rep. 271, 103 E. C. L. 479; Reade *v.* Lacy, 1 Johns. & H. 524, 7 Jur. N. S. 463, 30 L. J. Ch. 655, 4 L. T. Rep. N. S. 354, 9 Wkly. Rep. 531.

77. See *supra*, III, A, 5, a.

78. Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217; Duck *v.* Bates, 13 Q. B. D. 843, 48 J. P. 501, 53 L. J. Q. B. 338, 50 L. T. Rep. N. S. 778, 32 Wkly. Rep. 813; Wall *v.* Taylor, 11 Q. B. D. 102, 52 L. J. Q. B. 558, 31 Wkly. Rep. 712 [*affirming* 9 Q. B. D. 727, 46 J. P. 679, 51 L. J. Q. B. 547, 47 L. T. Rep. N. S. 47, 30 Wkly. Rep. 948]; Russell *v.* Briant, 8 C. B. 836, 14 Jur. 201, 19 L. J. C. P. 33, 65 E. C. L. 836; Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871.

"It must be a question of fact in each case whether the nature of the representation given makes it public or leaves it domestic. A place may be a place of dramatic entertainment for the time, although it is so used only once, and although no payment is taken." Duck *v.* Bates, 13 Q. B. D. 843, 48 J. P. 501, 53 L. J. Q. B. 338, 50 L. T. Rep. N. S. 778, 32 Wkly. Rep. 813.

"The use for the time in question, and not for a former time, is the essential fact. As a regular theater may be a lecture room, dining room, ball room and concert room on successive days, so a room used ordinarily for either of these purposes would become for the time being a theater." Per Denman, C. J., in Russell *v.* Smith, 12 Q. B. 217, 237, 17 L. J. Q. B. 225, 12 Jur. 723, 64 E. C. L. 217.

79. Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217.

80. The word "permitting," as used in 5 & 6 Vict. c. 45, § 20, if it have any meaning at all, can only be explanatory of the words "cause to be represented," as used in 3 & 4 Wm. IV, c. 15. The later statute does not purport to extend the nature of the performing right. MacGillivray Copyright 139.

81. MacGillivray Copyright [*citing* Duck *v.* Mayen, 8 T. L. R. 339].

82. Lyon *v.* Knowles, 3 B. & S. 556, 9 Jur. N. S. 774, 32 L. J. Q. B. 71, 7 L. T. Rep. N. S. 670, 113 E. C. L. 556 (proprietor of theater having no control over employees of lessee not liable); Russell *v.* Briant, 8 C. B. 836, 14 Jur. 201, 19 L. J. C. P. 33, 65 E. C. L. 836 (proprietor of tavern who let room for performance not liable); Marsh *v.* Conquest, 17 C. B. N. S. 418, 10 Jur. N. S. 989, 33 L. J. C. P. 319, 10 L. T. Rep. N. S. 717, 12 Wkly. Rep. 1006, 112 E. C. L. 418 (proprietor having control over theater and lessee's employees held liable); Parsons *v.* Chapman, 5 C. & P. 33, 24 E. C. L. 439 (acting manager held liable); Monaghan *v.* Taylor, 2 T. L. R. 685 (proprietor of music-hall held liable for song sung by employee, to whom was left choice of songs).

83. MacGillivray Copyright 141 [*citing* French *v.* Day, 9 T. L. R. 548, in which a manager was held not to be liable]. But see Parsons *v.* Chapman, 5 C. & P. 33, 24 E. C. L. 439, in which a contrary view was taken.

84. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256.

agency of a mechanical instrument does not constitute an infringement of copyright in a musical composition.[85]

6. Of Works of Art — a. England — (i) *Engravings* — (A) *In General.* The copyright in an engraving or print is infringed by engraving, etching, working, or in any manner copying and selling the protected work; by printing, reprinting, or importing for sale any pirated copy; by knowingly or innocently publishing, selling, or exposing for sale, any pirated copy, or by knowingly disposing of such copy in any other manner; by making a copy or copies, whether for sale or not; or by causing or procuring any of these acts to be done.[86]

(B) *Where Design Is Original With Engraver.* Where the design of a print is original with the first engraver, it seems that he will be protected as to that, under the statutes, as well as to that part of his engraving which is the result of his peculiar art.[87]

(C) *What Constitutes Piratical Copy* — (1) In General. The same tests of piracy apply in the case of prints and engravings as in the case of other copyrighted works. To copy or reproduce the original, either in whole or in a material part, is piracy;[88] and the fact that the original is enlarged or diminished is no defense.[89] The question is whether the main design of the original has been copied,[90] and where this is shown to have been done the manner of its accomplishment is wholly immaterial.[91]

(2) Copy of Original From Which Engraving Is Made. It is no infringement of an engraving for a subsequent artist to make another engraving of the same subject, provided always that he in nowise copies from the earlier engraving.[92]

85. Stern *v.* Rosey, 17 App. Cas. (D. C.) 562; Kennedy *v.* McTammany, 33 Fed. 584; Boosey *v.* Whight, [1900] 1 Ch. 122, 69 L. J. Ch. 66, 81 L. T. Rep. N. S. 571, 48 Wkly. Rep. 228.

Phonograph.— Reproduction through the agency of a phonograph of the sounds of musical instruments playing music, for which a copyright has been granted, is not a violation of the copyright, such reproduction not being publishing or copying within the meaning of the Copyright Act. Stern *v.* Rosey, 17 App. Cas. (D. C.) 562.

Perforated sheets.— A sheet of paper perforated so that when it is placed in a mechanical instrument and made to pass under tubes through which air is forced, a copyright tune is reproduced, is not a copy of a sheet of music so as to constitute an infringement of the copyright, within the meaning of 5 & 6 Vict. c. 45. Boosey *v.* Whight, [1900] 1 Ch. 122, 69 L. J. Ch. 66, 81 L. T. Rep. N. S. 571, 48 Wkly. Rep. 228. See also Kennedy *v.* McTammany, 33 Fed. 584, in which it was held that the manufacture and sale of perforated strips of paper to be used in organettes, and by which a certain tune is produced, are not a violation of the copyrighted sheet music of the same tune.

86. 17 Geo. III, c. 57; 8 Geo. II, c. 13. See also MacGillivray Copyright 155; Scrutton Copyright, § 207.

87. Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Dicks *v.* Brooks, 15 Ch. D. 23, 49 L. J. Ch. 812, 43 L. T. Rep. N. S. 71, 29 Wkly. Rep. 87. But see Martin *v.* Wright, 6 Sim. 297, 298, 9 Eng. Ch. 297, in which A made a copy of a print invented by B, in colors, and of larger dimensions, and exhibited it as a diorama. The court refused to restrain the exhibition until the right had been established at law, on the ground that the act was not intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner. "Exhibiting for Profit is, in no way, analogous to selling a Copy of the Plaintiff's Print, but is dealing with it in a very different manner."

88. West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402; Moore *v.* Clarke, 6 Jur. 648, 9 M. & W. 692.

89. 17 Geo. III, c. 57; 8 Geo. II, c. 13. See also Graves *v.* Ashford, L. R. 2 C. P. 410, 36 L. J. C. P. 139, 16 L. T. Rep. N. S. 98, 15 Wkly. Rep. 498; Bradbury *v.* Hotten, L. R. 8 Exch. 1, 42 L. J. Exch. 1, 27 L. T. Rep. N. S. 450, 21 Wkly. Rep. 126; Gambart *v.* Ball, 14 C. B. N. S. 306, 9 Jur. N. S. 1059, 32 L. J. C. P. 166, 8 L. T. Rep. N. S. 426, 11 Wkly. Rep. 699, 108 E. C. L. 306.

90. West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Moore *v.* Clarke, 6 Jur. 648, 9 M. & W. 692.

91. Graves *v.* Ashford, L. R. 2 C. P. 410, 36 L. J. C. P. 139, 16 L. T. Rep. N. S. 98, 15 Wkly. Rep. 498; Gambart *v.* Ball, 14 C. B. N. S. 306, 9 Jur. N. S. 1059, 32 L. J. C. P. 166, 8 L. T. Rep. N. S. 426, 11 Wkly. Rep. 699, 108 E. C. L. 306.

The word "copy" in the statutes applies to a copying by any process by which copies may be indefinitely multiplied. Gambart *v.* Ball, 14 C. B. N. S. 306, 9 Jur. N. S. 1059, 32 L. J. C. P. 166, 8 L. T. Rep. N. S. 426, 11 Wkly. Rep. 699, 108 E. C. L. 306.

92. De Berenger *v.* Wheble, 2 Stark. 548, 3 E. C. L. 525. See also Newton *v.* Cowe,

(3) Copies in Pen or Pencil. While there is no direct adjudication on the question, it seems probable that pen or pencil copies would not be considered an infringement, unless such copies should compete commercially with the engraving by tending to lessen its sale.[93]

(4) Taking Prints From Legal Plates. It is no infringement of the proprietor's copyright to strike prints from his own plates, although the act is unauthorized.[94]

(II) *Paintings, Drawings, and Photographs* — (A) *In General.* For any one other than the proprietor and without his consent to repeat, copy, colorably imitate, or otherwise multiply for sale, hire, exhibition, or distribution; or knowingly or innocently to import, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, any copy unlawfully made; or to cause or procure any of the above acts to be done is an infringement of the proprietor's copyright in a painting, drawing, or photograph.[95]

(B) *What Constitutes a Piratical Copy* — (1) In General. A copy, in whatsoever manner made, is an infringement of the proprietor's copyright in the original. It may be either a taking of the design, or of the mode of execution, or of both,[96] and may be indirect as well as direct.[97] The infringing copy must be something which is itself in the nature of a picture,[98] and as in

4 Bing. 234, 246, 5 L. J. C. P. O. S. 159, 12 Moore C. P. 457, 29 Rev. Rep. 541, 13 E. C. L. 482, in which it is said that "the first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says, take the trouble of going to the picture yourself, but do not avail yourself of my labor, who have been to the picture, and have executed the engraving." And see Dicks *v.* Brooks, 15 Ch. D. 22, 49 L. J. Ch. 812, 43 L. T. Rep. N. S. 71, 29 Wkly. Rep. 87, in which it was held that a printed pattern for wool work was not a piratical copy of the print from which it was taken, said print not being the invention or design of the engraver, but engraved from a painting of another. The statutes only give protection to that which is original with the engraver, and where the design is the composition of another he has no copyright therein.

93. See Gambart *v.* Ball, 14 C. B. N. S. 306, 9 Jur. N. S. 1059, 32 L. J. C. P. 166, 8 L. T. Rep. N. S. 426, 11 Wkly. Rep. 699, 108 E. C. L. 306; Dicks *v.* Brooks, 15 Ch. D. 22, 49 L. J. Ch. 812, 43 L. T. Rep. N. S. 71, 29 Wkly. Rep. 87; Scrutton Copyright, § 206.

94. Murray *v.* Heath, 1 B. & Ad. 804, 9 L. J. K. B. O. S. 111, 20 E. C. L. 698.

95. 25 & 26 Vict. c. 68, §§ 6, 11.

Causing or procuring infringement.— In Bolton *v.* London Exhibitions, 14 T. L. R. 550 [*cited* in MacGillivray Copyright 179], defendants ordered a poster, gave the lithographer a general idea of what was wanted, and told him to do his best. The lithographer infringed plaintiff's photograph of a lion. It was held that as defendants did not authorize the reproduction of the photograph they had not "caused or procured" the infringement complained of.

Innocent agents.— Under section 6 of the Fine Arts Copyright Act of 1862 (25 & 26 Vict. c. 68), the printers, although merely innocent agents, are liable for penalties for an infringement as well as the publishers. Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56.

The making in a foreign country of a copy of a work on which there is a copyright only in England may reasonably be said not to be unlawful, and if so the sale of such a copy in England is not a sale of a copy unlawfully made. Tuck *v.* Priester, 19 Q. B. D. 629, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93.

96. *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852 (photograph of painting); Bolton *v.* Aldin, 65 L. J. Q. B. 120 (pencil sketch of photograph).

97. *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852; Hanfstaengl *v.* Baines, [1895] A. C. 20; Hanfstaengl *v.* Empire Palace, [1894] 3 Ch. 109, 63 L. J. Ch. 681, 70 L. T. Rep. N. S. 854, 7 Reports 385, 42 Wkly. Rep. 681 [*affirmed* in 64 L. J. Ch. 81, 11 Reports 88].

A sketch of a tableau vivant, representing a picture, and published in a daily illustrated newspaper, may constitute an infringement of the copyright of the picture, although the tableau itself does not. Hanfstaengl *v.* Empire Palace, [1894] 3 Ch. 109, 63 L. J. Ch. 681, 70 L. T. Rep. N. S. 854, 7 Reports 385, 42 Wkly. Rep. 681 [*affirmed* in 64 L. J. Ch. 81, 11 Reports 88].

98. Hanfstaengl *v.* Empire Palace, [1894] 2 Ch. 1, 63 L. J. Ch. 417, 70 L. T. Rep. N. S. 459, 7 Reports 375, 42 Wkly. Rep. 454, in which it was held that a tableau vivant after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the statute.

other cases of piracy a material part of the protected work must be substantially taken.[99]

(2) ADOPTION OF GENERAL IDEA. The same general idea which is suggested by a copyrighted work may be expressed by another painting, drawing, or photograph, which is in no sense a copy and does not borrow its design.[1]

b. United States — (I) *IN GENERAL.* The copyright in a work of art is infringed where any person, after the recording of the title or description of the work, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, engraves, etches, works, copies, prints, publishes, or imports, either in whole or in part, or by varying the main design, with intent to evade the law, or knowing the same to be so printed, published, or imported, sells or exposes to sale any copy of such work.[2]

(II) *WHAT IS A PIRATICAL COPY.* In the case of works of art copying in any mode constitutes an infringement,[3] where the material features of the original work are substantially taken,[4] either directly or indirectly.[5] But it is no infringement for a later artist to work on the same original materials, provided that he does not evasively use those already collected and embodied by the skill, industry, and expenditures of another.[6]

B. Remedies — 1. AT LAW — a. Common-Law Remedies. Independently of statute, and even where other remedies are specifically given, an action for damages lies at common law for the infringement of copyright;[7] but the common-

99. Moore *v.* Clarke, 6 Jur. 648, 9 M. & W. 692; Brooks *v.* Religious Tract. Soc., 45 Wkly. Rep. 476.

Sentiment of picture.— Where a picture contains a direct copy of a substantial portion of a copyrighted work, that portion constitutes an infringement, if it is a copy in the ordinary sense, and particularly where the sentiment expressed in the copyrighted picture has also been embodied. Brooks *v.* Religious Tract Soc., 45 Wkly. Rep. 476.

1. Hanfstaengl *v.* Baines, [1895] A. C. 20.

2. 28 U. S. Stat. at L. 965, amending U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. 1901) p. 3414].

Reproduction of photograph of painting.— Where illustrations published by defendant, which were alleged to constitute an infringement of the copyright on plaintiff's painting, were reproductions of a copyrighted photograph of such painting, and not of the painting, such illustrations constituted an infringement of the copyright on the photographs only, and not of the copyright of plaintiff's painting. Champney *v.* Haag, 121 Fed. 944.

3. Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445; Falk *v.* Howell, 37 Fed. 202; Rossiter *v.* Hall, 20 Fed. Cas. No. 12,082, 5 Blatchf. 362.

A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs. Falk *v.* Howell, 37 Fed. 202.

4. Falk *v.* Donaldson, 57 Fed. 32; Fishel *v.* Lueckel, 53 Fed. 499; Falk *v.* Brett Lithographing Co., 48 Fed. 678; Richardson *v.* Miller, 20 Fed. Cas. No. 11,791.

Differences which relate merely to size and material are not important. They may affect the question of damages, but not the question of infringement. Falk *v.* Howell, 37 Fed. 202.

That a copy lacks the artistic excellence of the original is no defense to an action for infringement. Falk *v.* Donaldson, 57 Fed. 32.

Incomplete copies.— A photogravure company, under an agreement with defendants, made copies of copyrighted engravings and etchings, omitting the tint, title, and plate-mark, shipped them to London, and there caused the tint, title, and plate-mark to be put on, and delivered the finished pictures to defendants. It was held that, under U. S. Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406], the copyright was infringed, whether the unfinished copies were marketable or not. Fishel *v.* Lueckel, 53 Fed. 499.

5. Although the law recognizes a distinction between a painting and a print, a copyright for the former will protect its owner in the sale of copies thereof, even though they may appropriately be called "prints," and a party who copies such copies will be guilty of infringement. Schumacher *v.* Schwencke, 30 Fed. 690.

6. Falk *v.* Brett Lithographing Co., 48 Fed. 678; Johnson *v.* Donaldson, 3 Fed. 22, 18 Blatchf. 287. See also Collender *v.* Griffith, 6 Fed. Cas. No. 3,000, 11 Blatchf. 212.

Infringement in respect to copyrighted photographs of a stage dancer cannot be sustained merely upon exhibits cut from a daily paper showing a crude illustration or woodcut of certain poses which the dancer assumes, but which do not appear to be copies of, or have any connection with, the petitioner's photographs. Falk *v.* City Item Printing Co., 79 Fed. 321.

7. Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Novello *v.* Sudlow, 12 C. B. 177, 16 Jur. 689, 21 L. J. C. P. 169, 74 E. C. L. 177; Cambridge University *v.* Bryer, 16 East

law action of replevin, as it is practised in Pennsylvania, is not an appropriate remedy by which to enforce the forfeiture provided by the United States statutes.[8]

b. Statutory Remedies — (I) *Action For Damages.* In England an action on the case for damages lies in all cases of infringement,[9] and in the United States the same action lies for the infringement of copyright in books or for the infringement of the exclusive right of representing or performing dramatic or musical compositions.[10]

(II) *Action For Penalties and Forfeitures* — (A) *England* — (1) Books — (a) Delivery Up of Copies. Copies of books unlawfully printed or imported shall be deemed to be the property of the registered proprietor of the copyright, who may after demand in writing sue in detinue or trover, or if necessary in both combined, to recover the piratical copies, or for damages for their conversion.[11] Where the piratical book is not merely a reprint of the copyrighted work, it seems doubtful whether section 23 of chapter 45 of the act of 5 & 6 Victoria will apply,[12] but whether it would or not, the proprietor would be entitled in equity to delivery up for cancellation.[13]

317; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Beckford *v.* Hood, 7 T. R. 620, 4 Rev. Rep. 527; Bernard *v.* Bertoni, 14 Quebec 219.

8. Rinehart *v.* Smith, 121 Fed. 148 [*citing* Falk *v.* Curtis Pub. Co., 102 Fed. 967].

9. Books.— Novello *v.* Sudlow, 12 C. B. 177, 16 Jur. 689, 21 L. J. C. P. 169, 74 E. C. L. 177, where it was held that an action would lie, although the copies were not printed, and were made for gratuitous distribution and not for sale or hire.

Engravings and prints.— West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402; Murray *v.* Heath, 1 B. & Ad. 804, 9 L. J. K. B. O. S. 111, 20 E. C. L. 698; Gambart *v.* Sumner, 5 H. & N. 5, 5 Jur. N. S. 1109, 29 L. J. Exch. 98, 8 Wkly. Rep. 27; Moore *v.* Clark, 6 Jur. 648, 9 M. & W. 692.

Paintings, drawings, and photographs.— See Tuck *v.* Priester, 19 Q. B. D. 629, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93; Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56.

Play-right.— Adams *v.* Batley, 18 Q. B. D. 625, 56 L. J. Q. B. 393, 56 L. T. Rep. N. S. 770, 35 Wkly. Rep. 437 [*distinguished* in Saunders *v.* Wiel, [1892] 2 Q. B. 18]. See also Fitzball *v.* Brooke, 6 Q. B. 873, 2 D. & L. 477, 9 Jur. 657, 14 L. J. Q. B. 192, 51 E. C. L. 873.

10. 26 U. S. Stat. at L. 1106, amending U. S. Rev. Stat. (1878) § 4964 [U. S. Comp. Stat. (1901) p. 3413]; 29 U. S. Stat. at L. 481, amending U. S. Rev. Stat. (1878) § 4966 [U. S. Comp. Stat. (1901) p. 3415].

Accrual of right.— The right of action at law as well as in equity, conferred by the copyright acts of 1831 and 1856, may accrue before actual publication of the work, and the author or proprietor may maintain an action for infringement committed after the filing of the title, but before publication. Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34. But see Centennial Catalogue Co. *v.* Porter, 5 Fed. Cas. No. 2,546, where it was held that an injunction will not lie to protect a projected publication.

Trespass will not lie for a recovery of damages for an infringement. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

11. 5 & 6 Vict. c. 45, § 23; Muddock *v.* Blackwood, [1898] 1 Ch. 58, 67 L. J. Ch. 6, 77 L. T. Rep. N. S. 493; Delf *v.* Delamotte, 3 Jur. N. S. 933, 3 Kay & J. 581.

There is no common-law right in the author or proprietor of a book which is pirated to the delivery up of the copies of the illegal work. Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543.

Compensation for cost of production or publication.— The registered owner of a copyright in a work is entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication. Delf *v.* Delamotte, 3 Jur. N. S. 933, 3 Kay & J. 581.

Copies made before registration.— In Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39, it was held that the plaintiffs not having been the registered proprietors at the time the copies were printed were not entitled to have them delivered up under 5 & 6 Vict. c. 45, § 23; but that the court had power under its general jurisdiction to order the delivery up for destruction of all articles created in violation of the plaintiffs' rights. *Contra,* Isaacs *v.* Fiddemann, 49 L. J. Ch. 412, 42 L. T. Rep. N. S. 395, in which it was held that books piratically printed before registration become the property of the proprietor after registration.

12. Partial infringement.— See Rooney *v.* Kelley, 14 Ir. C. L. 158, 171 [*cited* in MacGillivray Copyright 90], where O'Brien, J., said: "It would be difficult to maintain that under the 23rd section the proprietor of the copyright in a book would acquire the property of all copies of another book which contained printed therein a few pages or passages of his book."

13. Boosey *v.* Whight, [1900] 1 Ch. 122, 69 L. J. Ch. 66, 81 L. T. Rep. N. S. 571, 48 Wkly. Rep. 228; Warne *v.* Seebohm, 39 Ch. D. 73, 57 L. J. Q. B. 689, 58 L. T. Rep. N. S. 928, 36 Wkly. Rep. 686.

(b) Seizure and Fine. Where one imports a foreign copy or copies, or sells, hires, or has in his possession for sale or hire foreign copies, knowing them to be unlawfully imported, such copies may be seized and destroyed by any officer of customs, and on conviction before two justices, a fine of ten pounds for every offense and double the value of every copy dealt with may be imposed upon the offender.[14]

(2) Dramatic Compositions. The remedy for the infringement of play-right is an action for the statutory penalty of forty shillings for each performance, or the defendant's profits, or the actual damage sustained, whichever be greater.[15]

(3) Engravings and Prints. For infringement of copyright in engravings and prints an action lies for the statutory penalty of five shillings for every copy published, and for the forfeiture of all plates and sheets to the proprietor of the copyright.[16]

(4) Paintings, Drawings, and Photographs. An action lies for the statutory penalty, not exceeding ten pounds for each copy made and dealt with, and for forfeiture and delivery up of copies, in case of infringement of copyright in paintings, drawings, or photographs.[17]

(B) *United States* — (1) Books. The legal owner of the copyright in a book may bring an action at law for the forfeiture of piratical copies.[18]

(2) Maps, Charts, Dramatic or Musical Compositions, and Works of Art. The remedy at law for infringement of copyright in maps, charts, dramatic or musical compositions, prints, cuts, engravings, photographs, or chromos, or in paintings, drawings, statues, or statuary, is limited to the statutory penalties and forfeitures, enforceable by action,[19] which when brought for the penalties is an

14. 5 & 6 Vict. c. 45, § 17. See Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720.

15. 3 & 4 Wm. IV, c. 15, § 2.

The "penalty" is not a true penalty, but a "statutory assessment of the damages in the case of small injuries, where it is difficult or impossible to prove greater damages." Adams *v.* Batley, 18 Q. B. D. 625, 629, 56 L. J. Q. B. 393, 56 L. T. Rep. N. S. 770, 35 Wkly. Rep. 437 [*distinguished* in Saunders *v.* Wiel, [1892] 2 Q. B. 18]. See also Fitzball *v.* Brooke, 6 Q. B. 873, 2 D. & L. 477, 9 Jur. 657, 14 L. J. Q. B. 192, 51 E. C. L. 872.

16. 8 Geo. II, c. 13; 17 Geo. III, c. 57. And see West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402.

17. 25 & 26 Vict. c. 68, §§ 6, 9, 11. See also *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 283, 16 Wkly. Rep. 852; Tuck *v.* Priester, 19 Q. B. D. 629, 52 J. P. 213, 56 L. J. Q. B. 553, 36 Wkly. Rep. 93; *Ex p.* Graves, L. R. 3 Ch. 642, 19 L. T. Rep. N. S. 241, 16 Wkly. Rep. 993; Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56.

The penalties are in the nature of a fine for a criminal offense, and not of a civil debt. *Ex p.* Graves, L. R. 3 Ch. 642, 19 L. T. Rep. N. S. 241, 16 Wkly. Rep. 993.

18. Backus *v.* Gould, 7 How. (U. S.) 798, 12 L. ed. 919; Rogers *v.* Jewett, 20 Fed. Cas. No. 12,012, Brunn. Col. Cas. 683.

Applicable only to reprints.— The statutory penalty for violation of a copyright is not incurred unless the defendant reprint a transcript of the entire work; it is not enough that it amounts to an infringement of plaintiff's copyright. Rogers *v.* Jewett, 20 Fed. Cas. No. 12,012, Brunn. Col. Cas. 683. *Compare* Backus *v.* Gould, 7 How. (U. S.) 798, 12 L. ed. 919, where the question was raised and formally ruled *contra* in the circuit court of New York. But the supreme court did not have occasion to pass upon it, the case being decided upon another ground.

19. 28 U. S. Stat. at L. 965, amending U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. (1901) p. 3414]; Morrison *v.* Pettibone, 87 Fed. 330.

Statute construed.— U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. (1901) p. 3414]. gives no right of action to recover damages, merely as such, but limits the remedy for an infringement of the owner's right to the forfeiture of the plates on which the infringing article is copied, and "every sheet thereof, either copied or printed"; and to the further forfeiture of one dollar for every sheet of the same found in the possession of the infringer. Thornton *v.* Schreiber, 124 U. S. 612, 8 S. Ct. 618, 31 L. ed. 577. An action under the statute to recover the penalties thereby imposed for infringement of a copyrighted cut can only be maintained when the cut has been copyrighted as such. The copyrighting of a newspaper containing such cut as a whole gives no right of action under that section, but the remedy for infringement in that case is prescribed by section 4964. Bennett *v.* Boston Traveler Co., 101 Fed. 445, 41 C. C. A. 445.

Replevin is a proper remedy to enforce a

action *qui tam*, half to the use of the United States and half to the use of the plaintiff.[20]

(3) Playright and Musical Performing Right. An action for penal damages lies for the unlawful representation or performance of a dramatic or musical composition;[21] and if the unlawful representation or performance is given wilfully and for profit, it is a misdemeanor, punishable by imprisonment for a term not exceeding one year.[22]

2. In Equity — a. Nature and Grounds of Relief. The jurisdiction of courts of equity in copyright cases is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages.[23] There is no material difference between the principles and rules applicable to such cases and those applicable to other suits in equity.[24]

b. Injunction — (I) *Preliminary Injunction* — (A) In General. A preliminary injunction should issue whenever the complaint shows a proper subject of equitable cognizance, when the plaintiff's right and the defendant's violation of it are clear, and when the case exhibits no special facts which would render the process unjust; and it should not issue under any other circumstances.[25]

forfeiture under Rev. Stat. § 4965, of infringing plates and sheets found in the possession of defendant. Morrison *v.* Pettibone, 87 Fed. 330.

What is the appropriate procedure where it is sought both to enforce the forfeiture and recover the penalty (whether by a single suit in the nature of replevin, or by separate suits) has not been conclusively determined; but where two suits are brought (one in replevin to recover the sheets, and the other in assumpsit to recover the penalty), the cause of action in the latter suit does not accrue until the infringing sheets have been found in the defendant's possession and seized in the former, and a suit to recover the penalty brought at the same time as the one in replevin is premature. Falk *v.* Curtis Pub. Co., 102 Fed. 967.

The penalty is recoverable irrespective of any proof of actual damages. Springer Lithographing Co. *v.* Falk, 59 Fed. 707, 8 C. C. A. 224.

In the case of "a painting, statue, or statuary," there is to be a forfeiture of ten dollars for every copy found in the defendant's possession, or by him sold or exposed for sale. Thornton *v.* Schreiber, 124 U. S. 612, 8 S. Ct. 618, 31 L. ed. 577.

20. See Taylor *v.* Gilman, 24 Fed. 632, 23 Blatchf. 325; Schreiber *v.* Sharpless, 6 Fed. 175, 14 Phila. (Pa.) 581, 38 Leg. Int. (Pa.) 73.

21. Daly *v.* Brady, 69 Fed. 285, construing U. S. Rev. Stat. (1878) § 4966 [U. S. Comp. Stat. (1901) p. 3415], and holding it to be a penal statute.

22. 29 U. S. Stat. at L. 481, amending U. S. Rev. Stat. (1878) § 4966 [U. S. Comp. Stat. (1901) p. 3415].

23. Wilkins *v.* Aikin, 17 Ves. Jr. 422, 424, 11 Rev. Rep. 118, per Eldon, L. C. See also Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720; Spottiswoode *v.* Clark, Coop. Ch. 254, 10 Jur. 1043, 2 Phil. 154; Lawrence *v.* Smith, Jac. 471, 23 Rev. Rep. 125, 4 Eng. Ch. 471; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30.

"Our jurisdiction, unless I mistake, is founded upon this; that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease." Per Eldon, L. C., in Lawrence *v.* Smith, Jac. 471, 472, 23 Rev. Rep. 125, 4 Eng. Ch. 471.

24. Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23; Scribner *v.* Stoddart, 21 Fed. Cas. No. 12,561. And see, generally, Equity.

Allegation of proprietorship.— Where a bill alleged that complainant was the owner of the copyrighted work known as the "American and English Encyclopædia of Law" and the "Encyclopædia of Pleading and Practice," and charged that the volumes of such work were edited, prepared, and published by and under complainant's direction, at great expense, from original sources, complainant being at a great expense in collecting the cases and authorities therein cited, and searching for judicial precedents, and in discussing and formulating the propositions of law therein contained, and in presenting, selecting, and arranging the matter contained in said books, the bill sufficiently alleged how complainant became the proprietor of the work. Edward Thompson Co. *v.* American Law Book Co., 119 Fed. 217.

Allegation of recordation.— A bill for infringement which fails to allege that the titles of the alleged copyrighted books have been recorded by the librarian of congress is demurrable. Edward Thompson Co. *v.* American Law Book Co., 119 Fed. 217.

25. Trow Directory, etc., Co. *v.* Boyd, 97 Fed. 586; Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74; Harper *v.* Holman, 84 Fed. 224; Ladd *v.* Oxnard, 75 Fed. 703; America Trotting Register Assoc. *v.* Gocher, 70 Fed. 237; West Pub. Co. *v.* Lawyers' Co-operative Pub.

(B) AGAINST PARTIAL INFRINGEMENT. In cases of partial infringement, an injunction in general terms against the parts pirated ought to be granted whenever it appears by sufficient evidence that a copyright exists, and that piracy has

Co., 53 Fed. 265 [*reversed* in 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400]; Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. 474; Humphreys' Homeopathic Medicine Co. *v.* Armstrong, 30 Fed. 66; Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373; Hubbard *v.* Thompson, 14 Fed. 689; Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Flint *v.* Jones, 9 Fed. Cas. No. 4,872; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; Miller *v.* McElroy, 17 Fed. Cas. No. 9,581; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Smith *v.* Johnson, 22 Fed. Cas. No. 13,066, 4 Blatchf. 252; Scribner *v.* Stoddart, 22 Fed. Cas. No. 12,561; Morris *v.* Wright, L. R. 5 Ch. 279, 22 L. T. Rep. N. S. 78, 18 Wkly. Rep. 327; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Chapman, 3 Beav. 133, 43 Eng. Ch. 133; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Maple *v.* Junior Army, etc., Stores, 21 Ch. D. 369, 52 L. J. Ch. 67, 47 L. T. Rep. N. S. 589, 31 Wkly. Rep. 70; Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 13 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720; Platts *v.* Button, Coop. 303, 19 Ves. Jr. 447, 10 Eng. Ch. 303; Johnson *v.* Wyatt, 12 De G. J. & S. 18, 9 Jur. N. S. 1333, 33 L. J. Ch. 394, 12 Wkly. Rep. 234, 67 Eng. Ch. 15; Chappell *v.* Davidson, 8 De G. M. & G. 1, 57 Eng. Ch. 1; Novello *v.* James, 5 De G. M. & G. 876, 1 Jur. N. S. 217, 24 L. J. Ch. 111, 3 Wkly. Rep. 127, 54 Eng. Ch. 686; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; McNeill *v.* Williams, 11 Jur. 344; Saunders *v.* Smith, 2 Jur. Ch. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Stevens *v.* Wildy, 19 L. J. Ch. 190; Baily *v.* Taylor, 8 L. J. Ch. O. S. 49, 1 Russ. & M. 73, Taml. 295, 5 Eng. Ch. 73; Smith *v.* Chatto, 31 L. T. Rep. N. S. 775, 23 Wkly. Rep. 290; Southey *v.* Sherwood, 2 Meriv. 435; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; Sheriff *v.* Coates, 1 Russ. & M. 159, 5 Eng. Ch. 159; Robinson *v.* Wilkins, 8 Ves. Jr. 224 note; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30. And see, generally, INJUNCTIONS.

The propriety in granting a preliminary injunction rests solely in the sound discretion of the court; and the writ will not therefore be granted where it would operate oppressively, inequitably, or contrary to the real justice of the case. The courts decline to lay down any rule which shall limit their discretion to grant or withhold the writ as respects particular cases. Scribner *v.* Stoddart, 21 Fed. Cas. No. 12,561.

Considerations governing granting.— In case of contested copyright, the court is disposed rather to restrict than to increase the number of cases in which it interferes by injunction before the establishment of the legal title, and it will give great weight to the consideration of the questions, which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action. McNeill *v.* Williams, 11 Jur. 344. In Hanson *v.* Jaccard Jewelry Co., 32 Fed. 202, application was made by the plaintiff for an order *pendente lite* restraining the defendant from circulating a guide-book containing matter infringing upon the copyright of the plaintiff, and it was held that the question of the damage that might be sustained by the defendant upon granting the order, as compared with that to the plaintiff by denying it, the financial ability of the defendant to respond to any damages assessed against him, the fact that there was no intent on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant by one employed to compile the work, are all considerations which it is proper for the court to weigh in determining the question of granting or denying the application. In Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, a preliminary injunction was refused, although the court was satisfied of the plaintiff's right and the defendant's infringement, because it believed the extent of the plaintiff's injury to be sustained prior to the final hearing could readily be measured and be compensated in money, and the danger of loss to the defendant be thus avoided.

In doubtful cases a preliminary injunction should be refused. Thus where it was a matter of much doubt whether the plaintiff's engravings, published with a price-list of the articles described in his book as an advertisement of those articles, were intrinsically valuable as works of art the injunction was denied. Lamb *v.* Grand Rapids School Furniture Co., 39 Fed. 474.

Plaintiff must show compliance with law. — A temporary injunction will not be granted unless complainant shows affirmatively, beyond any doubt, that he has complied with the copyright law. American Trotting Register Assoc. *v.* Gocher, 70 Fed. 237.

Works of a transitory nature.— Unless the court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined, where the controversy arises over works of a transitory nature, such as almanacs. "In such a case, if the plaintiff is right, the court has some means, at last, of indemnifying him, by making the defendant keep an account; whereas, if the defendant be

been committed to an extent which is likely to be seriously prejudicial to the plaintiff, without waiting till all the parts which have been pirated can be distinctly specified;[26] but if it appears that the piratical parts of the defendant's book can be distinguished from that which is original, this will be done in the injunction.[27]

(c) MOTION TO DISSOLVE. Denials of complainant's title or right upon information and belief are not sufficient to dissolve an injunction.[28]

(II) *PERMANENT INJUNCTION*—(A) IN GENERAL. Where the plaintiff's right and a piracy of the whole or of a material part of his work is clearly shown a perpetual injunction may issue;[29] and these facts being shown an injunction should issue without proof of actual damage.[30]

right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury." Spottiswoode *v.* Clark, Coop. Ch. 254, 10 Jur. 1043, 2 Phil. 154. See also Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206; Matthewson *v.* Stockdale, 12 Ves. Jr. 270.

Where action for penalty is pending.— An injunction to prevent infringement of a copyright may be granted, although a *qui tam* action for the penalty allowed by law is pending. Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373.

Security to respond for any damages which may ultimately be recovered against him may be required of the defendant in lieu of an injunction. Trow Directory, etc., Co. *v.* Boyd, 97 Fed. 586.

26. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Stevens *v.* Wildy, 19 L. J. Ch. 190. See also Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385.

27. Lamb *v.* Evans, [1892] 3 Ch. 462; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

28. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

29. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400 [*reversing* 64 Fed. 360, 25 L. R. A. 441; Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445; Fishel *v.* Lueckel, 53 Fed. 499; Sanborn Map, etc., Co. *v.* Dakin Pub. Co., 39 Fed. 266; Reed *v.* Holliday, 19 Fed. 325; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Macklin *v.* Richardson, Ambl. 694, 27 Eng. Reprint 451; Johnson *v.* Wyatt, 2 De G. J. & S. 18, 9 Jur. N. S. 1333, 33 L. J. Ch. 394, 12 Wkly. Rep. 234, 67 Eng. Ch. 45; Prince Albert *v.* Strange, 2 De G. & Sm. 652, 1 Hall & T. 1, 13 Jur. 10, 18 L. J. Ch. 120, 1 Macn. & G. 25; MacRae *v.* Holdsworth, 2 De G. & Sm. 496, 12 Jur. 820; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Dickens *v.* Lee, 8 Jur. 183; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646.

The rule is that the complainant is entitled to an injunction, if at all, at the time the decretal order is entered, to restrain the defendant from any further violation of his rights, as the whole case is then before the court. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

Future publications.— An injunction will not lie to protect a projected publication. Centennial Catalogue Co. *v.* Porter, 5 Fed. Cas. No. 2,546; Cate *v.* Devon, etc., Newspaper Co., 40 Ch. D. 500, 58 L. J. Ch. 288, 60 L. T. Rep. N. S. 672, 37 Wkly. Rep. 487. *Contra*, Bradbury *v.* Sharp, [1891] W. N. 143 [*cited* in MacGillivray Copyright 89] in which, where a single illustration had been taken from Punch, Kekewich, J., said he saw no objection to the injunction extending to the protection of the contents of future numbers and granted a perpetual injunction accordingly.

The cessation of the infringement removes the occasion, but not the right to an injunction, and such cessation does not deprive complainant of the right to equitable relief. Gilmore *v.* Anderson, 38 Fed. 846.

30. Black *v.* Henry G. Allen Co., 56 Fed. 764; Fishel *v.* Lueckel, 53 Fed. 499; Reed *v.* Holliday, 19 Fed. 325; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197. See also Borthwick *v.* Evening Post, 37 Ch. D. 449, 57 L. J. Ch. 406, 58 L. T. Rep. N. S. 252, 36 Wkly. Rep. 434.

"When once the Court has found that there is 'injuria,' the plaintiff ought to be allowed to judge of the 'damnum': who can tell to what extent she may be prejudiced by the best portions of her work being pirated and sold without her consent? It would be very

(B) *Where Piracy Is Inconsiderable.* The piracy proved may be so inconsiderable, and so little likely to injure the plaintiff, that the court may decline to interfere at all, and may leave the plaintiff to his remedy at law.[31]

(C) *Doubtful Cases.* If it is doubtful whether or not there has been an infringement of copyright, the court may, in the exercise of its sound discretion, refuse to grant an injunction.[32]

(D) *Against Partial Infringement* — (1) IN GENERAL. To authorize an injunction against particular parts of an alleged infringing work, it is only necessary that a substantial portion of the copyrighted work should have been taken. It is not material that the injunction will practically destroy the value of the original portions of the work.[33]

(2) WHERE PIRATICAL PORTIONS CANNOT BE SEPARATED. Where the piratical portions of an infringing work cannot be separated from those that are original, or at least non-piratical, an injunction will issue against the whole work;[34] and this is true even though a very large proportion of the work is unquestionably original.[35]

difficult for any jury to arrive at an exact conclusion upon that subject." Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876.

31. Carte *v.* Ford, 15 Fed. 439; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Gray *v.* Russell, 10 Fed. Cas. No. 5,728, 1 Story 11; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Webb *v.* Powers, 28 Fed. Cas. No. 17,323, 2 Woodb. & M. 497; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Bohn *v.* Bogue, 10 Jur. 420; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31; Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197; Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141; Bailey *v.* Taylor, 3 L. J. Ch. O. S. 66; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Jarrold *v.* Heywood, 18 Wkly. Rep. 279. See also Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186, 203, where Clifford, J., said: "Decided cases have been cited by the counsel for the respondent, which show that when the invasion of a copyright is light, and the copying consists of indefinite or small parts, so scattered through the work that it is difficult or nearly impossible to estimate either the amount of injury to the complainant, or the profit to the respondent, relief in equity has sometimes been refused, and the party turned over to his remedy at law. Those decisions were doubtless correct as applied to the facts and circumstances under which they were made."

The question of minuteness in value of the original matter extracted from a work for purposes of criticism will have great weight with the court in influencing its decision on the application for an injunction. Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141.

Where a phrase is copied here and there, but there is nothing to show extensive copying or extraction of the vital part of the original work, the remedy by injunction ought not to be applied. Moffatt *v.* Gill, 84 L. T. Rep. N. S. 452, 49 Wkly. Rep. 438.

32. Howell *v.* Miller, 91 Fed. 129, 33 C. C. A. 407; Blunt *v.* Patten, 3 Fed. Cas. No. 1,580, 2 Paine 397; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Spiers *v.* Brown, 6 Wkly. Rep. 352.

33. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. 360, 25 L. R. A. 441 [*reversed* in 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400]; Farmer *v.* Elstner, 33 Fed. 494; List Pub. Co. *v.* Keller, 30 Fed. 772; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497.

34. Williams *v.* Smythe, 110 Fed. 961; West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400 [*reversing* 64 Fed. 360, 25 L. R. A. 441]; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Stevens *v.* Wildy, 19 L. J. Ch. 190; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385. And see cases cited *infra*, note 35 *et seq.*

35. "As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts, which have been copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my

(E) *Form of Injunction.* The form of the injunction is dependent upon the nature and extent of the piracy, and may be either general or particular in its terms, and extend to the whole or to specified portions of the piratical work.[36]

c. Discovery. On a bill for the infringement of copyright, discovery may be compelled in aid of the action,[37] unless it is sought to enforce penalties and forfeitures.[38] So too the court will permit interrogatories as to the sale of the plaintiff's work to be administered to the plaintiff for the purpose of ascertaining the amount of damages sustained, and of enabling the defendant to pay a sufficient sum into court to meet it.[39]

d. Account of Profits — (I) *In General.* The right to an account of profits is incident to the right to an injunction, and will not be ordered when the case for an injunction fails.[40]

(II) *Account Pending Injunction.* Defendant may be ordered to keep an

literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame." Per Lord Eldon in Mawman *v.* Tegg, 2 Russ. 385, 390, 26 Rev. Rep. 112, 3 Eng. Ch. 385 [*cited* and *approved* in Lewis *v.* Fullarton, 2 Beav. 6, 11, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6]. See also Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

36. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. 360, 25 L. R. A. 441 [*reversed* in 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400]; Farmer *v.* Elstner, 33 Fed. 494; List Pub. Co. *v.* Keller, 30 Fed. 772; Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 796; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Morris *v.* Ashbee, L. R. 7 Eq. 34, 19 L. T. Rep. N. S. 550; Scott *v.* Stanford, L. R. 3 Eq. 718, 36 L. J. Ch. 729, 16 L. T. Rep. N. S. 51, 15 Wkly. Rep. 757; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Stevens *v.* Wildy, 19 L. J. Ch. 190; Smith *v.* Chatto, 31 L. T. Rep. N. S. 775, 23 Wkly. Rep. 290.

37. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Kelly *v.* Wyman, 20 L. T. Rep. N. S. 300, 17 Wkly. Rep. 399; Stephens *v.* Brett, 10 L. T. Rep. N. S. 231.

Sources of defendant's work.— A plaintiff has a right to a full and particular discovery as to the original sources from which the defendant alleges himself to have drawn his work. Kelly *v.* Wyman, 20 L. T. Rep. N. S. 300, 17 Wkly. Rep. 399.

38. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228. See also Johnson *v.* Donaldson, 3 Fed. 22, 18 Blatchf. 287, where it was held that in an action for penalties and forfeitures the defendant cannot be compelled to produce his books of account, photographic plates, and copies of printed chromos.

39. Wright *v.* Goodlake, 3 H. & C. 540, 12 Jur. N. S. 14, 34 L. J. Exch. 82, 13 L. T. Rep. N. S. 120, 13 Wkly. Rep. 349.

Inspection.— The court will grant an inspection of the work alleged to be pirated in an action of copyright, upon an affidavit that the defendant had no recollection of having sold copies thereof, but is desirous of refreshing his memory in order to be able to state positively if he has ever done so. Graves *v.* Mercer, 16 Wkly. Rep. 790.

40. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Falk *v.* Gast Lithographing, etc., Co., 54 Fed. 890, 4 C. C. A. 648; Sanborn Map, etc., Co. *v.* Dakin Pub. Co., 39 Fed. 266; Gilmore *v.* Anderson, 38 Fed. 846; Chapman *v.* Ferry, 12 Fed. 693, 8 Sawy. 191; Stevens *v.* Cady, 23 Fed. Cas. No. 13,395, 2 Curt. 200; Colburn *v.* Simms, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543; Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51; Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197; Baily *v.* Taylor, 8 L. J. Ch. O. S. 49, 1 Russ. & M. 73, Taml. 295, 5 Eng. Ch. 73; Delondre *v.* Shaw, 2 Sim. 237, 2 Eng. Ch. 237; Grierson *v.* Eyre, 9 Ves. Jr. 341; Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30.

Defendants may be compelled to produce their books and papers on the accounting before the master, in a suit in equity for an infringement, although complainant has brought replevin against them to forfeit the copies of the infringing works in their possession. Since the forfeiture cannot be enforced in the equity suit, defendants are not thus compelled to produce evidence against themselves in aid thereof. Callaghan *v.*

account of profits pending the determination of the plaintiff's right to injunctive relief.[41]

(III) *What Profits to Be Accounted For* — (A) *In General.* In regard to the general question of the profits to be accounted for by the defendant in an action for infringement, the only proper rule is to deduct from the selling price the actual and legitimate manufacturing cost;[42] but if these profits prove insufficient to recoup the plaintiff for the damages he has suffered, an inquiry of damages may be ordered to supplement his recovery.[43]

(B) *In Case of Partial Infringement.* Although the entire copyrighted work is not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendant will be given to the plaintiff.[44]

(C) *Commissions.* Commissions received from the sales of a pirated work are profits which must be accounted for on a bill by the proprietor of the copyright.[45]

(IV) *Mode of Ascertainment.* The usual mode of ascertaining profits is by reference to a master to take evidence and report,[46] although they may be ascertained from affidavits filed by the defendant.[47]

e. Effect of Decree as Bar to Action. That the plaintiff asks in his injunction suit for an accounting is no bar to a subsequent action for statutory damages, where no accounting of profits is in fact sought or obtained.[48]

C. Procedure — 1. Conditions Precedent to Right of Action — a. Registration. As has been previously stated, it is a condition precedent to the right of

Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547.

41. Hubbard *v.* Thompson, 14 Fed. 689; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Spottiswoode *v.* Clark, Coop. Ch. 254, 10 Jur. 1043, 2 Phil. 154; McNeill *v.* Williams, 11 Jur. 344; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118.

42. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Scribner *v.* Clark, 50 Fed. 473; Myers *v.* Callaghan, 24 Fed. 636; Delf *v.* Delamotte, 3 Jur. N. S. 933, 3 Kay & J. 581. But see Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321, in which it was held that the defendant is to account for every copy of his book sold as if it were a copy of complainant's book, and to pay the complainant the profit which the latter would have received from the sale of so many additional copies.

Charges and allowances.— An infringing firm will not be allowed on an accounting to charge the cost for stereotyping the infringing volumes, the amount paid for editing them, nor an amount paid to different members of the firm for their services as salaries during the period of the infringement; nor will they be allowed a credit for the cost of producing volumes which remain unsold, and they will be charged with the profits of resales of the infringing volumes which they had purchased as second-hand books. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547 [*affirming* 24 Fed. 636]. While a court will not presume that all the money received by a piratical publisher on the sale of his books is profit, still, as the proof as to the cost of producing the work is wholly in the control of the defendant, the complainant makes a *prima facie* case of right to recover by showing the selling price and the usual manufacturers' cost. Myers *v.* Callaghan, 24 Fed. 636.

43. See Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385.

44. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385. See also West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 64 Fed. 360, 25 L. R. A. 441; Farmer *v.* Elstner, 33 Fed. 494.

45. Stevens *v.* Gladding, 23 Fed. Cas. No. 13,399, 2 Curt. 608.

46. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Gilmore *v.* Anderson, 38 Fed. 846, 42 Fed. 267; Myers *v.* Callaghan, 24 Fed. 636; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Stevens *v.* Gladding, 23 Fed. Cas. No. 13,399, 2 Curt. 608.

The usual practice is to enter an interlocutory decree providing for an injunction, and then send the matter to a master to take proof of damages or profits. Upon the return of the master's report a final decree disposes of the question of damages. Patterson *v.* J. S. Ogilvie Pub. Co., 119 Fed. 461.

47. Pike *v.* Nicholas, L. R. 5 Ch. 260 note, 38 L. J. Ch. 529, 20 L. T. Rep. N. S. 906, 17 Wkly. Rep. 842; Kelly *v.* Hodge, 29 L. T. Rep. N. S. 387 [*cited* in Drone Copyright 533].

48. Brady *v.* Daly, 83 Fed. 1007, 28 C. C. A. 253 [*affirmed* in 175 U. S. 148, 20 S. Ct. 62, 44 L. ed. 109].

action under the English statute for the infringement of copyright in a book that the book be duly registered at Stationers' Hall.[49]

b. Demand. A demand in writing is a condition precedent to an action of detinue or trover under the English statute,[50] but is not required in the United States in case of an action for forfeitures and penalties under the statute.[51]

2. Jurisdiction — a. England. The high court of justice, either in the king's bench or chancery division, has jurisdiction of all actions for the infringement of copyright.[52]

b. United States — (I) *In General.* The circuit courts of the United States have original jurisdiction of all suits at law or in equity arising under the copyright laws,[53] and the circuit courts, and the district courts having jurisdiction of circuit courts, have jurisdiction upon bill in equity to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights.[54] This jurisdiction of the federal courts is exclusive in all cases arising under the statutes;[55] but in cases arising under the common law they only acquire jurisdiction on the ground of diverse citizenship, or where an injunction is asked to restrain the unauthorized publication of manuscripts, in neither of which is the jurisdiction exclusive.[56]

(II) *To Adjudge Penalties and Forfeitures.* The jurisdiction to adjudge penalties and forfeitures under the copyright acts is in the federal courts sitting as courts of law.[57]

3. Persons Entitled to Sue — a. In General. The legal proprietor of copyright, whether the author, inventor, or designer of the work, or his legal representative, either by act of law or of the parties, is entitled to sue for an infringement thereof;[58] but an author who has pirated a large part of his work from

49. See *supra*, I, E, 1, a, b.

50. 5 & 6 Vict. c. 45, § 23.

51. Hegeman *v.* Springer, 110 Fed. 374, 49 C. C. A. 86.

52. Muddock *v.* Blackwood, [1898] 1 Ch. 58, 67 L. J. Ch. 6, 77 L. T. Rep. N. S. 493.

53. U. S. Rev. Stat. (1878) § 629 [U. S. Comp. Stat. (1901) p. 503].

54. U. S. Rev. Stat. (1878) § 4970 [U. S. Comp. Stat. (1901) p. 3416].

Statutes construed.— In view of section 106 of the act of congress of July 8, 1870, conferring on the circuit courts jurisdiction of all actions arising under the copyright laws, whether civil or penal in their nature, those courts, under U. S. Rev. Stat. (1878) § 629, cl. 9 [U. S. Comp. Stat. (1901) p. 504], giving them jurisdiction of all suits arising under the copyright laws, have jurisdiction of *qui tam* actions for penalties imposed by section 4963 [p. 3412] for violations of the law relating to copyright, although by section 563 [p. 455] the district courts have jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. Taft *v.* Stephens Lithograph, etc., Co., 37 Fed. 726.

55. Potter *v.* McPherson, 21 Hun (N. Y.) 559; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23; Taft *v.* Stephens Lithograph, etc., Co., 37 Fed. 726.

56. Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511; Woolsey *v.* Judd, 4 Duer (N. Y.) 379; Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328; Maloney *v.* Foote, 101 Fed. 264; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean, 32; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644; Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537; Pualte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328.

Where the parties are residents of the same state, and plaintiff fails to make out his title to the copyright, the court has no jurisdiction to restrain the use of the title of the work upon principles relating to the good-will of trades. Jollie *v.* Jaques, 13 Fed. Cas. No. 7,437, 1 Blatchf. 618.

57. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Chapman *v.* Ferry, 12 Fed. 693, 8 Sawy. 191.

58. Scribner *v.* Clark, 50 Fed. 473; Scribner *v.* Henry G. Allen Co., 49 Fed. 854; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Hanson *v.* Jaccard Jewelry Co., 32 Fed. 202; Estes *v.* Williams, 21 Fed. 189; Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; 15 Fed. Cas. No. 8,395, 2 Blatchf. 362; Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Bernard *v.* Bertoni, 14 Quebec 219.

An assignee of the exclusive right of acting and representing a copyrighted drama for one year throughout the United States, excepting five specified cities, may maintain an injunction suit in his own name against a mere wrong-doer. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698.

others is not entitled to have his copyright protected. He does not come into equity with clean hands.[59]

b. Joint Proprietors — (I) *Right of All to Sue.* Joint proprietors of copyright may sue jointly for its infringement;[60] but persons not having a common interest in the subject of the suit cannot be joined as co-plaintiffs.[61]

(II) *Right of One to Sue.* Although the joint owners of copyright take as tenants in common, and not as joint tenants,[62] yet any one or more of them may maintain an action against a stranger for an infringement of the entire copyright.[63]

c. Equitable Owner. While it is necessary in an action at law that the plaintiff have a valid legal title, the same is not true in equity, which will interfere to protect an equitable owner.[64]

4. Persons Liable — a. England — (I) *Books.* Any person printing or causing to be printed a piratical copy, or importing or selling any such copy, is liable.[65]

(II) *Dramatic or Musical Compositions.* Any person who represents or performs, or causes to be represented or performed, any dramatic or musical composition in which there is a subsisting copyright, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment, may be sued under the statute.[66]

One who does business under a conventional or fictitious partnership name, and has obtained a copyright under that name, may sue to restrain an infringement thereof without averring the filing of the certificate required by the New York statutes. Scribner *v.* Henry G. Allen Co., 49 Fed. 854. See also Scribner *v.* Clark, 50 Fed. 473.

Where the legal and beneficial ownership are separated, an action may be maintained by the holder of the legal title. Hanson *v.* Jaccard Jewelry Co., 32 Fed. 202.

59. Unclean hands.— Edward Thompson Co. *v.* American Law Book Co., 122 Fed. 922 [*reversing* 121 Fed. 907], in which the complainant, the publisher of a law encyclopædia, which furnished the authors of its articles with paragraphs cut from copyrighted digests of other publishers, its authors using such paragraphs in the compilation of their articles, in some instances copying the language of such paragraphs without the consent of the owners of the copyrights, has no standing in a court of equity to charge another with infringement of its own copyright.

60. Stevens *v.* Wildy, 19 L. J. Ch. 190.

61. Page *v.* Townsend, 5 Sim. 395, 9 Eng. Ch. 395.

62. Powell *v.* Head, 12 Ch. D. 686, 48 L. J. Ch. 731, 41 L. T. Rep. N. S. 70. See also *supra*, I, D, 2, d, (II).

63. Lauri *v.* Renad, [1892] 3 Ch. 402, 61 L. J. Ch. 580, 67 L. T. Rep. N. S. 275, 40 Wkly. Rep. 679; Prince Albert *v.* Strange, 2 De G. & Sm. 652, 1 Hall & T. 1, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25.

64. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; 15 Fed. Cas. No. 8,395, 2 Blatchf. 369; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Sims *v.* Marryat, 17 Q. B. 281, 20 L. J. Q. B. 454, 79 E. C. L. 281; Bohn *v.* Bogue, 10 Jur. 420; Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572; Sweet *v.* Shaw, 3 Jur. 217; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Colburn *v.* Duncombe, 9 Sim. 151, 16 Eng. Ch. 151; Chappell *v.* Purday, 4 Y. & C. Exch. 485 [*limiting* Millar *v.* Taylor, 4 Burr. 2303]; Turner *v.* Robinson, 10 Ir. Ch. 121 [*affirmed* in 10 Ir. Ch. 510]; Hodges *v.* Welsh, 12 Ir. Eq. 266.

If the equitable right to the copyright is complete the court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property. Bohn *v.* Bogue, 10 Jur. 420.

65. Prowett *v.* Mortimer, 2 Jur. N. S. 414, 4 Wkly. Rep. 519; Dilly *v.* Doig, 2 Ves. Jr. 486. See Kelly's Directories *v.* Gavin, [1901] 1 Ch. 374, 70 L. J. Ch. 237, 84 L. T. Rep. N. S. 581, 49 Wkly. Rep. 313.

A separate suit must be brought against each person taking copies of a spurious edition for sale. Dilly *v.* Doig, 2 Ves. Jr. 486.

66. 5 & 6 Vict. c. 45, §§ 20, 21; 3 & 4 Wm. II, c. 15, § 2. See also Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217; Lyon *v.* Knowles, 3 B. & S. 556, 9 Jur. N. S. 774, 32 L. J. Q. B. 71, 7 L. T. Rep. N. S. 670, 113 E. C. L. 556; Russell *v.* Briant, 8 C. B. 836, 14 Jur. 201, 19 L. J. C. P. 33, 65 E. C. L. 836; Marsh *v.* Conquest, 17 C. B. N. S. 418, 10 Jur. N. S. 989, 33 L. J. C. P. 319, 10 L. T. Rep. N. S. 717, 12 Wkly. Rep. 1006, 112 E. C. L. 418; Parsons *v.* Chapman, 5 C. & P. 33, 24 E. C. L. 439; French *v.* Day, 9 T. L. R. 548 (construing the above cited statutes); Monaghan *v.* Taylor, 2 T. L. R. 685.

All the actors who take part in an unlawful performance are within the section as "representing," and are liable to penalties. Duck *v.* Mayen, 8 T. L. R. 339 [*affirmed* in [1892] 2 Q. B. 511].

Letting theater.—A proprietor of a theater let it for one night for the benefit of one of his performers, who was to pay him thirty pounds for the use of it for that night, to-

(III) *Paintings, Drawings, and Photographs.* Any person, even the artist who has parted with his copyright, is liable, although he may be an innocent agent.[67]

(IV) *Engravings and Prints.* Under the earlier statute the seller of a piratical copy of an engraving or print was only liable to the penalties and forfeitures provided, when he knew that the copy had been produced without the consent of the proprietor of the copyright,[68] and it has been contended that this guilty "knowledge" should be read into the later statute making the seller liable in damages. The contention has, however, been rejected.[69]

b. United States — (I) *Books, Etc.* The printer, publisher, dramatizer, translator, or importer of a piratical copy, or a vendor of such a copy who knows the same to be unlawful, is liable under the statute.[70] A principal, however, is not liable to penalty or forfeiture for an infringement of which his agents have been guilty without his knowledge,[71] although he may be liable in damages.[72]

(II) *Maps, Charts, Dramatic or Musical Compositions, and Works of Art.* Any person who shall engrave, etch, work, copy, print, publish, dramatize, translate, or import a piratical copy, or who shall sell such copy knowing it to be unlawful, is liable to an action for infringement.[73] As in the case of the infringe-

gether with the services of the corps dramatique, band, lights, and accessories. The performer who so had the use of the theater represented therein a dramatic piece, the sole right of representing which had been assigned to the plaintiff. It was held that the proprietor of the theater caused the piece to be represented, and consequently was guilty of an infringement of the plaintiff's right, and liable to the penalty imposed by 3 & 4 Wm. IV, c. 15, § 2. Marsh *v.* Conquest, 17 C. B. N. S. 418, 10 Jur. N. S. 989, 33 L. J. C. P. 319, 10 L. T. Rep. N. S. 717, 12 Wkly. Rep. 1006, 112 E. C. L. 418. *Compare* Lyon *v.* Knowles, 3 B. & S. 556, 9 Jur. N. S. 774, 32 L. J. Q. B. 71, 7 L. T. Rep. N. S. 670, 11 Wkly. Rep. 266, 113 E. C. L. 556 [*affirmed* in 5 B. & S. 751, 10 L. T. Rep. N. S. 876, 12 Wkly. Rep. 1083, 117 E. C. L. 751].

One who merely lets a room to the offender is not liable, even though he supplies the benches and lights, or sells a ticket of admission, himself deriving no other profit than that arising from the letting of the room. Russell *v.* Briant, 8 C. B. 836, 14 Jur. 201, 19 L. J. C. P. 33, 65 E. C. L. 836.

Since the musical compositions act of 1888 (51 & 52 Vict. c. 17) the proprietor, tenant, or occupier of any place of dramatic entertainment or other place at which any unauthorized representation or performance of any musical composition shall take place is not liable, unless he shall wilfully cause or permit such representation or performance, knowing it to be unauthorized.

67. *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852; Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56.

68. See West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402; Gambart *v.* Sumner, 5 H. & N. 5, 5 Jur. N. S. 1109, 29 L. J. Exch. 98, 8 Wkly. Rep. 27.

69. West *v.* Francis, 5 B. & Ald. 737, 1 D. & R. 400, 24 Rev. Rep. 541, 7 E. C. L. 402; Gambart *v.* Sumner, 5 H. & N. 5, 5 Jur. N. S. 1109, 29 L. J. Exch. 98, 8 Wkly. Rep. 27.

Unauthorized sale of lawful copies.— The statute (17 Geo. III, c. 57) applies only to impressions of engravings pirated from other engravings, and not to prints taken from a lawful plate. Murray *v.* Heath, 1 B. & Ad. 804, 9 L. J. K. B. O. S. 111, 20 E. C. L. 698.

70. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Millett *v.* Snowden, 16 Fed. Cas. No. 9,600.

One who prints an infringing book under a contract with the publisher is liable, with the publisher, to account for the profits realized. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514.

Vendors are liable for the sale of a book which invades a copyright, and the owner of the copyright is not bound to seek redress against the author or publishers. Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186.

Officer of corporation.— The managing officer of a corporation which has infringed copyright without his knowledge and against his express instructions cannot alone be held personally responsible merely because he is an officer of the corporation. Stuart *v.* Smith, 68 Fed. 189.

71. Taylor *v.* Gilman, 24 Fed. 632, 23 Blatchf. 325.

72. Trow Directory, etc., Co. *v.* Boyd, 97 Fed. 586.

73. Falk *v.* Curtis Pub. Co., 98 Fed. 989; Fishel *v.* Lueckel, 53 Fed. 499; Sarony *v.* Ehrich, 28 Fed. 79, 23 Blatchf. 556; Harper *v.* Shoppell, 26 Fed. 519, 23 Blatchf. 431, 28 Fed. 613; Millett *v.* Snowden, 17 Fed. Cas. No. 9,600.

A corporation is liable to the statutory penalties and forfeitures as well as a natural person. Falk *v.* Curtis Pub. Co., 98 Fed. 989.

One who procures an infringement to be

ment of books, an innocent principal is not liable to penalty or forfeiture for an infringement by his agent.[74]

(III) *PLAY-RIGHT.* The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly performed.[75]

5. PLEADING — a. Bill, Declaration, or Complaint — (I) *IN GENERAL.* A bill, declaration, or complaint for the infringement of copyright must set out in detail a substantial compliance with the various requirements of the copyright laws,[76] and distinctly aver the plaintiff's title[77] and the fact that the defendant has been guilty

made is liable. Fishel *v.* Lueckel, 53 Fed. 499.

Having control as business manager of sheets of a photograph does not give a person such possession as to render him liable to the penalty imposed by U. S. Rev. Stat. (1878) § 4965, which provides that, when any one shall copy a photograph which has been copyrighted, he shall forfeit one dollar for every sheet of the same found in his possession. Thornton *v.* Schreiber, 124 U. S. 612, 8 S. Ct. 618, 31 L. ed. 577.

Former judgment a bar.—Judgment against the lithographer who made the prints for the infringer of a copyright is a bar to further recovery by the proprietor of the copyright against the infringer for the value of the prints. Sarony *v.* Ehrich, 28 Fed. 79, 23 Blatchf. 556.

74. McDonald *v.* Hearst, 95 Fed. 656; Schreiber *v.* Sharpless, 6 Fed. 175, 14 Phila. (Pa.) 581, 38 Leg. Int. (Pa.) 73.

75. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256.

76. Burnell *v.* Chown, 69 Fed. 993; Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291; Scribner *v.* Henry G. Allen Co., 49 Fed. 854; Scribner *v.* Henry G. Allen Co., 43 Fed. 680; Trow City Directory Co. *v.* Curtin, 36 Fed. 829; Falk *v.* Howell, 34 Fed. 739; Stover *v.* Lathrop, 33 Fed. 348; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. 758; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Parkinson *v.* Laselle, 18 Fed. Cas. No. 10,762, 3 Sawy. 330.

It is necessary for the complainant to allege and show that he has deposited with the librarian of congress on or before the day of publication, a printed copy of the title-page of his book, and also two copies of his book, and that he has given the lawful copyright notice; but further than this complainant is not required to go in making out a *prima facie* case of legal copyright, and consequently it is not incumbent on him in the first instance to allege or prove that his copyrighted books were printed from type set within the limits of the United States as required by U. S. Rev. Stat. (1878) § 4956 [U. S. Comp. Stat. (1901) p. 3407]; Osgood *v.* A. S. Aloe Instrument Co., 69 Fed. 291.

Averments which follow the language of the statute are sufficient. Consequently a bill which avers that two copies of the book were deposited in the librarian's office in Washington within ten days after publication is sufficient, without alleging that the book was published within a reasonable time after the deposit of the copy of the title. Scribner *v.* Henry G. Allen Co., 49 Fed. 854. See also Burnell *v.* Chown, 69 Fed. 993, 994, where it was held that the deposit of copies within ten days after publication must be affirmatively averred, and that an averment that "within the time and in the manner prescribed by law, your orator did all the things required by law to be done in order to secure to himself the full enjoyment of all the rights and privileges" granted by the copyright laws was not sufficient.

Delivery and mailing of copies — Conjunctive statement.— U. S. Rev. Stat. (1878) § 4956 [U. S. Comp. Stat. (1901) p. 3407], allowing a person seeking a copyright to deliver at the office of the librarian of congress the copy of the title of the book and the two copies of the book which the statute requires to be deposited, and also permitting the deposit of such copies in the mail, addressed to such librarian, does not prevent both the delivery and mailing of the copies; and, where a complaint for infringement avers that both these acts were done, complainant will not be required to elect which averment he will undertake to prove at the trial, and to abandon the other. Scribner *v.* Henry G. Allen Co., 43 Fed. 680 [*distinguishing* Falk *v.* Howell, 34 Fed. 739, where a disjunctive statement that the complainant mailed or delivered copies to the librarian of congress, although in the language of the statute, was held insufficient].

Notice of copyright upon title-page or page next following must be averred. Trow City Directory Co. *v.* Curtin, 36 Fed. 829.

The statement of the legal conclusion that "the copyright was taken out by [plaintiff] previous to the publication thereof, in full accordance with the requirements of the laws of the United States" is insufficient. Trow City Directory Co. *v.* Curtin, 36 Fed. 829. See also Burrell *v.* Chown, 69 Fed. 993.

77. Lillard *v.* Sun Printing, etc., Assoc., 87 Fed. 213; Falk *v.* Seidenberg, 48 Fed. 224; Falk *v.* Schumacher, 48 Fed. 222; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Russell *v.* Smith, 12 Q. B. 217, 12 Jur. 723, 17 L. J. Q. B. 225, 64 E. C. L. 217.

But it is not necessary to set out the facts showing proprietorship (Falk *v.* Schumacher, 48 Fed. 222; Falk *v.* Seidenberg, 48 Fed. 224), or the plaintiff's chain of title (Lillard *v.* Sun Printing, etc., Assoc., 87 Fed. 213).

of infringement.[78] In addition to these there should also be averments of citizenship,[79] authorship,[80] and the existence of the facts of originality, intellectual production, thought, and conception.[81] On the other hand matters of evidence,[82] or facts which might subject the defendant to penalties and forfeitures,[83] should not be stated. Nor, unless knowledge is an essential statutory element of the offense, is it necessary to aver that the defendant knowingly invaded the right.[84] Similarly, in a suit for relief against violation of the "sole liberty of printing," etc., it is unnecessary either to allege or prove the absence of the written consent of the proprietor, as would be necessary in an action for statutory penalties and for forfeitures.[85] Penalties and forfeitures need not be waived in the bill of complaint seeking an injunction,[86] but unless they are the defendant cannot be compelled to make discoveries which would subject him thereto.[87]

(11) *In Action to Recover Forfeitures.* In an action to recover a forfeiture it is sufficient to allege the copying, printing, publishing, and exposing for sale of the infringing copies by the defendant, and that such copies were made within two years next before the commencement of the suit, and were found in

Alternative conclusions from facts showing title.— A bill to restrain an infringement, which sets out the terms of the agreement between the author and his co-plaintiffs, the publishers, and states that if such agreement is not an assignment it is an exclusive license, correctly pleads publishers' title to the copyright by thus alleging the facts and stating the conclusions therefrom in the alternative. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433.

78. Falk *v.* Curtis Pub. Co., 100 Fed. 77; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Stover *v.* Lathrop, 33 Fed. 348; Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871.

Description of offense.— In an action for penalties for the representation of a dramatic piece at a place of dramatic entertainment it is sufficient to describe the offense in the words of the act. Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871.

Averment of knowledge of infringement. — Where the bill positively avers the infringement of the copyright, it is sufficient, although it is not stated to be within the knowledge of affiant. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433.

Where a statement of claim in a suit under U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. (1901) p. 3414] properly alleges the copying, printing, publishing, and exposing for sale of the infringing copies of defendant, either of which constitutes an infringement, it need not allege that defendant was actually engaged in any such acts at the time copies of the infringing publication were found in his possession. Falk *v.* Curtis Pub. Co., 100 Fed. 77.

79. Webb *v.* Powers, 29 Fed. Cas. No. 17,323, 2 Woodb. & M. 497, where it was held that where the bill alleges the plaintiffs to be citizens of the United States and this is not denied in the answer, it must be considered as admitted, although no other evidence of citizenship is offered.

Sufficiency of averment.— Where the certificate from the librarian of congress described the person taking out a copyright as "of New York," and such person testifies that he is now a resident in New York, and that he mailed the two copies in the city of New York, it was held a sufficient averment to show that he is "a citizen of the United States or a resident therein." Patterson *v.* J. S. Ogilvie Pub. Co., 119 Fed. 451.

80. Henderson *v.* Tompkins, 60 Fed. 758; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

Inconsistencies of allegations as to authorship in a bill for infringement of copyright are no ground of objection on general demurrer, if other allegations are sufficiently explicit as to the authorship. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

81. Falk *v.* City Item Printing Co., 79 Fed. 321.

82. Falk *v.* Curtis Pub. Co., 100 Fed. 77; Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228; Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51.

Specification of parts pirated.— Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated, although he does not claim copyright in all the passages which are the same in both works. Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51. But see Liddell *v.* Copp-Clark Co., 19 Ont. Pr. 332, where it was held that the defendants were entitled to particulars showing what part of defendant's book infringed plaintiff's right.

83. Chapman *v.* Ferry, 12 Fed. 693, 8 Sawy. 191.

84. Lee *v.* Simpson, 3 C. B. 871, 4 D. & L. 666, 11 Jur. 127, 16 L. J. C. P. 105, 54 E. C. L. 871.

85. Gilmore *v.* Anderson, 38 Fed. 846.

86. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

87. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

the defendant's possession prior to the time it was brought. It need not be alleged by whom the copies were found, nor, where the defendant is a corporation, is it necessary to state what officer or agent had them in custody, nor the authority under which he was acting.[88]

(III) *Joinder of Common-Law and Statutory Counts.* In an action for an infringement of copyright it is not permissible to join a count founded upon a common-law right with counts under the statute upon the same cause of action.[89]

(IV) *Prayer For Relief*—(A) *For General Relief.* Under a prayer for general relief, the court can decree an account of profits, since such account is a right incident to an injunction in copyright cases.[90]

(B) *For Enforcement of Penalties and Forfeitures.* A bill in equity that prays the enforcement of penalties and forfeitures is demurrable.[91]

(V) *Exhibits.* It is proper to attach to a bill praying an injunction against the infringement of a copyright, copies of the infringed and infringing works.[92]

(VI) *Verification.* A bill praying for an injunction and which is not to be used as evidence need not be verified at the time it is signed.[93]

b. Plea or Answer—(I) *In General.* A plaintiff in a suit to restrain breach of a copyright and for an accounting is entitled to an answer, not only with a view to an accounting, but also for the purpose of establishing his title.[94]

(II) *General Issue.* In the United States the defendant may plead the general issue in all actions arising under the laws respecting copyrights, and give the special matter in evidence.[95]

(III) *Notice of Objections Under English Practice*—(A) *In General.* In any action brought under the English statute the defendant, on pleading thereto, must give to the plaintiff a notice in writing of any objections on which he means to rely at the trial.[96] Where the objection is that the plaintiff is not the author, first publisher, or proprietor, the notice must give the name of the person whom the defendant alleges to be the author or first publisher of the book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published.[97]

88. Falk *v.* Curtis Pub. Co., 100 Fed. 77, 98 Fed. 989. See also Ashdown *v.* Lavigne, 2 Quebec 361.

89. Boozey *v.* Tolkien, 5 C. B. 476, 5 D. & L. 547, 17 L. J. C. P. 137, 57 E. C. L. 476.

90. Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155; Gilmore *v.* Anderson, 38 Fed. 846. But see Stevens *v.* Cady, 23 Fed. Cas. No. 13,395, 2 Curt. 200, where there was a prayer for an injunction and the delivery up of the copperplate and copies of the piratical map, and it was held that an account of profits could not be decreed as incidental to the relief by injunction, but should have been prayed for in the bill.

91. Trow City Directory Co. *v.* Curtin, 36 Fed. 829; Chapman *v.* Ferry, 12 Fed. 693, 8 Sawy. 191; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Stevens *v.* Cady, 23 Fed. Cas. No. 13,395, 2 Curt. 200. See also Stevens *v.* Gladding, 17 How. (U. S.) 447, 15 L. ed. 155.

92. Lillard *v.* Sun Printing, etc., Assoc., 87 Fed. 213; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433.

93. Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433.

94. Kelly *v.* Hooper, 4 Jur. 21, 1 Y. & C. Ch. 197, 20 Eng. Ch. 197.

95. Johnston *v.* Klopsch, 88 Fed. 692, construing U. S. Rev. Stat. (1878) §§ 914, 4969 [U. S. Comp. Stat. (1901) pp. 684, 3416].

96. 5 & 6 Vict. c. 45, § 16; Hayward *v.* Lely, 56 L. T. Rep. N. S. 418.

Objections may as well be made by plea as by separate notice in writing, but a suggestion of defect of registration contained in an affidavit is not sufficient. Hayward *v.* Lely, 56 L. T. Rep. N. S. 418.

97. Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39; Boosey *v.* Davidson, 4 D. & L. 147; Boosey *v.* Purday, 10 Jur. 1038.

Specification of day and month.— In case of an old publication first made abroad, it was held sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should specify the day and month. Boosey *v.* Davidson, 4 D. & L. 147.

Illustration.— A defendant is not entitled to object that "some person, whose name is to the defendant unknown, and not the plaintiff, was the proprietor of said copyright;" nor "that the plaintiff was not himself the author;" nor "that the work was not first printed or published in the British dominions;" nor "that the plaintiff never acquired any title by assignment 'or otherwise' to

But where the plaintiff's claim is defeated by defects of title disclosed by his own evidence, the action may be dismissed, although the notice of objections has not been delivered before issue joined.[98]

(B) *Objection Must Be Specific.* A general notice of objections is insufficient. The notice must be specific, and fully inform the plaintiff of the grounds of defense relied on.[99]

(C) *Amendment.* The defendant may be allowed, within the sound judicial discretion of the court, to amend his notice of objections.[1]

6. Ascertainment of Infringement — a. In General. Originally all questions of fact in proceedings for infringement of copyright were determinable only by a jury,[2] which is still the proper tribunal for the determination of such questions in all actions at law.[3] At the present day questions of fact in equitable actions are ascertained either by the court,[4] or, and this is the prevailing practice in the United States, by reference to a master.[5]

the copyright; nor that there was no 'valid' assignment;" nor "that there is no copyright in a work first published out of the British dominions, under such circumstances as the books in question were published." Boosey *v.* Davidson, 4 D. & L. 147.

It is a sufficient compliance with the statute to allege a definite publication of the disputed work at some particular place by some definite party, either before or simultaneously with the publication by the plaintiff, or with a publication in another place. Boosey *v.* Purday, 10 Jur. 1038.

98. Coote *v.* Judd, 23 Ch. D. 727, 48 L. T. Rep. N. S. 405, 31 Wkly. Rep. 423. See also Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39; Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504. *Contra*, Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 12 Jur. 1091, 18 L. J. C. P. 97, 62 E. C. L. 4.

99. Chappell *v.* Davidson, 18 C. B. 194, 2 Jur. N. S. 544, 25 L. J. C. P. 225, 4 Wkly. Rep. 559, 86 E. C. L. 194; Leader *v.* Purday, 7 C. B. 4, 6 D. & L. 408, 12 Jur. 1091, 18 L. J. C. P. 97, 62 E. C. L. 4; Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504; Boosey *v.* Davidson, 4 D. & L. 147; Boosey *v.* Purday, 10 Jur. 1038.

A denial of the plaintiff's title, and the statement that the proprietor "is some person unknown, but not the plaintiff," is insufficient. There must be a definite statement as to who is the true proprietor. Hole *v.* Bradbury, 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T. Rep. N. S. 153, 250, 28 Wkly. Rep. 39; Boosey *v.* Davidson, 4 D. & L. 147. See also Coote *v.* Judd, 23 Ch. D. 727, 48 L. T. Rep. N. S. 405, 31 Wkly. Rep. 423.

Registration.— A notice of defense, which stated, "The Defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register," is insufficient. The notice must state specifically what the objection to the registration is. Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504.

Printing and publication.— An objection that the books in question were not first printed or published in the British dominions should be struck out as too general. Boosey *v.* Purday, 10 Jur. 1038.

1. Collette *v.* Goode, 7 Ch. D. 842, 47 L. J. Ch. 370, 38 L. T. Rep. N. S. 504; Hayward *v.* Lely, 56 L. T. Rep. N. S. 418.

2. As to the determination of title to copyright see *supra*, II, C.

3. Keene *v.* Clarke, 5 Rob. (N. Y.) 38; Bolles *v.* Outing Co., 77 Fed. 966, 23 C. C. A. 594; Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393; Planche *v.* Braham, 4 Bing. N. Cas. 17, 33 E. C. L. 574, 8 C. & P. 68, 34 E. C. L. 614, 3 Hodges 288, 1 Jur. 823, 8 L. J. C. P. 25, 5 Scott 242.

In a qui tam action for infringement of the copyright of a chart, the question whether defendant copied from plaintiff's survey is for the jury. Blunt *v.* Patten, 3 Fed. Cas. No. 1,579, 2 Paine 393.

Whether a photograph is an original work of art or a mere manual reproduction of subject-matter is a question of fact. Bolles *v.* Outing Co., 77 Fed. 966, 23 C. C. A. 594.

Admissions.— A court of equity has jurisdiction to direct admissions in an action brought by the direction of the court. Dickens *v.* Lee, 8 Jur. 183; Sweet *v.* Cater, 5 Jur. 68, 11 Sim. 572, 34 Eng. Ch. 572.

4. Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Lewis *v.* Fullarton, 2 Beav. 6, 3 Jur. 669, 8 L. J. Ch. 291, 17 Eng. Ch. 6; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Sheriff *v.* Coates, 1 Russ. & M. 159, 5 Eng. Ch. 159; Spiers *v.* Brown, 6 Wkly. Rep. 352.

Comparisons of copies and originals.— Notwithstanding Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141, if the court is led to the conclusions that there has been a piracy, it will not grudge any labor that may be requisite in order to ascertain how far the injunction should extend. Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

5. Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Story *v.* Derby, 23 Fed. Cas. No. 13,496, 4 McLean 160; Story *v.* Holcombe, 23 Fed. Cas. No. 13,497, 4 McLean 306; Jeffery *v.* Bowles, Dick. 429.

b. Evidence — (I) *In General.* Infringement of copyright may be shown by all kinds of evidence, and especially by the resemblances between the two works.[6] It is said, however, to be much more important, where a suit is brought for the violation of copyright, that the existence of facts of originality, of intellectual production, of thought and conception on the part of the author should be proved, than in case of the infringement of a patent right.[7]

(II) *Judicial Knowledge.* The court will not interpose its judicial knowledge to the extent of finding on demurrer against the allegations of the bill touching the questions of originality.[8]

(III) *Presumptions and Burden of Proof* — (A) *Presumptions* — (1) From Copyright. The copyright is *prima facie* evidence that the plaintiff was the author, and the burden of proof is upon the defendant to show the contrary;[9] and similarly the record of copyright made in the prescribed form is *prima facie* evidence of the due deposit of title.[10]

(2) From Resemblances — (a) In General. Marked resemblances between the original and alleged infringing works raise a presumption of piracy against the defendant.[11]

(b) Common Errors. The existence of common errors and inaccuracies in the original and alleged piratical works raises a presumption of infringement so strong that it can only be overcome by the clearest and most convincing proof;[12] and when a considerable number of passages are proved to have been copied,

Before granting a preliminary injunction on a charge of an infringement of copyright, the court will generally refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act on the case. Story *v.* Derby, 23 Fed. Cas. No. 13,496, 4 McLean 160.

To ascertain nature and extent of piracy. — An equity suit for infringement will be referred to a master to examine as to the nature and extent of the infringement, although infringement has been established on the principal hearing. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

6. Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255.

As to evidence generally see Evidence.

7. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 S. Ct. 279, 28 L. ed. 349 [*cited* with approval in Courier Lithographing Co. *v.* Donaldson Lithographing Co., 104 Fed. 993, 44 C. C. A. 296].

8. Henderson *v.* Tompkins, 60 Fed. 758.

9. Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72.

10. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906, Brunn. Col. Cas. 698.

11. Blunt *v.* Patten, 3 Fed. Cas. No. 1,580, 2 Paine 397; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Roworth *v.* Wilkes, 1 Campb. 94, 10 Rev. Rep. 642; Holtcn *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934; Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Spiers *v.* Brown, 6 Wkly. Rep. 352; Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255 [*affirmed* in 31 Can. Supreme Ct. 370].

In case of compilations of facts and statistics taken from common sources, the presumption arising from resemblances is not strong. Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255.

Where it is clearly apparent from inspection that in a city directory compiled for publication by defendant, matter has in numerous instances been pirated from a copyrighted directory published by complainant for a preceding year, complainant is entitled to an injunction restraining the publication of defendant's directory as a whole although portions of it appear to be free from the charge of piracy, unless defendant can eliminate the portions which he has unlawfully appropriated. Wiliams *v.* Smythe, 110 Fed. 961.

12. Jewelers' Mercantile Agency *v.* Jewellers' Weekly Pub. Co., 84 Hun (N. Y.) 12, 32 N. Y. Suppl. 41, 65 N. Y. St. 198; Chicago Dollar Directory Co. *v.* Chicago Directory Co., 66 Fed. 977, 14 C. C. A. 213; List Pub. Co. *v.* Keller, 30 Fed. 772; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Cox *v.* Land, etc., Journal Co., L. R. 9 Eq. 324, 39 L. J. Ch. 152, 21 L. T. Rep. N. S. 548, 18 Wkly. Rep. 206; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496; Murray *v.* Bogue, 1 Drew. 353, 17 Jur. 219, 22 L. J. Ch. 457, 1 Wkly. Rep. 109; Mawman *v.* Tegg, 2 Russ. 385, 26 Rev. Rep. 112, 3 Eng. Ch. 385; Longman *v.* Winchester, 16 Ves. Jr. 269; Spiers *v.* Brown, 6 Wkly. Rep. 352; Cadieux *v.* Beauchemin, 31 Can. Supreme Ct. 370 [*affirming* 10 Quebec Q. B. 255]. *Compare* Cary *v.* Kearsley, 4 Esp. 168, 6 Rev. Rep. 846, where it was held that a count for pirating generally is not supported by evidence that there are in the original work particular errors and mistakes, with

by the copying of blunders in them, other passages which are the same with the passages in the original book must be presumed *prima facie* to be likewise copied, although no blunders occur in them.[13]

(3) From Unfair Use of Part. When it is conclusively shown from internal evidence that a subsequent digester has made an unfair use of any part of a copyrighted syllabus, the presumption is that he made use of the whole.[14] And the mere addition of original work is not sufficient to purge an infringing work of the charge of infringement.[15]

(4) From Employment. When an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission, rests heavily upon the artist himself.[16]

(B) *Burden of Proof*—(1) To Show Compliance With Statute. The burden of showing a literal compliance with each and every statutory requirement in the nature of conditions precedent to the acquisition of a valid copyright is upon the plaintiff.[17]

(2) To Show Infringement. The burden is upon the plaintiff to show infringement of his copyright.[18]

(IV) *Admissibility*—(A) *Certificate of Librarian.* A certificate of the librarian of congress is admissible in evidence to show compliance with requirements of the Copyright Act;[19] but an unsigned statement that copies were deposited attached to a certificate of the librarian is no evidence of the deposit.[20]

(B) *Expert Testimony.* While expert testimony as to the comparisons between the copyrighted book and the alleged infringing book is admissible, it is in the nature of secondary evidence and does not relieve the court from the necessity of making a personal examination of the books on the question of infringement.[21]

(C) *Opinion Evidence.* Testimony of witnesses who have compared the copyrighted work with the alleged infringing work as to their general conclusions on the question of infringement is not competent; but where they point out similarities of language and other *indicia* of infringement, the testimony may be used to assist the court in its examination.[22]

(D) *Parol Evidence*—(1) Of Assignment. Parol evidence of the assignment of an interest in a copyright is sufficient, unless objected to or rebutted.[23]

(2) Of Similarities. On the trial of a suit for infringement of a copyright a witness cannot testify as to identities between the parts of the alleged infringing

which the pirated edition corresponds *verbatim*.

13. Per Lord Eldon in Mawman *v.* Tegg, 2 Russ. 385, 393, 26 Rev. Rep. 112, 3 Eng. Ch. 385.

14. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400 [*reversing* 64 Fed. 360, 25 L. R. A. 441].

15. Williams *v.* Smythe, 110 Fed. 961.

16. Dielman *v.* White, 102 Fed. 892.

17. Osgood *v.* A. S. Aloe Instrument Co., 83 Fed. 470; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306.

18. Lucas *v.* Cooke, 13 Ch. D. 872, 42 L. T. Rep. N. S. 180, 28 Wkly. Rep. 439; Leader *v.* Strange, 2 C. & K. 1010, 61 E. C. L. 1010.

Knowledge of copyright.— In England it has been held that in an action for an infringement of copyright by merely publishing a work printed or caused to be printed by others, knowledge of the copyright so infringed must be proved. Leader *v.* Strange, 2 C. & K. 1010, 61 E. C. L. 1010.

19. Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514.

Evidence of register.— The certificate of registration of a copyright is *prima facie* evidence that the requirements of law previous to its issuance have been complied with (Bernard *v.* Bertoni, 14 Quebec 219); and where the register of copyrights certifies that he has made search and cannot find any copies of the books on file, evidence that the author had mailed two copies of the book, addressed to the librarian of congress, is sufficient to show filing (Patterson *v.* J. S. Ogilvie Pub. Co., 119 Fed. 451).

20. Merrell *v.* Tice, 104 U. S. 557, 26 L. ed. 854. See also McMurty *v.* Popham, 8 Ky. L. Rep. 704.

21. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1.

22. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400.

23. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547.

work and the original work, where the works themselves are not produced in court or their absence accounted for.[24]

(E) *Statement of Co-Defendant.* In an action for damages for the infringement of a copyright a statement by one of the defendants that he had disposed of a certain number of copies of their work is not available against the other defendant, a corporation, although he is an officer of such corporation.[25]

(F) *Evidence of Authorship.* The fact that the plan, arrangement, and combination of a copyrighted work originated in the brain of its author may be proved by some person other than such author.[26]

(G) *Experimental Tests.* Where the relative rate of speed with which the original and alleged infringing works have been compiled is relied on as evidence tending to show that an unfair use must have been made of the earlier work, it is within the discretion of the court to allow the defendant in rebuttal to give an ocular demonstration of the speed with which its editors can do such work.[27]

(H) *Affidavits in Rebuttal.* On the question of infringement, a complainant may read affidavits in rebuttal, although in support of his title he must depend upon the affidavits filed with his bill.[28]

(V) *Sufficiency*—(A) *To Show Infringement*—(1) In General. In order to show piracy it is not sufficient to show that parts of the defendant's work may have been suggested by that of the plaintiff, or that some parts of it have resemblances in methods and details to the plaintiff's. It must be further shown that such resemblances are so close, full, uniform, and striking as fairly to lead to the conclusion that the one is a substantial copy of the other or mainly borrowed from it;[29] but where this is shown, a simple denial by the defendant that he made use of the plaintiff's work is insufficient to overcome the *prima facie* case so made.[30]

24. Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

25. Chils *v.* Gronlund, 41 Fed. 145.

26. Bullinger *v.* Mackey, 4 Fed. Cas. No. 2,127, 15 Blatchf. 550.

27. As tending to show an unfair use of its syllabi, complainant showed that defendant's regular and experienced editors digested from twenty to forty cases per day, while complainant's own editors, working from the opinions alone, averaged only from four to seven cases a day. An independent witness, the official reporter of the court of appeals of New York, with twenty-one years' experience, testified that he had not been able to do over seven cases a day, and that his average was about four. Thereupon defendant offered to produce some of its editors who, in the master's presence, with cases of average length to be selected by him, would, under conditions insuring fairness, show their rate of speed in original work. It was held that it was in the discretion of the court to reject this offer, on complainant's objection; that the rate of speed attained under such conditions would not fairly represent the average speed for weeks and months continuously, under varying conditions, mental and physical; and that on the whole not much weight was to be attached to the argument from the rate of speed as, to be of much value, the character of the digest paragraphs would have to be carefully investigated. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400 [*affirming* 64 Fed. 360, 25 L. R. A. 441].

28. Farmer *v.* Calvert Lithographing, etc., Co., 8 Fed. Cas. No. 4,651, 1 Flipp. 228.

29. Myers *v.* Callaghan, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441; Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768.

Similarity of arrangement.— In connection with other evidences of infringement, the court will consider the arrangement of the books infringing the original edition, and such evidence will be entitled to weight in judging of the fact of infringement. Myers *v.* Callaghan, 20 Fed. 441.

In a suit for infringement of the copyright of a directory, proof that defendant had in its office three pages concededly taken from the complainant's book, cut, pasted, and edited apparently for the purpose of being used as copy for defendant's book, is sufficient to entitle complainant to a preliminary injunction, unless a denial of the intention to use such pages as copy is supported by a clear showing of the methods used by defendant, and the sources from which his copy was obtained. Chicago Directory Co. *v.* U. S. Directory Co., 122 Fed. 189.

30. West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400, where, however, it appeared that defendant's principal editor had digested some seven thousand of the entire thirteen thousand three hundred cases digested from complainant's pamphlets. Two of these cases were found to contain suggestive verbal identities, but no errors in common with the syllabi, and it was held that the denial of such editor that he had made use of the syllabi

(2) Proof of Animus Furandi. When in addition to the resemblance between a copyrighted book and one which is claimed to infringe it, there is an intent on the part of the author of the second work to appropriate the labors of the author of the first work, the presumption which results therefrom constitutes proof of infringement.[31]

(3) Infringement of Other Work. Since it is immaterial where an alleged infringer obtains suggestions for making variations in a copyrighted work, another work offered in evidence to show that a certain feature was taken from it is irrelevant.[32]

(4) Segregation of Infringing Matter. It is not necessary, in an action for infringement of copyright, to segregate the matter which is claimed to have been infringed, where the defendant or his employee has so mingled the matter contained in its publication with that contained in the original work that no one except the defendant himself or his employee can segregate the pirated matter from the original matter.[33]

(5) False Denial of Infringement. For a defendant falsely to deny that he has copied or taken any idea from another work is a strong indication of *animus furandi*.[34]

(B) *To Rebut Infringement* — (1) Knowledge of Infringement. Evidence that the plaintiff knew that the defendant was infringing his copyright and did not object to it is not sufficient to warrant the inference that the plaintiff assented to the infringement.[35]

(2) Want of Notice of Copyright. The *prima facie* case that notice of copyright was inscribed on all copies, made by affidavits of those in charge of preparing the copies, is not overthrown by evidence that the original was without the statutory notice when it came into the defendant's possession, but it must be shown that it lacked such notice when it left the plaintiff's possession.[36]

(3) Production of Original Manuscript. It has been held to be of greatest importance as evidence of *bona fides* that the defendant should produce his original manuscript.[37]

(C) *To Show Date of Publication.* The date on the title-page of a book is not conclusive evidence of the time of its publication;[38] nor is the fact that a person on a certain date heard a piece of music performed from printed sheets evidence that the music had been published as a book at that date.[39]

(D) *To Show Assignment.* A receipt for the purchase-money of a copyrighted work is no evidence of its assignment.[40]

7. Damages — a. In General. Damages as well as profits cannot be recovered in equity for an infringement of copyright.[41] Nor can substantial damages be allowed where it appears that the matters charged have not worked any prejudice to the plaintiff.[42]

was sufficient to rebut complainant's *prima facie* case so far as concerned his own work.

31. Beauchemin *v.* Cadieux, 10 Quebec Q. B. 255.

32. Springer Lithographing Co. *v.* Falk, 59 Fed. 707, 8 C. C. A. 224.

33. Edward Thompson Co. *v.* American Law Book Co., 119 Fed. 217 [*citing* with approval West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400].

34. Jarrold *v.* Houlston, 3 Jur. N. S. 1051, 3 Kay & J. 708.

35. Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

36. Falk *v.* Gast Lithographing, etc., Co., 40 Fed. 168, 48 Fed. 262.

37. Hotten *v.* Arthur, 1 Hem. & M. 603, 32 L. J. Ch. 771, 9 L. T. Rep. N. S. 199, 11 Wkly. Rep. 934. See also Spiers *v.* Brown, 6 Wkly. Rep. 352.

38. Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182.

39. Boosey *v.* Davidson, 13 Q. B. 257, 13 Jur. 678, 18 L. J. Q. B. 174, 66 E. C. L. 257.

40. Lover *v.* Davidson, 1 C. B. N. S. 182, 87 E. C. L. 182.

41. Chapman *v.* Ferry, 12 Fed. 693, 8 Sawy. 191.

42. Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306.

Nominal damages.—In an action to recover penalties for several infringements of copyright under section 6 of the fine arts copyright act of 1862, the court can award a sum of money which, in relation to each of the several offenses, may represent only a frac-

b. For Literary Piracy — (I) *In General.* In case of literary piracy the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies;[43] but where the defendant uses only part of the matter of the original, and his edition is a much cheaper one and sold at a very much lower price, the measure of damages is the amount of profits realized by the defendant, and not the amount of profits that would have been realized to the copyright owner by the sale of an equal number of copies of the copyright edition.[44] This latter rule also maintains in an action of trover,[45] under the English statute.[46]

(II) *Vindictive Damages.* In Canada, where there is clear proof of counterfeiting, the damages will not be measured merely by the price realized through the sale of the counterfeit, but vindictive damages will be allowed.[47]

c. For Infringement of Play-Right. In a common-law action for damages for the invasion of play-right there is no limit, as in the statute, to the amount of damages. That is a question of proof, to be determined by the evidence in the case, and in relation to which the jury are to form their own conclusions.[48]

8. Penalties and Forfeitures. The penalties and forfeitures provided in case of maps, plats, charts, dramatic or musical compositions, and works of art, are penal in character, and highly punitive in effect, and must be strictly construed.[49] The provision imposing a penalty of one dollar per sheet applies only to such sheets as have been found in the defendant's possession for the purpose of forfeiture and condemnation, and until the sheets have been so found, no right of action to recover such penalty accrues.[50]

tional part of the lowest coin in the realm as the penalty for each offense, and is not bound to award such a sum as will represent a farthing at the least in respect of each offense. Hildesheimer *v.* Faulkner, [1901] 2 Ch. 552, 70 L. J. Ch. 800, 85 L. T. Rep. N. S. 322, 49 Wkly. Rep. 708.

Technical infringement.— Where the great bulk of matter which might be copyrighted seemed to be made up independently of the infringed volume, and in many instances where a similarity could be clearly traced such similarity was trivial and unimportant, although there was technically an infringement of plaintiff's copyright, defendant was required to pay a small royalty, and a forfeiture of the whole edition was denied. Myers *v.* Callaghan, 20 Fed. 441.

43. Pike *v.* Nicholas, L. R. 5 Ch. 260 note, 38 L. J. Ch. 529, 20 L. T. Rep. N. S. 906, 17 Wkly. Rep. 842. But see Bernard *v.* Bertoni, 14 Quebec 219, where it was held that the measure of damages is the amount realized by the party guilty of the infringement.

In Canada the owner of a duly registered copyright is entitled, by way of damages, to all the profits realized by the infringer from the sale of the infringing copy, and also to the cost of expert testimony necessary to establish the infringement. Beauchemin *v.* Cadieux, 22 Quebec Super. Ct. 482.

44. Scribner *v.* Clark, 50 Fed. 473 [*distinguishing* Pike *v.* Nicholas, L. R. 5 Ch. 260 note, 38 L. J. Ch. 529, 20 L. T. Rep. N. S. 906, 17 Wkly. Rep. 842]. See also Bernard *v.* Bertoni, 14 Quebec 219.

45. Muddock *v.* Blackwood, [1898] 1 Ch. 58, 67 L. J. Ch. 6, 77 L. T. Rep. N. S. 493.

46. 5 & 6 Vict. c. 45, § 23.

47. Bernard *v.* Bertoni, 16 Quebec 73.

48. Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

49. Bolles *v.* Outing Co., 175 U. S. 262, 20 S. Ct. 94, 44 L. ed. 156 [*affirming* 77 Fed. 966, 23 C. C. A. 594]; Backus *v.* Gould, 7 How. (U. S.) 798, 12 L. ed. 919; Child *v.* New York Times Co., 110 Fed. 527; Falk *v.* Curtis Pub. Co., 107 Fed. 126, 46 C. C. A. 201 [*affirming* 102 Fed. 967]; Falk *v.* Curtis Pub. Co., 98 Fed. 989; Morrison *v.* Pettibone, 87 Fed. 330; Falk *v.* Heffron, 56 Fed. 299; Sarony *v.* Ehrich, 28 Fed. 79, 23 Blatchf. 556; Schreiber *v.* Thornton, 17 Fed. 603; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540; Dwight *v.* Appleton, 8 Fed. Cas. No. 4,215.

50. The penalty imposed by U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. (1901) p. 3414] extends only to sheets found in his possession, for the purpose of forfeiture and condemnation, and does not extend to sheets which are merely proved to have been in his possession at some time within two years before the action began. Bolles *v.* Outing Co., 175 U. S. 262, 20 S. Ct. 94, 44 L. ed. 156 [*affirming* 77 Fed. 966, 23 C. C. A. 594]. See also cases cited *supra*, note 49.

Corporations — Possession of agent.— The provisions of U. S. Rev. Stat. (1878) § 4965 [U. S. Comp. Stat. (1901) p. 3414], which subjects "any person" to the forfeitures therein prescribed for having in his possession, etc., unauthorized copies of a copyrighted publication, apply as well to corporations as to natural persons; and the possession of such copies by agents of the corporation, acting in its behalf, is the possession of the corporation. Falk *v.* Curtis Pub. Co., 98 Fed. 989.

9. Costs — a. England — (i) *Books.* In actions for the infringement of literary copyright the allowance, disallowance, or apportionment of costs is a matter within the sound discretion of the court.[51] The plaintiff may be refused his costs, even though successful, if by his conduct he has induced the defendant to incur expense,[52] or if, after acquiescence and delay, he brings an action without fair notice.[53] Similarly the costs of unnecessary proceedings,[54] those of an action which should never have been brought, and in which only nominal damages are recovered,[55] or those in an action brought merely for the purpose of making money out of it,[56] may be refused. So too if the plaintiff has increased the expenses by raising other questions in which he has failed the costs will be apportioned.[57] On the other hand a successful defendant may be refused his costs where his defense is merely technical,[58] where the court is of the opinion that he has brought the action on himself, either by his conduct,[59] or by an unfair and unjust use of plaintiff's work, which does not amount to piracy.[60]

(ii) *Play-Right.* In case of infringement of play-right the statute provides for a full and reasonable indemnity as to costs which, being given by statute, are not in the discretion of the court, but must be awarded the successful plaintiff.[61]

(iii) *Engravings and Prints.* The plaintiff in an action for the infringement of copyright in an engraving or print is entitled to "full costs," which has been construed to mean the ordinary costs as between party and party.[62] Being given by statute, they are probably not within the discretion of the court.[63]

b. United States. In the United States there are no statutory provisions as

The amount of the forfeiture is determined solely by the number of sheets, without regard to the number of copies of the work that may be printed on the sheet. Falk *v.* Heffron, 56 Fed. 299.

Copies beyond control of defendant — Recovery of value.— When the infringing copies are out of the possession and beyond the control of the infringer, the proprietor of the copyright cannot recover of him their value in an action at law. Sarony *v.* Ehrich, 28 Fed. 79, 23 Blatchf. 556.

The copies must be so far perfected as to constitute an imitation of a substantial part, and as to establish identity. Consequently sheets seized in defendant's possession, after the first or outline impression only of the photograph had been taken, are not forfeitable, although it was the defendant's intention to complete the copies. Morrison *v.* Pettibone, 87 Fed. 330.

51. Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720; Walter *v.* Steinkopff, [1892] 3 Ch. 489, 61 L. J. Ch. 521, 67 L. T. Rep. N. S. 184, 40 Wkly. Rep. 599. See also Upmann *v.* Forester, 24 Ch. D. 231.

52. Maxwell *v.* Somerton, 30 L. T. Rep. N. S. 11, 22 Wkly. Rep. 313.

53. Walter *v.* Steinkopff [1892] 3 Ch. 489, 61 L. J. Ch. 521, 67 L. T. Rep. N. S. 184, 40 Wkly. Rep. 599.

54. Kelly *v.* Hodge, 29 L. T. Rep. N. S. 387.

55. Dicks *v.* Brooks, 15 Ch. D. 22, 49 L. J. Ch. 812, 43 L. T. Rep. N. S. 71, 29 Wkly. Rep. 87, where the plaintiff was ordered to pay the defendant's costs as well as his own.

56. Wall *v.* Taylor, 11 Q. B. D. 102, 52 L. J. Q. B. 558, 31 Wkly. Rep. 712.

57. Metzler *v.* Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. Rep. N. S. 544, 26 Wkly. Rep. 577. See also Page *v.* Wisden, 20 L. T. Rep. N. S. 435, 17 Wkly. Rep. 483, where it was held that although copyright may be claimed in part of a work only, the whole of which is registered, the part in which copyright is claimed should be distinguished in the bill, as otherwise the costs unnecessarily incurred must be borne by the plaintiff.

58. Liverpool General Brokers' Assoc. *v.* Commercial Press Tel. Co., [1897] 2 Q. B. 1, 66 L. J. Q. B. 405, 76 L. T. Rep. N. S. 292.

59. Kelly's Directories *v.* Gavin, [1901] 1 Ch. 374, 70 L. J. Ch. 237, 84 L. T. Rep. N. S. 581, 49 Wkly. Rep. 313, where the defendant, by lending his name to a publication, led the plaintiff to believe that he had "caused" it to be printed.

60. Pike *v.* Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. 435, 18 Wkly. Rep. 321; Cobbett *v.* Woodward, L. R. 14 Eq. 407, 41 L. J. Ch. 656, 27 L. T. Rep. N. S. 27, 20 Wkly. Rep. 963.

61. Reeve *v.* Gibson, [1891] 1 Q. B. 652, 60 L. J. Q. B. 451, 39 Wkly. Rep. 420; Hasker *v.* Wood, 54 L. J. Q. B. 419, 33 Wkly. Rep. 697. See also Judicature Act (1890), § 5.

"Full and reasonable indemnity as to all costs, charges, and expenses" (5 & 6 Vict. c. 97, § 2) probably means nothing more than the usual costs as between party and party. See Reeve *v.* Gibson, [1891] 1 Q. B. 652, 60 L. J. Q. B. 451, 39 Wkly. Rep. 420; Avery *v.* Wood, [1891] 3 Ch. 115, 65 L. T. Rep. N. S. 122, 39 Wkly. Rep. 577.

62. Avery *v.* Wood, [1891] 3 Ch. 115, 65 L. T. Rep. N. S. 122, 39 Wkly. Rep. 577.

63. See Reeve *v.* Gibson, [1891] 1 Q. B. 652, 60 L. J. Q. B. 451, 39 Wkly. Rep. 420; Hasker *v.* Wood, 54 L. J. Q. B. 419, 33 Wkly. Rep. 697.

to costs in copyright suits, and consequently their allowance is governed by the general principles of law applicable in other proceedings.[64]

10. Limitations and Laches — a. Limitations — (I) *England* — (A) *Literary Copyright.* All actions, suits, bills, indictments, or informations for any offense committed against the act shall be brought, sued, and commenced within twelve calendar months next after such offense is committed, or else the same shall be void and of no effect.[65]

(B) *Play-Right and Musical Performing Right.* Actions and suits for the infringement of play-right or performing right must be brought within twelve calendar months of the offense.[66]

(C) *Engravings and Prints.* Under 8 Geo. II, c. 13, and the supplemental and amendatory statute of 7 Geo. III, c. 38, actions for penalties must be brought within three months after the discovery of the infringement, and within six months after the offense. These statutes, however, do not apply to an action for damages under 17 Geo. III, c. 57, to which the limitation for actions on the case generally is applicable.[67]

(D) *Sculpture.* An action for the infringement of copyright in sculpture must be brought within six months of the discovery of the offense.[68]

(E) *Paintings, Drawings, and Photographs.* No special limit having been fixed by statute, an action for the infringement of a painting, drawing, or photograph will not be barred for six years.[69]

(II) *United States.* No action can be maintained for a penalty or forfeiture unless it be brought within two years after the cause of action arises,[70] and this is held to include damages under U. S. Rev. Stat. (1878) § 4964 [U. S. Comp. Stat. (1901) p. 3413] in respect to books.[71]

b. Laches — (I) *Acquiescence and Consent.* Consent, whether express or implied, or long acquiescence in an infringement, will prevent relief in equity.[72]

64. See, generally, Costs. See also Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768, where the defendant was given the right to elect a trial by jury of the issue of infringement on payment of the ordinary taxable costs up to such time, the expense of printing the record to be divided between the parties, and the future costs to abide the result of the verdict and decree of the court.

65. 5 & 6 Vict. c. 45, § 26.

Statute construed.—In Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640, it was held that even though the remedy for the offense is barred, the proprietor may sue for subsequent offenses. See also Macmillan *v.* Suresh Chunder Deb, Ind. L. R. 17 Calc. 951 [*cited* in MacGillivray Copyright 92].

Meaning of "offense."— It has been held that the words "for any offense committed" refer only to actions to enforce penalties, and that therefore the limitation does not apply to actions for damages. Clark *v.* Bell, 10 Mor. Dic. Dec. Lit. Prop. App. 9 [*cited* in Drone Copyright 476]; Stewart *v.* Black, 9 Sc. Sess. Cas. (2d ser.) 1026 [*cited* in MacGillivray Copyright 92]. See also Weldon *v.* Dicks, 10 Ch. D. 247, 262, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639, where it is said *obiter* by Malins, V. C., that in his opinion the limitation referred only to an action for penalties.

66. 3 & 4 Wm. IV, c. 15, § 3.

67. Graves *v.* Mercer, 16 Wkly. Rep. 790. See also, generally, Limitations of Actions.

68. 54 Geo. III, c. 56.

69. 16 Jac. I, c. 16, § 3.

70. U. S. Rev. Stat. (1878) § 4968 [U. S. Comp. Stat. (1901) p. 3416]; Reed *v.* Carusi, 18 Fed. Cas. No. 11,642, Taney 72.

Every printing for sale is a new infraction of the copyright, although the plates used were engraved more than two years before the institution of the action. Reed *v.* Carusi, 18 Fed. Cas. No. 11,642, Taney 72.

71. Wheeler *v.* Cobbey, 70 Fed. 487.

72. Heine *v.* Appleton, 11 Fed. Cas. No. 6,324, 4 Blatchf. 125; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Johnson *v.* Wyatt, 2 De G. J. & S. 18, 9 Jur. N. S. 1333, 33 L. J. Ch. 394, 12 Wkly. Rep. 234, 67 Eng. Ch. 15; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646; Bailey *v.* Taylor, 3 L. J. Ch. O. S. 66; Straham *v.* Graham, 17 L. T. Rep. N. S. 457; Latour *v.* Bland, 2 Stark. 382, 3 E. C. L. 455; Allen *v.* Lyon, 5 Ont. 615.

"Not only conduct with the party with whom the contest exists, but conduct with others, may influence the court in the exercise of its equitable jurisdiction by injunction." Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 729, 14 Eng. Ch. 711.

"In order that the defence should prevail, it must be made out that there is proof of

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(11) *DELAY.* Mere delay in bringing suit is no defense to the suit when brought, where there is no proof of acquiescence in, or failure to object to, the acts constituting infringement, and the defendant's conduct has not been induced by any act or omission of those interested in the copyright.[73] Where, however, the plaintiff has been guilty of culpable negligence in seeking redress, relief will be refused in equity, although the legal right may be acknowledged.[74]

IV. INTERNATIONAL COPYRIGHT.

A. England — 1. IN GENERAL. Works first produced in a foreign country with which England has a treaty for the mutual protection of literary and artistic works are protected from infringement in the British dominions under the domestic legislation of the United Kingdom;[75] but works first published in a foreign country with which there is no treaty, or to which the provisions of the international copyright acts have not been extended by order in council are in no way protected from infringement.[76]

2. WORKS PROTECTED — a. In General. In order to claim protection in England the work must be such as is protected in the country of its origin, and also such as is entitled to copyright in the United Kingdom.[77]

at least one of three propositions: viz., either that the Plaintiff authorized what was done by the Defendants, or that his conduct conduced to what was done by them; or that there is enough to displace the *prima facie* proof of the Plaintiff's copyright." Morris *v.* Ashbee, L. R. 7 Eq. 34, 38, 19 L. T. Rep. N. S. 550.

Custom of trade is insufficient to imply acquiescence or consent. Maxwell *v.* Somerton, 30 L. T. Rep. N. S. 11, 22 Wkly. Rep. 313. See also Walter *v.* Steinkapff, [1892] 3 Ch. 489, 61 L. J. Ch. 521, 67 L. T. Rep. N. S. 184, 40 Wkly. Rep. 599; Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535, 2 New Rep. 438, 11 Wkly. Rep. 876; Campbell *v.* Scott, 6 Jur. 186, 11 L. J. Ch. 166, 11 Sim. 31, 34 Eng. Ch. 31.

The belief that consent has been obtained is no defense to an action for infringement, although it is ground for the infliction of a merely nominal penalty. *Ex p.* Beal, L. R. 3 Q. B. 387, 9 B. & S. 395, 37 L. J. Q. B. 161, 18 L. T. Rep. N. S. 285, 16 Wkly. Rep. 852.

73. Black *v.* Henry G. Allen Co., 56 Fed. 764; Gilmore *v.* Anderson, 38 Fed. 846; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Greene *v.* Bishop, 10 Fed. Cas. No. 5,763, 1 Cliff. 186; Hogg *v.* Scott, L. R. 18 Eq. 444, 43 L. J. Ch. 705, 31 L. T. Rep. N. S. 73, 163, 22 Wkly. Rep. 640; Weldon *v.* Dicks, 10 Ch. D. 247, 48 L. J. Ch. 201, 39 L. T. Rep. N. S. 467, 27 Wkly. Rep. 639; Platts *v.* Button, Coop. 303, 10 Eng. Ch. 303, 19 Ves. Jr. 447; Buxton *v.* James, 5 De G. & Sm. 80, 16 Jur. 15; Maxwell *v.* Somerton, 30 L. T. Rep. N. S. 11, 22 Wkly. Rep. 313; Latour *v.* Bland, 2 Stark 382, 3 E. C. L. 455.

Delay in prosecuting earlier suits. — The failure of the publishers of a foreign encyclopedia to press to completion suits for infringement of copyrights of certain volumes does not estop them from prosecuting suits for infringement of parts of later volumes. Black *v.* Henry G. Allen Co., 56 Fed. 764.

Delay while law doubtful. — The copyright of work of an alien was sold to a British subject, who published it in this country in 1844. The copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against the infringement; but in 1851, within a reasonable time after the decision of a case in the exchequer chamber had established the general question of copyright in an alien, he filed his bill and moved to restrain the publication of the pirated work. It was held that there had been so much delay as to disentitle him to an injunction. Buxton *v.* James, 5 De G. & Sm. 80, 16 Jur. 15.

74. Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Lewis *v.* Chapman, 3 Beav. 133, 43 Eng. Ch. 133; Rundell *v.* Murray, Jac. 311, 23 Rev. Rep. 75, 4 Eng. Ch. 311; Chappell *v.* Sheard, 1 Jur. N. S. 996, 2 Kay & J. 117, 3 Wkly. Rep. 646.

75. MacGillivray Copyright 193.

76. No order in council has been made extending the provisions of the international copyright acts to the United States. Consequently an American author or artist can only obtain English copyright under the provisions of the copyright acts, that is, those relating to domestic copyright, which require a first or simultaneous publication in Great Britain and that the author, at the time of publication, be within the British dominions. Boucicault *v.* Delafield, 1 Hem. & M. 597, 9 Jur. N. S. 1282, 33 L. J. Ch. 38, 9 L. T. Rep. N. S. 709, 12 Wkly. Rep. 101; Boucicault *v.* Chatterton, 35 L. T. Rep. N. S. 541 [*affirmed* in 5 Ch. D. 267, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287]. See also *supra*, I, E, 1, e, (III).

Before the statutes the court would not protect a foreigner's copyright. Delondre *v.* Shaw, 2 Sim. 237, 2 Eng. Ch. 237. See also Guichard *v.* Mori, 9 L. J. Ch. O. S. 227; Page *v.* Townsend, 5 Sim. 395, 9 Eng. Ch. 395.

77. Hanfstaengl *v.* Empire Palace, [1894] 3 Ch. 109, 63 L. J. Ch. 681, 70 L. T. Rep.

b. Translations. A translation of a foreign play, in order that it may be protected under the law of international copyright, does not necessarily require to be an absolutely literal translation. It is sufficient if it is substantially a translation, from which the character of the original work may be understood.[78]

c. Works Published Before Dec. 6, 1887. Works published before Dec. 6, 1887, are protected except in so far as such protection may prejudice rights or interests arising from or in connection with such works which are subsisting and valuable at that date.[79]

3. Proceedings to Obtain — a. Registration and Delivery of Copies. Where an order in council respecting any foreign country is made under the international copyright acts, the provisions of those acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as is provided by the order.[80]

b. Notice of Copyright. A foreign print cannot claim copyright unless the date of publication and the name of the proprietor are engraved thereon.[81]

4. Duration of Copyright. The international copyright act of 1886 limits the duration of the term of copyright to that prescribed by the law of the country of origin of the proprietor.[82]

5. Infringement — a. Importation of Copies. Where an international copyright is owned by different persons in different countries, the owner in one country has not the right to import his books into the other's country.[83]

b. Remedies. The remedies for infringement of copyright are governed by the law of the country in which the infringement takes place.[84]

B. United States. By the act of congress of March 3, 1891, the provisions of the copyright laws are extended to citizens and subjects of a foreign state or nation only when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens, or when such foreign state or nation is a party to an international

N. S. 854, 7 Reports 385, 42 Wkly. Rep. 681.

78. Wood *v.* Chart, L. R. 10 Eq. 193, 39 L. J. Ch. 641, 22 L. T. Rep. N. S. 432, 18 Wkly. Rep. 822; Lauri *v.* Renad, [1892] 3 Ch. 402, 61 L. J. Ch. 580, 67 L. T. Rep. N. S. 275, 40 Wkly. Rep. 679.

79. Moul *v.* Groenings, [1891] 2 Q. B. 443; Hanfstaengl Art Pub. Co. *v.* Holloway, [1893] 2 Q. B. 1, 57 J. P. 407, 62 L. J. Q. B. 347, 68 L. T. Rep. N. S. 676, 5 Reports 358; Schauer *v.* Field, [1893] 1 Ch. 35, 62 L. J. Ch. 72, 68 L. T. Rep. N. S. 81, 3 Reports 78, 41 Wkly. Rep. 201.

80. Haenfstaengl *v.* American Tobacco Co., [1895] 1 Q. B. 347 [*approving* Haenfstaengl Art Pub. Co. *v.* Holloway, [1893] 2 Q. B. 1, 57 J. P. 407, 62 L. J. Q. B. 347, 68 L. T. Rep. N. S. 676, 5 Reports 358, and *disapproving* Fishburn *v.* Hollingshead, [1891] 2 Ch. 371, 60 L. J. Ch. 768, 64 L. T. Rep. N. S. 647]. *Compare* Wood *v.* Chart, L. R. 10 Eq. 193, 39 L. J. Ch. 641, 22 L. T. Rep. N. S. 432, 18 Wkly. Rep. 822, decided under 15 Vict. c. 12, § 8.

Where the order in council requires registry, neglect to comply with its requirements will prevent an author's having the benefit of the statutes. Wood *v.* Boosey, L. R. 2 Q. B. 340, 7 B. & S. 869, 36 L. J. Q. B. 103, 15 L. T. Rep. N. S. 530, 15 Wkly. Rep. 309 [*affirmed* in L. R. 3 Q. B. 223, 9 B. & S. 175, 37 L. J. Q. B. 84, 18 L. T. Rep. N. S. 105, 16 Wkly. Rep. 485]; Fairlie *v.* Boosey, 4 App. Cas. 711, 48 L. J. Ch. 697, 41 L. T. Rep. N. S. 73, 28 Wkly. Rep. 4; Cassell *v.* Stiff, 2 Kay & J. 279.

81. Avanzo *v.* Mudie, 10 Exch. 203, under 7 & 8 Vict. c. 12, and 8 Geo. III, c. 13. But see Scrutton Copyright (3d ed.) 213.

82. Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56.

83. Pitts *v.* George, [1896] 2 Ch. 866, 66 L. J. Ch. 1, 75 L. T. Rep. N. S. 320, 45 Wkly. Rep. 164, where it was held that where an English copyright is subsisting in a book first published in a foreign country, it is unlawful for any one, without the consent of the proprietor of the English copyright, to import into England for sale copies of the book published abroad, although lawfully printed by the owner of the original copyright in the country where the book was first published.

84. Baschet *v.* London Illustrated Standard Co., [1900] 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. Rep. N. S. 509, 48 Wkly. Rep. 56. See also Morocco Bound Syndicate *v.* Harris, [1895] 1 Ch. 534, where it was held that an English court has no jurisdiction, at the instance of the English proprietor of the performing right of a musical dramatic work of an English author, to restrain a threatened infringement by a British subject in any foreign country comprised in the International Copyright Union.

agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of either of these conditions as aforesaid shall be determined by the president of the United States by proclamation made from time to time as the purposes of the act may require.[85]

COR. Heart.[1]

CORAAGE. See CORAAGIUM.

CORAAGIUM or **CORAAGE.** Measures of corn; an unusual and extraordinary tribute, arising only on special occasions.[2]

CORAL. A general term for the hard calcareous skeleton secreted by the marine cœlenterate polyps for their support and habitation (polypidom).[3]

CORAM. Before; in the presence of. Applied to persons only.[4]

CORAM DOMINO REGE. Before our lord the king.[5]

CORAM IPSO REGE. Before the king himself; the old name of the court of king's bench, which was originally held before the king in person.[6]

CORAM NOBIS. Before us ourselves, (the king, *i. e.*, in the king's or queen's bench);[7] the name given to writs of error on judgments of the court of king's (or queen's) bench, so called from that clause in the old forms which described the record and process as remaining "before us," (*quæ coram nobis resident*); that being the style of the court.[8] (See, generally, JUDGMENTS.)

CORAM NON JUDICE. In presence of a person not a judge.[9]

CORAM PARIBUS. Before the peers or freeholders.[10]

CORAM SECTATORIBUS. Before the suitors.[11]

CORAM VOBIS. Before you; a writ of error directed by a court of review to the court which tried the cause, to correct an error in fact;[12] writs of error to correct the judgments of other courts, (such as the common pleas,) are said to be *coram vobis*; the record and process being stated to remain "before you," (*quæ*

85. 26 U. S. Stat. at L. 1110 [U. S. Comp. Stat. (1901) p. 3417].

Prior to the passage of the International Copyright Act (26 U. S. Stat. at L. 1106, amending Rev. Stat. (1878) § 4952 [U. S. Comp. Stat. (1901) p. 3406]) a foreign author could not assign or transfer to a citizen his manuscript or common-law right of property therein, so that the latter could have copyright protection within the United States. Fraser *v.* Yack, 116 Fed. 285, 53 C. C. A. 563 [*citing* with approval Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452].

Proof of place of printing.— Since the act of March 3, 1891, it seems that it would be necessary to prove that the work was printed from type set up within the United States, or from plates made therefrom. In 1902, in the case of Patterson *v.* J. S. Ogilvie Pub. Co., 119 Fed. 451, it was held that the complainant in that suit was not obliged to prove that it was printed from type set within the United States, or from plates made therefrom, on the ground that U. S. Rev. Stat. (1878) § 4956 [U. S. Comp. Laws (1901) p. 3407] had only been amended so as to require such proof by the act of March 3, 1901. The book was published in 1890.

1. Burrill L. Dict. [*citing* Kelham Dict.].

2. Distinguished from services; and mentioned in connection with "hidage" and "carvage." Black L. Dict.

3. Century Dict. See also Bailey *v.* Schell, 2 Fed. Cas. No. 745. 5 Blatchf. 195.

4. Burrill L. Dict. [*citing* Townsend Pl. 22].

5. Black L. Dict.

6. 3 Bl. Comm. 41; Burrill L. Dict. [*citing* Bracton, fol. 362].

7. Black L. Dict.

8. Burrill L. Dict. [*citing* 1 Archbold Pr. 234, 276; 2 Tidd Pr. 1136]. See also Sanders *v.* State, 85 Ind. 318, 327, 44 Am. Rep. 29; Bridendolph *v.* Zellers, 3 Md. 325, 333; Albree *v.* Johnson, 1 Fed. Cas. No. 146, 1 Flipp. 341.

9. Black L. Dict. See also 3 Bl. Comm. 111; Kent Comm. 317.

Proceeding coram non judice.—When a suit is brought and determined in a court which has no jurisdiction in the matter, it is then said to be *coram non judice*, and the judgment is void. Black L. Dict. See also Little *v.* Dyer, 138 Ill. 272, 281, 27 N. E. 905, 32 Am. St. Rep. 140; Larue *v.* Deslauriers, 5 Can. Supreme Ct. 91, 128; Graham *v.* McArthur, 25 U. C. Q. B. 478, 484; Wragg *v.* Garvis, 5 U. C. Q. B. O. S. 290, 292; and CERTIORARI, 6 Cyc. 800.

10. Burrill L. Dict.

The attestation of deeds, like all other solemn transactions, was originally done only *coram paribus*. Black L. Dict. [*citing* 3 Bl. Comm. 307].

11. Burrill L. Dict. [*citing* Cro. Jac. 582].

12. Black L. Dict. [*citing* 3 Stephen Comm. 642].

coram vobis resident), that is, before the justices of the court.[13] (See, generally, APPEAL AND ERROR.)

CORAUNT. Passing; running; current.[14]

CORD. A measure of wood, containing one hundred and twenty-eight cubic feet;[15] a quantity of wood eight feet long, four feet broad, and four feet high.[16]

CORDAGE. A general appellation to all stuff to make ropes and for all kinds of ropes belonging to the rigging of a ship.[17]

CORDIAL. Any medicine which increases strength, dispels languor, and promotes cheerfulness; a sweet and aromatic liquor.[18] (See, generally, CUSTOMS DUTIES; INTOXICATING LIQUORS.)

CORDUROY. A thick stuff especially used for the outer garments of men engaged in rough labor, field sports, and the like.[19]

CO-RESPONDENT. A person summoned to answer a bill, petition, or libel, together with another respondent. Now chiefly used to designate the person charged with adultery with the respondent in a suit for divorce for that cause, and joined as a defendant with such party.[20] (See, generally, DIVORCE.)

CORIUM FORISFACERE. To forfeit one's skin, applied to a person condemned to be whipped; anciently the punishment of a servant.[21]

CORN. In England, in its most general sense, all the kinds of grain which constitute the food of man and horses.[22] In English law, grain, including wheat, rye, oats, and barley.[23] In the United States the word is now generally and popularly restricted in its meaning to maize or Indian corn.[24] (Corn: Conversion of Into Whisky, see ACCESSION. See also, generally, CROPS.)

13. Burrill L. Dict. [*citing* 2 Tidd Pr. 1137].

14. Burrill L. Dict. [*citing* Kelham Dict.].

15. McMannus *v.* Louden, 53 Minn. 339, 340, 55 N. W. 139; Kennedy *v.* Oswego, etc., R. Co., 67 Barb. (N. Y.) 169, 179, 181; Robinson *v.* Grannis, 33 N. Y. Suppl. 291, 292, 67 N. Y. St. 25; Black L. Dict.

But by custom it seems that a cord may designate a cubic measurement of two hundred and fifty-six cubic feet. McManus *v.* Louden, 53 Minn. 339, 340, 55 N. W. 139. And see Robinson *v.* Grannis, 33 N. Y. Suppl. 291, 67 N. Y. St. 25.

The term "cord wood," as used in a statute, was held not to include any amount of wood less than a cord. Pray *v.* Burbank, 12 N. H. 267. *Compare* Colton *v.* King, 2 Allen (Mass.) 317, 319, construing Mass. Rev. Stat. c. 28, § 200. And see Pillsbury *v.* Locke, 33 N. H. 96, 102, 66 Am. Dec. 711.

"Cords of wood" and "cord wood" are distinguished in Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194, 195.

Cord of stone measured in the wall.— One hundred and twenty-eight feet of rough stone make only ninety-nine cubic feet of masonry. Robinson *v.* Grannis, 33 N. Y. Suppl. 291, 67 N. Y. St. 25.

16. Jacob L. Dict.; Wharton L. Lex.

17. Jacob L. Dict.

18. Century Dict.

Cordial as a beverage distinguished from cordial as a medicine.— See State *v.* Bennet, 3 Harr. (Del.) 565, 567 (where it is said: "Common store cordial is sweetened whisky, sold as spirituous liquor; Godfrey's cordial is a very different thing, known for, and sold as, medicine; and there can be no danger, from the sale of it, or promoting tippling, which is the evil designed to be provided for by our act of assembly"); *In re* Gourd, 49 Fed. 728, 729 (where it is said: "As to this article in the bottle, Benedictine, paragraphs 99 and 313 of the act of 1883 use the same words, to some extent, 'cordials' and 'bitters.' One names cordials as 'beverages,' and the other names cordials and quite a lot of other things as 'proprietary articles,' or articles recommended for medicine, or 'prepared according to some private formula.' It seems to me, in looking this over, that the idea of congress in those two paragraphs was to separate these things into beverages and medicinal preparations; and that whatever was medicine was to come in under one paragraph, and whatever was a beverage was to come in under the other paragraph").

19. Century Dict. [*cited* in Stewart, etc., Co. *v.* U. S., 113 Fed. 928, 929, 51 C. C. A. 558].

Distinguished from "velvet cord," "ribbed velvet," "corded velvet," etc., in Stewart, etc., Co. *v.* U. S., 113 Fed. 928, 929, 51 C. C. A. 558.

20. Black L. Dict.

21. Wharton L. Lex.

22. Webster Dict. [*cited* in Bend *v.* Georgia Ins. Co., 1 N. Y. Leg. Obs. 12, 14].

23. Burrill L. Dict. And see Rex *v.* Swatkins, 4 C. & P. 548, 551, 19 E. C. L. 643.

In the common memorandum in policies of insurance the term includes malt, pease, and beans, but not rice. Bend *v.* Georgia Ins. Co., 1 N. Y. Leg. Obs. 12, 14; Scott *v.* Bourdillion, 2 B. & P. N. R. 213; Black L. Dict. [*citing* Parke Ins. 112]; Burrill L. Dict. [*citing* 2 Arnould Ins. 112].

24. Webster Dict. [*cited* in Kerrick *v.* Van Dusen, 32 Minn. 317, 318, 20 N. W. 228]; Abbott L. Dict. See also Sullins *v.* State, 53 Ala. 474, 475 (where it is said: "'Corn,'

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy.[25]

CORN-CRIB. A crib for storing corn.[26] (Corn-crib: Breaking and Entering, see BURGLARY. Burning, see ARSON. Larceny From, see LARCENY.)

CORNER. A combination among the dealers in a specific commodity, or outside capitalists, for the purpose of buying up the greater portion of that commodity which is upon the market or may be brought to market, and holding the same back from sale, until the demand shall so far outrun the limited supply as to advance the price abnormally.[27] In surveying, an angle made by two boundary lines; the common end of two boundary lines, which run at an angle with each other.[28] (Corner: Determining Boundaries of Land, see BOUNDARIES. In the Nature of a Monopoly, see CONTRACTS; GAMING; MONOPOLIES.)

here, whatever it may elsewhere signify, or whatever it may have signified elsewhere, does not mean a cereal, or wheat, or barley, or oats, or mere grain. It means that which is termed Indian maize, and is and has been the principal breadstuff here"); Wood *v.* State, 18 Fla. 967, 969 (where it is said: "Corn is defined to be a cereal grain, and the word is commonly used in this country in place of Indian corn or maize"); Com. *v.* Pine, 3 Pa. L. J. 411, 412 (where it is said: "If we have any authority as a lexicographer in our own country, certainly it is Noah Webster. He says expressly, that by custom the term 'corn' is appropriated, in the United States, to maize; and he cites the customary phraseology that the crop of wheat is good, but the corn bad, &c. This is undoubtedly in conformity to the universal usage and understanding in the United States with regard to the term 'corn.'"

This is because the early settlers in America found maize cultivated by the Indians, and, being unfamiliar with it, they gave it the name Indian corn. Abbott L. Dict.

Shelled or in the ear.—"In this country, the term 'corn' applies mainly to maize or Indian corn, and it does not necessarily imply shelled corn. In a general sense — one in common use — it implies corn either shelled or in the ear." State *v.* Nipper, 95 N. C. 653, 654.

25. Black L. Dict.; Burrill L. Dict. See also Bacon Abr. tit. Tenure (N); 2 Bl. Comm. 74; Coke Litt. 107*a*.

26. Webster Dict. [*quoted* in Metz *v.* State, 46 Nebr. 547, 551, 65 N. W. 190].

"The words 'corn crib' and 'corn pen' have well understood and definite meanings. Everybody understands what a corn crib is and what a corn pen is, and nobody would speak of a dwelling house of even the humble class, called cabins, as either a corn pen or corn crib though it should be temporarily used for the storage of corn." Thomas *v.* State, 116 Ala. 461, 462, 22 So. 666. And see Cook *v.* State, 83 Ala. 62, 64, 3 So. 849, 3 Am. St. Rep. 688, where it is said: "We hold, that when the offense in this case was committed, the terms 'corn-pen containing corn,' and 'corn-crib containing corn,' had substantially the same popular signification; or, at least, that the phrase 'corn-crib containing corn,' included corn-pen containing corn." But see Wood *v.* State, 18 Fla. 967, 969, where it is said: "We have been unable to find this word 'corn-crib' in Worcester's Dictionary, and it is not necessarily a 'building, ship or vessel.'"

27. Black L. Dict. See also Wright *v.* Cudahy, 168 Ill. 86, 91, 48 N. E. 39 (where it is said: "In his testimony he defined a 'corner' to be 'where somebody succeeds in buying for future delivery more property of a given kind than is possible for the seller to deliver before the day of the maturity of the contract'"); Sampson *v.* Shaw, 101 Mass. 145, 3 Am. Rep. 327 ("a corner" in stocks as used in an agreement); Kent *v.* Miltenberger, 13 Mo. App. 503, 506 (where it is said: "It is thus perceived that these contracts were what are known in the slang of the exchange as 'option deals,' the seller having an option to make delivery of the commodity sold within certain days. There is much evidence in the record as to the general character of these contracts and the manner in which they are executed and discharged. It appears that delivery is always contemplated, not as a thing which will be necessarily insisted upon, but as a thing which the purchaser may insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts and which enables those who, during a particular month are on the successful side of them, to get up what is known as a 'corner.' This happens when a much greater amount of any given commodity has been sold for future delivery within a given period than can be purchased in the market. The buyers, who are called in the slang of the exchanges the 'longs,' then insist upon delivery, and by this means succeed in running up the prices to a fictitious point, at which the 'deals' are 'rung out,' between the dealers by the payment of differences, or, where the purchasers insist upon it, by actual delivery"); Kirkpatrick *v.* Bonsall, 72 Pa. St. 155, 158 (where it is said: "This, in the language of gambling speculation, is making a corner — that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power").

28. Burrill L. Dict. And see, generally, in this connection BOUNDARIES.

CORN LAWS. A former system of legislation in England, laying duties on importation of various kinds of grain.[29]

CORN RENT. A rent in wheat or malt paid on college leases by direction of 18 Eliz. c. 6.[30] (See, generally, LANDLORD AND TENANT.)

CORODIUM. A CORODY,[31] *q. v.*

CORODY or **CORRODY.** In old English law, a sum of money or allowance of meat, drink, and clothing due to the Crown from the abbey or other religious house, whereof it was founder, towards the sustentation of such one of its servants as is thought fit to receive it.[32]

COROLLARY. A collateral or secondary consequence, deduction, or inference.[33]

CORONA. The crown.[34]

CORONA MALA. The clergy who abuse their character.[35]

CORONARE. To give the tonsure, which was done on the crown, or in the form of a crown; to make a man a priest.[36]

CORONARE FILIUM. To make one's son a priest.[37]

CORONATION OATH. The oath administered to a sovereign at the ceremony of crowning or investing him with the insignia of royalty, in acknowledgment of his right to govern the kingdom, in which he swears to observe the laws, customs, and privileges of the kingdom, and to act and do all things conformably thereto.[38] (See, generally, OATHS AND AFFIRMATIONS.)

CORONATOR. A coroner.[39] (See, generally, CORONERS.)

29. Abbott L. Dict.
30. Black L. Dict.
31. Black L. Dict.
32. Wharton L. Lex. [*citing* Fitzherbert Nat. Brev. 250]. And see 1 Bl. Comm. 283; 2 Bl. Comm. 40.
It differs from a pension, in that it was allowed towards the maintenance of any of the king's servants in an abbey; a pension being given to one of the king's chaplains, for his better maintenance, till he may be provided with a benefice. Black L. Dict. See also, generally, PENSIONS.
33. Black L. Dict.
34. Burrill L. Dict.
35. Wharton L. Lex. [*citing* Blount Lex.].
36. Burrill L. Dict.
37. Black L. Dict. [*citing* Cowell].
38. Black L. Dict.
The exact form of oath is prescribed by 1 Wm. & Mary, c. 6. Wharton L. Lex.
39. Burrill L. Dict.

CORONERS

By Walter H. Michael

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CROSS-REFERENCES

For Matters Relating to:
Coroner Acting as Sheriff, see Sheriffs and Constables.
Coroner's Inquest as Evidence, see Homicide.
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I. DEFINITION.

Coroners are ancient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old time the principal con-

servators of the peace within their county.[1] In modern times they are county or municipal officers whose main duty is to hold inquests on the bodies of those who are supposed to have died violent deaths; with the additional ministerial duty, in many cases, of acting as a substitute for the sheriff in case of his incapacity to act.[2]

II. HISTORY AND FUNCTIONS AT COMMON LAW.

The office of coroner is a very ancient one at common law, and is said to be of equal antiquity with that of sheriff, the two having been ordained together to keep the peace, when the earls gave up the wardship of their counties.[3] The incumbent of the office was called coroner, or *coronator*, because he had principally to deal with pleas of the crown or those in which the king was immediately concerned.[4] Viewed in this light, the lord chief justice of the king's bench was by virtue of his office the chief coroner of England, and might if he pleased exercise the jurisdiction of a coroner in any part of the realm.[5] There were, however, other coroners in each county, usually four, but sometimes six or only two,[6] who were chosen by all the freeholders in the county court by virtue of the king's writ de coronatore eligendo.[7] They were supposed to be men of means and influence, and indeed it was provided by an early statute that "through all shires sufficient men shall be chosen to be coroners, of the most loyal and wise knights which know, will, and may best attend upon such offices, and which lawfully shall attach and present pleas of the crown."[8] And it was afterward provided that no coroner should be chosen unless he had land in fee in the same county sufficient to make him answerable to all manner of people for his miscon-

1. 2 Bacon Abr. tit. Coroners; 2 Hawkins P. C. c. 9, § 1; 4 Inst. 471; 2 Inst. 31.

"A coroner is an officer of great antiquity at the common law, whose powers and duties, like those of the sheriff, were both judicial and ministerial. By virtue of his office, like the sheriff, he was a conservator of the peace; and he has always had other duties attached to his office which do not pertain to that of sheriff. But his ministerial office is, and always has been, both in England and the United States, to act as the sheriff's substitute, in the execution of process, when the latter cannot act." Powell *v.* Wilson, 16 Tex. 59, 60 [*citing* 1 Bl. Comm. 346, 350; Burrill L. Dict.].

"Coroners also (by the common law) are conservators of the peace within the county where they be coroners; but they (as also all other the conservators of the peace by the common law) have power for the keeping of the peace only as the constables have to this day, to wit, they may take surety for the peace by obligation." Dalton Sherr. 3 [*quoted* in Davis *v.* Pembrokeshire Justices, 7 Q. B. D. 513, 514].

2. See the statutes of the several states.

By sections 1570 and 1571 of the Charter of the Greater City of New York (N. Y. Laws (1897), c. 378), the office of county coroner was abolished within the limits of the greater city, and it is provided that a certain number of coroners shall be elected in the different boroughs of the consolidated cities, who shall possess all the powers and perform all the duties vested in or imposed on coroners by any law of the state, or of the city as theretofore constituted. By this legislation the office of county coroner, within the territory of the new city, came to an end on Jan. 1, 1898. People *v.* Blair, 21 N. Y. App. Div. 213, 47 N. Y. Suppl. 495 [*affirmed* in 154 N. Y. 734, 49 N. E. 1102]; Tuthill *v.* New York, 29 Misc. 555, 61 N. Y. Suppl. 968.

3. 1 Bl. Comm. 347. In Jervis Coroners, p. 2, it is said that the office of coroner is of so great antiquity that its commencement is not known. See also U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65.

4. 2 Bacon Abr. tit. Coroners; 1 Bl. Comm. 346; 2 Hawkins P. C. c. 9, § 1; 4 Inst. 471; 2 Inst. 31.

5. 2 Bacon Abr. tit. Coroners; 1 Bl. Comm. 346; 2 Hale P. C. 53.

And the other judges of this court were also sovereign coroners. 2 Bacon Abr. tit. Coroners; 4 Inst. 173.

6. 1 Bl. Comm. 347; Fitzherbert Nat. Brev. 163; 2 Hale P. C. 56.

7. 2 Bacon Abr. tit. Coroners; 1 Bl. Comm. 347.

8. Statute of Westminster I, 3 Edw. I, c. 10.

By the statute of Merton, c. 3, enacted nearly forty years before the Statute of Westminster I, it seems to have been assumed that none but knights were elected. 2 Hawkins P. C. c. 9, § 3.

And it is said that there was an instance in the fifth year of Edward III of a man's being removed from this office because he was only a merchant. 2 Bacon Abr. tit. Coroners (A); 1 Bl. Comm. 347; 2 Inst. 32.

duct in office;[9] and if he was not possessed of property sufficient for this purpose, his fine was levied on the county as a punishment for electing an unsuitable officer.[10] Coroners, being thus required to be men of dignity and means, formerly served without compensation.[11] They were chosen for life, but were subject to removal either by being appointed to an incompatible office or by the king's writ de coronatore exonerando upon sufficient cause shown.[12] By an ancient statute, which is said to be wholly directory and declaratory of the common law, the duties of the coroner are either judicial or ministerial, but principally judicial.[13] His judicial powers and duties relate to inquiries after the manner of the death of any person who is slain, who dies suddenly, or who dies in prison, with the aid of a jury, *super visum corporis*, for if the body is not found the coroner cannot sit. In this capacity he is also to inquire concerning treasure-trove and shipwrecks.[14] His ministerial duties consisted only in acting as the sheriff's substitute when for any reason the sheriff was incapacitated to act.[15]

III. APPOINTMENT AND ELECTION.

At common law, as has been seen, the chief justice of the king's bench was coroner *virtute officii*, who by virtue of his office was the chief coroner of the realm.[16] So also there were certain coroners by charter, commission, or privilege, and these were ordinarily made by grant or commission without election, such as the coroners of particular lords of liberties and franchises, who by charter had power to create their own coroners or to be coroners themselves.[17]

9. 28 Edw. III, c. 6; 14 Edw. III, c. 8.

10. 1 Bl. Comm. 347; 2 Hale P. C. 55; 2 Inst. 175.

As the chief intent of these statutes was to prevent the choosing of persons of mean ability and circumstances, it was deemed sufficient if the coroner was a man of such substance and credit as would enable him to maintain the dignity of his office, although he were not a knight, especially as it was generally found impracticable to find knights enough who were willing to undertake the office. 2 Bacon Abr. tit. Coroners (A); 1 Bl. Comm. 347; Fitzherbert Nat. Brev. 163, 164; 2 Hawkins P. C. c. 9, § 3.

A freeholder of the county, having a place in the county where he has a right to reside, is eligible, and having been elected coroner will not be removed because he has another residence within the ambit of the county, but not a part of the county, where he has his more usual place of abode. Matter of Nottingham County, 7 L. J. Ch. O. S. 61.

11. 1 Bl. Comm. 347.

As to compensation generally see *infra*, IX.

12. 1 Bl. Comm. 348; Fitzherbert Nat. Brev. 163, 164; 2 Hale P. C. 56; 2 Hawkins P. C. c. 9, § 12.

As to removal from office generally see *infra*, X.

Coroner and deputy sheriff.— The offices of coroner and deputy sheriff are not incompatible. Wood *v.* Quincy, 11 Cush. (Mass.) 487; Colby *v.* Dillingham, 7 Mass. 475.

Coroner and county commissioner.—But the offices of coroner and county commissioner are incompatible. Rogers *v.* Slonaker, 32 Kan. 191, 4 Pac. 138.

13. 4 Edw. I, *de officio coronatoris*.

14. Abbott L. Dict.; 2 Bacon Abr. tit. Coroners; 1 Bl. Comm. 348 *et seq.*; 2 Hawkins P. C. c. 9. See also Giles *v.* Brown, 1 Mill (S. C.) 230.

As to coroners' inquests generally see *infra*, VIII.

Treasure-trove.— The jurisdiction of the coroner with regard to treasure-trove is confined to an inquiry as to who were the finders and who is suspected thereof; it is not necessary to hold an inquest for the purpose of informing the crown as to its rights. Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294.

Again, in case of death through misfortune, the coroner was to inquire of the deodand, its value, and in whose hands it was, and to seize and deliver the same to the township to be answerable to the crown for it. Reg. *v.* Polwart, 1 Q. B. 818, 1 G. & D. 211, 6 Jur. 190, 10 L. J. M. C. 118, 41 E. C. L. 792; Atty.-Gen. *v.* Eastern Counties R. Co., 3 R. & Can. Cas. 145; 2 Hale P. C. 62. Forfeiture in respect to deodands was abolished by 10 Vict. c. 62.

Anciently the coroner had some other judicial duties to perform, such as taking appeals of murder, robbery, rape, and mayhem; taking the accusation of an approver; taking the confession of felony by a felon; and taking his abjuration. 2 Hale P. C. 67, 68.

15. 2 Bacon Abr. tit. Coroners (C); 1 Bl. Comm. 348 *et seq.*; 2 Hawkins P. C. c. 9. See also Giles *v.* Brown, 1 Mill (S. C.) 230.

16. 2 Hale P. C. 53.

17. *In re* Local Government Act, 1 Q. B. 33, 65 J. P. 279, 61 L. J. Q. B. 27, 65 L. T. Rep. N. S. 614; Jewison *v.* Dyson, 11 L. J. Exch. 401, 9 M. & W. 540; 2 Hale P. C. 53.

Thus the mayor of London was by charter coroner of London; the bishop of Ely had, by

And again there were two great precincts that by royal grant had power to create coroners of their own, namely, the jurisdiction of the admiralty and of the verge.[18] But the general coroners of the counties are elected by the freeholders of the counties in the county court, by virtue of the king's writ de coronatore eligendo, issuing out of chancery and afterward returnable to the same, and consequently their authority does not terminate upon the demise of the king, as that of all judges acting only under the king's commission and not by virtue of an election.[19] The writ for the election of a coroner first recites the death or discharge of a former coroner, and then commands the sheriff to cause another to be chosen in full county court, by the assent of the county, according to the form of the statute in that case made and provided; who having taken his oath in the usual manner may do all things which belong to the office of a coroner, etc.; and then it concludes with commanding the sheriff to certify to the court the name of the person chosen.[20] In holding such court and making a return to the writ, the sheriff exercises judicial functions, and therefore a quo warranto does not lie to inquire into the validity of votes cast at the election.[21] In the United States coroners are usually elected in the same manner as sheriffs and other county officers.[22]

IV. OFFICIAL BOND.

Instead of the common-law property qualification, coroners are now usually required to execute and file a statutory bond with sufficient sureties, conditioned well and faithfully to perform all the duties appertaining to their office.[23] And such bond may, by assignment or otherwise, be put in suit by persons injured by the official misconduct of the coroner.[24] The sureties on the coroner's bond are bound for the faithful performance of his duties as sheriff where he is authorized to act as such in case of the sheriff's death or disability.[25] But as such statutes are usually directory the want of an official bond does not impair the validity of the

charter of Henry VII, power to appoint coroners within the isle of Ely; and Queen Catherine had authority under a charter from Henry VIII to nominate coroners for the hundred of Cobridge. See 2 Bacon Abr. tit. Coroners.

18. The coroner of the admiralty was appointed by the lord high admiral for inquisitions of deaths that occurred on the high seas. The coroner of the king's house, usually called the coroner of the verge, it seems, was anciently appointed by the king's letters patent; but by statute in the time of Henry VIII his appointment was settled in perpetuity in the lord steward or lord great master of the king's house for the time being. 2 Bacon Abr. tit. Coroners; 2 Hale P. C. 54; 33 Hen. VIII, c. 12.

19. *In re* Salop, 3 Swanst. 181; 2 Bacon Abr. tit. Coroners; 2 Hale P. C. 55; 2 Hawkins P. C. c. 9, § 5.

The qualification of a voter for coroner is the possession of a legal freehold. Neither an equitable freehold nor a right of common in gross will confer the right to vote. Reg. *v.* Day, 2 C. L. R. 1685, 3 E. & B. 859, 1 Jur. N. S. 107, 23 L. J. Q. B. 317, 2 Wkly. Rep. 515, 77 E. C. L. 859.

20. 2 Bacon Abr. tit. Coroners (A); 2 Hawkins P. C. c. 9, § 6.

Adjournment of election.— Where the sheriff received the writ for the election of a coroner more than six days before the next county court, it was held that he had no authority to postpone the election to an adjourned term fourteen days afterward, and that an election at such adjourned term was void. Matter of Stafford County, 5 L. J. Ch. O. S. 26, 2 Russ. 475, 3 Eng. Ch. 475. See also Reg. *v.* Grimshaw, 10 Q. B. 747, 11 Jur. 965, 16 L. J. Q. B. 385, 59 E. C. L. 747.

Amending return.— The sheriff may be permitted to amend his return to avoid the necessity of a new election. *In re* Hemel Hempstead, 2 Wkly. Rep. 630.

Issuance of new writ.— After a judgment of ouster upon an information in the nature of a quo warranto against a person returned by the sheriff as duly elected to the office of coroner, a new writ de coronatore eligendo issues as of course. *In re* Hemel Hempstead, 5 De G. M. & G. 228, 3 Wkly. Rep. 192, 54 Eng. Ch. 180.

Oath administered by sheriff.— The oath of office should be administered to the coroner elect by the sheriff. 2 Hawkins P. C. c. 9, § 7. See also *Ex p.* Jones, Mosely 254.

21. Reg. *v.* Diplock, L. R. 4 Q. B. 549, 10 B. & S. 613, 38 L. J. Q. B. 297, 21 L. T. Rep. N. S. 24, 17 Wkly. Rep. 823.

22. See, generally, ELECTIONS.

23. Harris *v.* Hanson, 11 Me. 241; Apthorp *v.* North, 14 Mass. 167; Pickering *v.* Pearson, 6 N. H. 559.

24. Mabry *v.* Turrentine, 30 N. C. 201; McRae *v.* Evans, 13 N. C. 383.

25. Tieman *v.* Haw, 49 Iowa 312. See also Allbee *v.* People, 22 Ill. 533.

coroner's acts as a *de facto* officer.[26] Nor does the fact that the statute has not been strictly complied with relieve the sureties from their liability on such bond.[27] Where the bond has been executed, and the coroner has acted officially, it may be presumed that the sureties have been approved.[28]

V. DEPUTIES.

In the absence of statutory authority, a coroner, who is a judicial as well as a ministerial officer, has no power to appoint a deputy to hold an inquest;[29] but in some jurisdictions there are statutes providing for the appointment of deputy or assistant coroners to perform the duties of the office in case of the illness or unavoidable absence of the coroner.[30] And where the jury is sworn, and the inquest is properly and lawfully commenced before a deputy, he should continue holding the inquest to its conclusion, although in the course of the proceedings the principal coroner may be present accidentally.[31]

VI. JUSTICE OF THE PEACE ACTING AS CORONER.

Under the constitutions and laws of some of the states justices of the peace are empowered to exercise the ordinary duties of coroners.[32] In other states they may do so only when there is no coroner in office, when the coroner is absent from the county,[33] is unable to attend,[34] or cannot be had in due time to hold the inquest,[35] or where the office of the coroner is a great distance from the place

26. Mabry *v.* Turrentine, 30 N. C. 201; McBee *v.* Hoke, 2 Speers (S. C.) 184.

27. Harris *v.* Hanson, 11 Me. 241.

Such bond is in force from the time it is handed into court as the security required by law, although from accident, carelessness, or the fraud of any of the parties concerned, it never reaches the treasurer, who is the proper custodian. Apthorp *v.* North, 14 Mass. 167.

The bond is admissible in evidence against the coroner and his sureties, although it has not been recorded as required by statute. Young *v.* Com., 6 Binn. (Pa.) 88.

Where the statute requires a recognizance as well as a bond, no recovery can be had on the bond if no recognizance has been given, for in that case the coroner's commission and all his acts *colore officii* are void. Young *v.* Com., 6 Binn. (Pa.) 88.

28. Young *v.* Com., 6 Binn. (Pa.) 88.

Where the bond was delivered to the court of common pleas for their approval and was afterward found on file, the court indulged the presumption that it was approved, inasmuch as the statute required no record of the determination, unless the bond was found to be insufficient. Apthorp *v.* North, 14 Mass. 167.

29. Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 156, 1 Chit. 745, 18 E. C. L. 407, 22 Rev. Rep. 373. See also Matter of Daws, 8 A. & E. 936, 1 P. & D. 146, 35 E. C. L. 917; *Ex p.* Carruthers, 2 M. & R. 397.

30. State *v.* Duffy, 39 La. Ann. 419, 2 So. 184; Buttz *v.* Charleston County, 17 S. C. 585; Reg. *v.* Perkin, 7 Q. B. 165, 9 Jur. 686, 14 L. J. M. C. 87, 53 E. C. L. 165; Reg. *v.* Johnson, L. R. 2 C. C. 15, 12 Cox C. C. 264, 42 L. J. M. C. 41, 27 L. T. Rep. N. S. 801.

Necessity of writing.— Such an appointment should be in writing or at least should be evidenced by writing and furnished to such officer. Buttz *v.* Charleston County, 17 S. C. 585.

Holding another inquest.— It is a lawful and reasonable cause of absence that the coroner is holding another inquest at the time. Reg. *v.* Perkin, 7 Q. B. 165, 9 Jur. 686, 14 L. J. M. C. 87, 53 E. C. L. 165.

Question of law.— The question of the lawful or reasonable cause for the absence of the coroner is for the court and not for the jury. Reg. *v.* Johnson, L. R. 2 C. C. 15, 12 Cox C. C. 264, 42 L. J. M. C. 41, 27 L. T. Rep. N. S. 801.

31. Reg. *v.* Perkin, 7 Q. B. 165, 9 Jur. 686, 14 L. J. M. C. 87, 53 E. C. L. 165.

An inquisition held by a deputy under such circumstances is properly described as taken before the principal coroner and is properly signed in his name by his deputy. Reg. *v.* Perkin, 7 Q. B. 165, 9 Jur. 686, 14 L. J. M. C. 87, 53 E. C. L. 165.

32. Stewart *v.* State, 6 Tex. App. 184.

33. Early County *v.* Jones, 94 Ga. 679, 21 S. E. 828; Iroquois County *v.* Viets, 59 Ill. App. 175; Stevens *v.* Harrison County, 46 Ind. 541.

34. Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Stevens *v.* Harrison County, 46 Ind. 541.

The meaning of this is that when there is an emergency for holding an inquest, and the coroner for any cause is so far out of the way as to be unable to reach the body and hold an inquest within a reasonable time, under all the circumstances, the proper justice of the peace may do so, and perform all the coroner's duties in connection therewith. Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874.

35. State *v.* Errickson, 40 N. J. L. 159.

where the death occurred or the body was found.[36] However, in the absence of statutory authority, a justice of the peace has no right to hold an inquest over a dead body, inasmuch as that power is vested in the coroner alone.[37]

VII. PRIVILEGES.

A coroner is clothed with certain judicial powers; and for error, mistake, or even misconduct, while acting in his judicial capacity, he is not liable to an action.[38] Thus an action will not lie against a coroner for defamatory words spoken by him while holding an inquest.[39] Nor will trespass lie against him for turning a man out of a room in which he is about to hold an inquest.[40] So also a coroner is privileged from arrest on civil process, while on his way to hold an inquest, and this privilege extends also to a deputy coroner, and if he is arrested under such circumstances the court will order his discharge.[41] But a coroner is also authorized to exercise ministerial and executive duties; and when he acts in this capacity he is answerable to those who are injured by any excess or abuse of his official powers.[42]

VIII. THE INQUEST.

A. Nature of Proceeding. The principal duty of a coroner is to hold inquests over the dead bodies of those who may reasonably be supposed to have come to their death by violence or through some cause which involves a violation of law, and in the performance of this duty he acts in a judicial capacity.[43]

B. Necessity For Holding. The object of an inquest is to seek information and to obtain and secure evidence in case of death by violence or other unlawful means; and if there is reasonable ground to suspect that it was so caused, it becomes the duty of the coroner to act,[44] especially where he has abundant cause

36. Where the statute authorizes a justice of the peace to hold an inquest over a dead body where the office of the coroner is more than ten miles distant, such justice may hold an inquest over a body found more than ten miles from the coroner's office, although the coroner has a deputy resident within ten miles of the place. *In re* Reitnauer's Inquest, 14 Pa. Co. Ct. 46.

37. *Ex p.* Schultz, 6 Whart. (Pa.) 269.

38. Smiley *v.* Allen, 13 Allen (Mass.) 465.

39. Thomas *v.* Churton, 2 B. & S. 475, 8 Jur. N. S. 795, 31 L. J. Q. B. 139, 6 L. T. Rep. N. S. 320, 110 E. C. L. 475.

40. Garnett *v.* Ferrand, 6 B. & C. 611, 9 D. & R. 657, 5 L. J. K. B. O. S. 221, 30 Rev. Rep. 467, 13 E. C. L. 277. See also Garner *v.* Coleman, 19 U. C. C. P. 106.

41. *Ex p.* Middlesex, 6 H. & N. 501, 7 Jur. N. S. 103, 30 L. J. Exch. 77, 3 L. T. Rep. N. S. 754, 9 Wkly. Rep. 281.

42. Thus it is the duty of a coroner who finds personal property on a dead body and rightfully takes possession of the same to deliver it to the true owner upon reasonable demand and proof of ownership, and if he refuses to do so an action of replevin will lie against him therefor. Smiley *v.* Allen, 13 Allen (Mass.) 465.

43. *California.*— People *v.* Devine, 44 Cal. 452.

Missouri.— Houts *v.* McCluney, 102 Mo. 13, 14 S. W. 766; Boisliniere *v.* St. Louis County, 32 Mo. 375.

New York.— Crisfield *v.* Perine, 15 Hun 200.

North Carolina.— State *v.* Knight, 84 N. C. 789.

Pennsylvania.— Lancaster County *v.* Mishler, 100 Pa. St. 624, 45 Am. Rep. 402; Uhler *v.* County, 1 Lehigh Val. Rep. 213.

South Carolina.— Giles *v.* Brown, 1 Mill 230.

England.— Reg. *v.* White, 3 E. & E. 137, 6 Jur. N. S. 868, 29 L. J. Q. B. 257, 2 L. T. Rep. N. S. 463, 8 Wkly. Rep. 580, 107 E. C. L. 137; 2 Bacon Abr. tit. Coroners (C); 1 Bl. Comm. 348; 2 Hawkins P. C. c. 9.

A coroner's inquest has always meant, and still means, a judicial investigation into the cause of death by a coroner, with the aid of a jury. People *v.* Coombs, 14 N. Y. Crim. 17. See also People *v.* Mondon, 4 N. Y. Crim. 112, 125, where it was said: "A coroner's inquest is a tribunal created by our statutes, charged with the duty of investigating crimes; and this inquest was engaged in an investigation aimed at this defendant."

44. Clark County *v.* Calloway, 52 Ark. 361, 12 S. W. 756; State *v.* Knight, 84 N. C. 789; State *v.* Bellows, 62 Ohio St. 307, 56 N. E. 1028; Lancaster County *v.* Mishler, 100 Pa. St. 624, 45 Am. Rep. 402; Lancaster County *v.* Dern, 2 Grant (Pa.) 262; Ralston's Petition, 9 Pa. Dist. 514.

It is the duty of the coroner to hold an inquest over the body of a deceased person, upon the receipt of information of the circumstances of his death which indicate that some one might be criminally liable; for the killing being known, the presumption is that the slayer is guilty of a crime, in the ab-

to believe that death was the result of violence or that the deceased was feloniously destroyed.[45] And where the cause of death is unknown, and a physician refuses to give a certificate of the cause of death, the coroner has, in the absence of other information, no discretion to refuse to hold an inquest upon the ground that it is unnecessary;[46] for while it is true that coroners ought not voluntarily to obtrude themselves into private houses, when they have received no notice from the police or other authority that death has occurred under circumstances which appear to them to call for an inquest,[47] it is also true that when a coroner receives from the proper police authorities information of a sudden death, in order that an inquest may be held, and when there is no medical certificate of death from any natural cause, or other ground on which he can reasonably form an opinion as to the actual cause of death, it is his duty to hold an inquest.[48] But a coroner may lawfully hold an inquest on the bodies of such persons only as may reasonably be supposed to have died by unlawful means,[49] or where the cause of death is unknown.[50] And where it is a clear case of suicide,[51] and the cause of death is not doubtful, and there is no reason to suspect that it implicates any person, an inquest should not be held.[52] The coroner should make a reasonable inquiry into the circumstances of the death before proceeding to summon a jury and hold an inquest;[53] for he has no authority to hold an inquest except for strictly public purposes,[54] and where there are no circumstances to arouse suspicion he is not justified in holding an inquest merely because a reputable citizen requests him to do so for his protection.[55] A coroner has no *ex officio* jurisdiction at common law to hold any other inquest than one on a dead body, *super visum corporis*.[56] He cannot therefore hold an inquest to inquire into the origin of a fire by which no death has been occasioned.[57]

sence of circumstances that justify or excuse the homicide. Jefferson County *v.* Cook, 65 Ark. 557, 47 S. W. 562.

45. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; Pfout's Case, 7 Pa. Co. Ct. 265; *In re* Jones' Inquest, 1 Pa. Co. Ct. 19; Uhler *v.* County, 1 Lehigh Val. Rep. (Pa.) 213.

Where death is the result of violence which did not suddenly terminate the life of the person injured it is still the duty of the coroner to hold an inquest. Lancaster County *v.* Dern, 2 Grant (Pa.) 262.

46. *In re* Hull, 9 Q. B. D. 689; Matter of Ward, 3 De G. F. & J. 700, 7 Jur. N. S. 853, 30 L. J. Ch. 775, 4 L. T. Rep. N. S. 458, 9 Wkly. Rep. 843, 64 Eng. Ch. 546.

47. *In re* Hull, 9 Q. B. D. 689; Reg. *v.* Clerk, 1 Salk. 377.

48. In such a case he cannot properly exercise any discretion to the contrary, unless, by inquiry or otherwise, he has obtained such credible information as may be sufficient to satisfy a reasonable mind that the death arose from illness or from some other cause rendering an inquest unnecessary. *In re* Hull, 9 Q. B. D. 689, 700, per Lord Selhorne.

Misdemeanor to obstruct coroner's action.— Where the case is a proper one for an inquest, it is a misdemeanor to burn or otherwise dispose of the body, with intent thereby to prevent the holding of a coroner's inquest and so to obstruct the coroner in the discharge of his duty. Reg. *v.* Stephenson, 13 Q. B. D. 331, 15 Cox C. C. 679, 49 J. P. 486, 53 L. J. M. C. 176, 52 L. T. Rep. N. S. 267, 33 Wkly. Rep. 44; Reg. *v.* Price, 12 Q. B. D. 247, 15 Cox C. C. 389, 53 L. J. M. C. 51, 33 Wkly. Rep. 45 note.

49. Clark County *v.* Calloway, 52 Ark. 361, 12 S. W. 756; Lancaster County *v.* Holyoke, 37 Nebr. 328, 55 N. W. 950, 21 L. R. A. 394; *In re* Stoeker's Inquest, 5 Kulp (Pa.) 487; Bender's Case, 8 Pa. Co. Ct. 664; Watson *v.* Beaver County, 27 Wkly. Notes Cas. (Pa.) 469.

And it is not his duty to inquire of sudden deaths, unless there is reasonable ground to believe that they are the result of violence or unnatural means. The authority is to be exercised within the limits of a sound discretion, and when exercised the presumption is that the coroner has acted in good faith and on sufficient cause. Clark County *v.* Calloway, 52 Ark. 361, 12 S. W. 756.

50. Muzzy *v.* Hamilton County, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 426; Birmingham *v.* Franklin County, 5 Ohio S. & C. Pl. Dec. 587.

51. Witmore's Case, 3 Pa. Dist. 699, 14 Pa. Co. Ct. 463; *In re* Crosby's Inquest, 3 Pittsb. (Pa.) 425.

52. Lee's Case, 9 Pa. Co. Ct. 474; Burns' Case, 5 Pa. Co. Ct. 549; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

53. Pfout's Case, 7 Pa. Co. Ct. 265; Burns' Case, 5 Pa. Co. Ct. 549.

54. Watson *v.* Beaver County, 27 Wkly. Notes Cas. (Pa.) 469.

55. McFadgen *v.* Chester County, 10 Pa. Co. Ct. 124; Rex *v.* Kent Justices, 11 East 229, 10 Rev. Rep. 484.

56. Reg. *v.* Herford, 3 E. & E. 115, 6 Jur. N. S. 750, 29 L. J. Q. B. 249, 2 L. T. Rep. N. S. 459, 8 Wkly. Rep. 579, 107 E. C. L. 115.

57. Reg. *v.* Herford, 3 E. & E. 115, 6 Jur. N. S. 750, 29 L. J. Q. B. 249, 2 L. T. Rep.

C. Time of Holding. It is the duty of the coroner upon receiving notice that a person within his jurisdiction has died by violence or through some unknown or unnatural cause to summon a jury and hold an inquest upon the body within a reasonable time.[58]

D. Place of Holding. Generally the inquest should be held in the county where the body is found.[59] And where, after a body has been removed from the county where the death occurred to another county, suspicions arise as to the cause of the death, an inquest may properly be held in the county to which the body has been removed.[60]

E. Summoning Jury. At common law when notice is given to the coroner of a misadventure calling for an inquest, he should issue a precept to the constable to return a competent number, twelve at least, of good and lawful men to make an inquisition touching that matter;[61] and if the constable makes no return, or the jurors returned do not appear, the default should be returned by the coroner, and the parties in default are liable to be amerced.[62] Or, as has been held, the coroner's power to summon a jury of inquest includes the incidental means of rendering that power efficient, and he may himself impose a fine on a juror who refuses to attend.[63]

N. S. 459, 8 Wkly. Rep. 579, 107 E. C. L. 115.

58. A coroner is not justified in delaying the inquest upon a dead body in a state of decomposition for so long a period as five days in order that the body may be identified. *In re* Hull, 9 Q. B. D. 689.

In an emergency he may lawfully act on Sunday, for, while it is true as a general rule that no judicial act can be done on Sunday, it does not follow that no step can be taken on that day to apprehend a criminal. Blaney *v.* State, 74 Md. 153, 21 Atl. 547.

59. Reg. *v.* Great Western R. Co., 3 Q. B. 333, 2 G. & D. 773, 6 Jur. 823, 11 L. J. M. C. 86, 3 R. & Can. Cas. 161, 43 E. C. L. 759; Foxall *v.* Barnett, 2 C. L. R. 273, 2 E. & B. 928, 18 Jur. 41, 23 L. J. Q. B. 7, 2 Wkly. Rep. 61, 75 E. C. L. 928. But see Fryer *v.* Central R., etc., Co., 50 Ga. 581, where it is said that a coroner has no vested right to hold an inquest over the body of a person found dead in his county.

A dead body "is found within the county" when it is ascertained to be in the county, and death is supposed to have been caused by violence, and there is substantial reason for believing that death was caused by unlawful means. State *v.* Bellows, (Ohio Sup. 1900) 56 N. E. 1028.

If the coroner of a municipality attempts to hold an inquest, in a case of supposed homicide which occurred beyond the jurisdiction of the city, he may be restrained by prohibition from exercising his office. Giles *v.* Brown, 1 Mill (S. C.) 230.

Where it appeared that a fair trial could not be had in the county where the alleged murder occurred the court of queen's bench removed the coroner's inquisition from the county at large to the queen's bench by certiorari. Reg. *v.* Palmer, 5 E. & B. 1024, 2 Jur. N. S. 235, 85 E. C. L. 1024.

60. Bartholomew County *v.* Jameson, 86 Ind. 154; Jameson *v.* Bartholomew County, 64 Ind. 524; Pickett *v.* Erie County, 3 Pa. Co. Ct. 23, 19 Wkly. Notes Cas. (Pa.) 60; Reg. *v.* Hinde, 5 Q. B. 944, 8 Jur. 927, 13 L. J. M. C. 150, 48 E. C. L. 944; Reg. *v.* Grand Junction R. Co., 11 A. & E. 128, note *b*, 3 P. & D. 57, 39 E. C. L. 91. Where the cause of death and the death occurred in the county of Surrey, and the body after death was removed to the city of London, it was held that the inquest was properly held by the coroner of London. Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470. But see Rentschler *v.* County, 1 Leg. Rev. (Pa.) 289, where it was held that a coroner has no jurisdiction to hold an inquest where the death occurred in another county, even though the body has been brought into his county.

61. 2 Hale P. C. 59.

The coroner should issue his warrant to a constable to summon a jury of inquest; and where a juror is summoned by the coroner in person the summons is illegal. City Coroner *v.* Cunningham, 2 Nott & M. (S. C.) 454. In Georgia, however, it seems that the coroner may summon the jury himself, but if he does so he is not entitled to any fees for doing it. Davis *v.* Bibb County, (Ga. 1902) 42 S. E. 403.

Constable as a juror.— In Reg. *v.* Winegarner, 17 Ont. 208, it was held that the constable to whom the coroner delivered the precept to summon a jury to serve on an inquest was not precluded from acting as a juror.

The number of jurors has in many jurisdictions been reduced — usually to six. See the local statutes. See also forms of inquisitions signed by the coroner and six jurors in U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 561, 22 N. E. 467, 6 L. R. A. 65; Reg. *v.* Farley, 24 U. C. Q. B. 384.

After a verdict the court will presume that the inquisition was found by the requisite number of jurors. Taylor *v.* Lambe, 4 B. & C. 138, 6 D. & R. 188, 3 L. J. K. B. O. S. 160, 10 E. C. L. 515.

62. 2 Hale P. C. 59.

63. *Ex p.* McAnnully, T. U. P. Charlt. (Ga.) 310.

F. Swearing Jury. The jury is to be sworn and charged to inquire upon the view of the body how the person came to his death, whether by murder by any person, by misfortune, or as *felo de se*;[64] but it seems that it is not necessary that the jurors should be sworn *super visum corporis*, that they should all be sworn at the same time, or that they should all view the body at the same time,[65] although it is doubtless the better practice for the coroner to swear the jury in the presence of the body.[66]

G. View of Body. The inquest to be valid must be held *super visum corporis*, that is, the coroner and jury must have a view of the body.[67] And where an inquisition has been quashed and sent down to the coroner for a fresh inquiry before a new jury, such fresh inquiry must be made *super visum corporis*;[68] but the coroner has no power, after holding an inquest and recording the verdict, to hold a second inquest on the same body, the first not having been quashed, and no writ of melius inquirendum having been awarded.[69] And as the inquest must be held *super visum corporis* the coroner should take up the body for that purpose, in case it has been buried before his arrival.[70]

H. The Autopsy. A coroner may order an autopsy to be made, when in his judgment that is the appropriate means of ascertaining the cause of a person's death;[71] and this he may do without the consent of the family of the

64. 2 Hale P. C. 60.

65. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793.

But in a case where the jury had viewed the body and heard part of the evidence, and another person was then sworn, viewed the body, and took part in the proceedings, upon hearing read that portion of the evidence which had previously been taken, it was held a sufficient ground for bringing up the inquisition. Reg. *v.* Yorkshire Coroners, 9 Cox C. C. 373, 9 L. T. Rep. N. S. 424.

66. State *v.* Knight, 84 N. C. 789; Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 156, 1 Chit. 745, 18 E. C. L. 407, 22 Rev. Rep. 373.

67. *Nebraska.*— Lancaster County *v.* Holyoke, 37 Nebr. 328, 55 N. W. 950, 21 L. R. A. 394.

New York.— People *v.* Budge, 4 Park. Crim. 519.

North Carolina.— State *v.* Knight, 84 N. C. 789.

Pennsylvania.— Lancaster County *v.* Mishler, 100 Pa. St. 624, 45 Am. Rep. 402; Northampton County *v.* Innes, 26 Pa. St. 156; Com. *v.* Harman, 4 Pa. St. 269.

England.— Rex *v.* Ferrand, 3 B. & Ald. 260, 5 E. C. L. 156, 1 Chit. 745, 18 E. C. L. 407, 22 Rev. Rep. 373; Reg. *v.* White, 3 E. & E. 137, 6 Jur. N. S. 868, 29 L. J. Q. B. 257, 2 L. T. Rep. N. S. 463, 8 Wkly. Rep. 580, 107 E. C. L. 137; Rex *v.* Philips, 1 Str. 261; Rex *v.* Saunders, 1 Str. 167; 2 Hale P. C. 415; 2 Hawkins P. C. c. 9, § 23; 6 Viner Abr. 251. In Rex *v.* Bond, 1 Str. 22, it was said that the jury ought to have a view of the whole body, and the filing of an inquisition taken five years after the death, when only the head was to be found, was stayed.

See 11 Cent. Dig. tit. "Coroners," § 12 *et seq.*

After the jury has been sworn and the coroner and jurors have had a view of the body, they may retire to a convenient place to take testimony and make up the report. State *v.* Knight, 84 N. C. 789.

68. Reg. *v.* Carter, 13 Cox C. C. 220, 45 L. J. Q. B. 711, 34 L. T. Rep. N. S. 849, 24 Wkly. Rep. 882.

69. People *v.* Budge, 4 Park. Crim. (N. Y.) 519; Reg. *v.* White, 3 E. & E. 137, 6 Jur. N. S. 868, 29 L. J. Q. B. 257, 2 L. T. Rep. N. S. 463, 8 Wkly. Rep. 580, 107 E. C. L. 137; Anonymous, 1 Str. 533; Rex *v.* Saunders, 1 Str. 167; 2 Hale P. C. 59.

70. In Rex *v.* Ferrand, 3 B. & Ald. 260, 261, 5 E. C. L. 156, 1 Chit. 745, 18 E. C. L. 407, 22 Rev. Rep. 373, it is said: "If the body be interred before he come, he must dig it up." In 2 Hale P. C. 58, it is said that in Wingfield's case the body was taken up fourteen days after burial and an inquisition taken thereon.

Body stealing.— Although it is irregular for a coroner to exhume and dissect a body without calling a jury and holding a regular inquest, such a proceeding does not render the person at whose instigation he does it liable to indictment for body stealing. People *v.* Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483.

71. *Arkansas.*—Kempner *v.* Pulaski County, 64 Ark. 139, 41 S. W. 50; Clark County *v.* Kerstan, 60 Ark. 508, 30 S. W. 1046; Flinn *v.* Prairie County, 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669; St. Francis County *v.* Cummings, 55 Ark. 419, 18 S. W. 461.

Colorado.— Pueblo County Com'rs *v.* Marshall, 11 Colo. 84, 16 Pac. 837.

Indiana.— Lang *v.* Perry County, 121 Ind. 133, 22 N. E. 667; Jay County *v.* Gillum, 92 Ind. 511; Dearborn County *v.* Bond, 88 Ind. 102; Jameson *v.* Bartholomew County, 64 Ind. 524; Stevens *v.* Harrison County, 46 Ind. 541; Gaston *v.* Marion County, 3 Ind. 497.

deceased,[72] for such power is incident to the coroner's official duty.[73] And a surgeon who makes a *post mortem* examination of a body at the request and in pursuance of the authority of the coroner is not liable in an action for damages by the family of the deceased for the mutilation of the remains.[74] At the *post mortem* examination the coroner has a discretion to determine whether any persons, and what persons, may be present besides the surgeons.[75] A surgeon who, at the request of the coroner or other officer lawfully acting as such, makes a *post mortem* examination of the body of a person whose death resulted from violence is entitled to compensation for his services out of the county treasury;[76] and parol evidence is

Iowa.— Moser *v.* Boone County, 91 Iowa 359, 59 N. W. 391, 55 N. W. 327; Sanford *v.* Lee County, 49 Iowa 148; Cushman *v.* Washington County, 45 Iowa 255.

Maryland.— Young *v.* Physicians, etc., College, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

New York.— Van Hoevenbergh *v.* Hasbrouck, 45 Barb. 197; People *v.* Niagara County, 15 N. Y. Suppl. 680, 38 N. Y. St. 964.

Pennsylvania.— Allegheny County *v.* Shaw, 34 Pa. St. 301; Northampton County *v.* Innes, 26 Pa. St. 126; Com. *v.* Harman, 4 Pa. St. 269; Allegheny County *v.* Watt, 3 Pa. St. 462; *In re* Coroner's Inquest, 3 Kulp 451, 1 Pa. Co. Ct. 14; *In re* Marvin Shaft Inquests, 3 Pa. Co. Ct. 10; Pickett *v.* Erie County, 19 Wkly. Notes Cas. 60.

Texas.— Polk County *v.* Phillips, 92 Tex. 630, 51 S. W. 535; Frio County *v.* Earnest, (Sup. 1891) 16 S. W. 1036; Fears *v.* Nacogdoches County, 71 Tex. 337, 9 S. W. 265; Rutherford *v.* Harris County, 3 Tex. App. Civ. Cas. § 114.

England.— Rex *v.* Quinch, 4 C. & P. 571, 19 E. C. L. 655.

See 11 Cent. Dig. tit. "Coroners," § 25.

A coroner is a public officer charged with the duty of holding inquests, and is clothed with general powers for that purpose, among which is the power to summon physicians to make a scientific examination of the body when the jury shall deem such examination necessary. Pueblo County Com'rs *v.* Marshall, 11 Colo. 84, 16 Pac. 837.

In Georgia the coroner's power to order an autopsy is limited to cases of suspected poisoning. Farrell *v.* Floyd County, 57 Ga. 347.

Surgeon's duty.— A surgeon so summoned should make the *post mortem* examination without inquiring whether an inquest is necessary. Northampton County *v.* Innes, 26 Pa. St. 156.

72. Young *v.* Physicians, etc., College, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

73. Lang *v.* Perry County, 121 Ind. 133, 22 N. E. 667; Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Jay County *v.* Gillum, 92 Ind. 511; Dearborn County *v.* Bond, 88 Ind. 102.

The coroner alone has power to employ a physician to hold a *post mortem* examination. The county commissioners have no such power. Allegheny County *v.* Shaw, 34 Pa. St. 301.

74. Young *v.* Physicians, etc., College, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540. See also Cook *v.* Walley, 1 Colo. App. 163, 27 Pac. 950; Larson *v.* Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85; Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558. But see Palenzke *v.* Bluming, 98 Ill. App. 644, where it is held that although Ill. Rev. Stat. c. 31, § 10, authorizes the coroner when informed of a death by violence to repair to the place where the dead body is, to take charge of the same, and to summon a jury of the neighborhood where the body was found to assemble at the place where the body is and inquire into the cause of the death; where the coroner, accompanied by a physician and undertaker, takes the body of a deceased which has been coffined for burial from the parents' possession, mutilates it, and removes part of it which, without such parents' consent, they throw away, such parents may maintain an action against them for damages for such outrage to their feelings. See also, generally, DEAD BODIES.

75. Crisfield *v.* Perine, 15 Hun (N. Y.) 200 [*affirmed* in 81 N. Y. 622].

Not even the jurors have a right to witness the examination; they are to be informed of what it discloses by the testimony of the surgeons. People *v.* Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; Crisfield *v.* Perine, 15 Hun (N. Y.) 202 [*affirmed* in 81 N. Y. 622].

76. *Arkansas.*— Clark County *v.* Kerstan, 60 Ark. 508, 30 S. W. 1046.

Indiana.— Lang *v.* Perry County, 121 Ind. 133, 22 N. E. 667; Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Jay County *v.* Gillum, 92 Ind. 511; Dearborn County *v.* Bond, 88 Ind. 102; Jameson *v.* Bartholomew County, 64 Ind. 524; Stevens *v.* Harrison County, 46 Ind. 541.

Iowa.— Moser *v.* Boone County, 91 Iowa 359, 59 N. W. 39, 55 N. W. 327; Sanford *v.* Lee County, 49 Iowa 148; Cushman *v.* Washington County, 45 Iowa 255.

New York.— People *v.* Niagara County, 15 N. Y. Suppl. 680, 38 N. Y. St. 964.

Pennsylvania.— Allegheny County *v.* Shaw, 34 Pa. St. 301; *In re* Coroner's Inquests, 3 Kulp 451, 1 Pa. Co. Ct. 14; Pickett *v.* Erie County, 3 Pa. Co. Ct. 23, 19 Wkly. Notes Cas. 60; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

See 11 Cent. Dig. tit. "Coroners," § 24.

Liability of county for post mortem fees.— It is the coroner's duty to avail himself of professional aid and skill, and his contract will bind the county to the payment of a reasonable compensation for making a *post mortem* examination. Northampton County *v.*

admissible to show that he was employed by the coroner;[77] but it seems that authority to employ a physician to make an autopsy does not authorize the coroner to charge the county, by the employment of a chemist to make a chemical analysis for the detection of poison.[78]

I. Attendance and Examination of Witnesses. The coroner when holding an inquest is a judicial officer and has the same power to compel witnesses to attend and answer pertinent questions that other judicial officers possess;[79] and he has power to punish a recalcitrant witness in like manner as may be done under a subpœna from a justice of the peace.[80] The witnesses should be sworn and examined under oath touching the matters inquired of at the inquest;[81] and they should be sworn by the coroner himself. A justice of the peace has no power or authority to administer an oath at an inquest held by the coroner.[82] A juror may properly be sworn and give evidence as a witness.[83] An accused person has no right to be confronted with the witnesses called to testify before the coroner at an inquest;[84] nor has he the privilege of producing witnesses in his own behalf;[85] and the coroner has no power to take testimony to establish the innocence of the prisoner and then discharge him contrary to the finding of the jury.[86] It is, however, the duty of the coroner to present before the jury all the material testimony within his power touching the death or wounding, as to the manner whereof the jury are to certify, and that which makes for as well as against the party accused.[87] And in a case of murder or manslaughter, it is his duty to bind over all witnesses who prove any material fact against the person accused.[88]

J. The Inquisition or Return — 1. General Requisites. At common law the inquisition was required to be written on parchment and not on paper.[89] It should show on its face the date when the inquest was held;[90] and if there has been an adjournment it is better to set it out in the caption of the inquisition, but it is sufficient to describe the inquest as being held on the first day of the sitting.[91]

Innes, 26 Pa. St. 156; Com. *v.* Harman, 4 Pa. St. 269; Allegheny County *v.* Watts, 3 Pa. St. 462. It has been held, however, that where a physician renders his professional services at an inquest, at the request of the coroner, with no special agreement that he shall look to any other source than the coroner for payment, the coroner himself is liable for the fee. Van Hoevenbergh *v.* Hasbrouck, 45 Barb. (N. Y.) 197. But this case was decided before the act of 1874 was passed, making the physician's services in such case a charge against the county. See People *v.* Niagara County, 15 N. Y. Suppl. 680, 38 N. Y. St. 964. In Rutherford *v.* Harris County, 3 Tex. App. Civ. Cas. § 114, it was held that the county was liable for such fees, although there was no statute declaring such liability; but the supreme court of Texas has established the contrary rule, and it is held that a physician cannot recover a fee from the county for making a *post mortem* examination, unless the statute imposes the expense upon the county. Frio County *v.* Earnest, (Tex. Sup. 1891) 16 S. W. 1036; Fears *v.* Nacogdoches County, 71 Tex. 337, 9 S. W. 265.

Where the statute prescribes the fee to be allowed a surgeon for a *post mortem* examination, nothing beyond the statutory allowance can lawfully be paid to him. Greene *v.* Monroe County, 72 Miss. 306, 17 So. 10. See also Naftel *v.* Montgomery County, 127 Ala. 563, 29 So. 29.

77. Jay County *v.* Gillum, 92 Ind. 511.

78. Doremus *v.* New York, 6 Daly (N. Y.) 121. See also Hill *v.* Mowry, 7 R. I. 167.

79. Com. *v.* Higgins, 5 Kulp (Pa.) 269; *In re* Coroner, 11 Phila. (Pa.) 387, 32 Leg. Int. (Pa.) 142.

80. Kuhlman *v.* San Francisco, 122 Cal. 636, 55 Pac. 589.

81. 2 Hale P. C. 61.

82. State *v.* Knight, 84 N. C. 789.

83. Reg. *v.* Winegarner, 17 Ont. 208.

84. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

85. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

86. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

87. Rex *v.* Scovey, 1 Leach C. C. 50; 2 Hale P. C. 61. And see People *v.* Collins, 20 How. Pr. (N. Y.) 111.

88. Reg. *v.* Taylor, 9 C. & P. 672, 38 E. C. L. 391, where it was further held that if the coroner bind over all the witnesses on both sides, no blame is imputable to the clerk of indictments if he require them all to be put on the back of the hill and examined before the grand jury.

89. Reg. *v.* Whalley, 7 D. & L. 317, 19 L. J. Q. B. 14; Rex *v.* Beavers, 1 East P. C. 383.

90. Rex *v.* Philips, 1 Str. 261; Reg. *v.* Winegarner, 17 Ont. 208.

91. Reg. *v.* Winegarner, 17 Ont. 209 [*citing* Reg. *v.* Skeats, 7 L. T. 433]; Jervis Coroners (4th ed.) 246.

It should also appear that the findings were made under oath;[92] and it should be stated where and when the death happened and where the body was found,[93] unless there is a statute making such statement unnecessary;[94] and where a crime is charged the inquisition should identify the body viewed as that of the person who was slain.[95] Where an inquest is held by a justice of the peace acting as coroner, the return is defective if it does not show upon its face that the justice had jurisdiction.[96] The return must of course include any additional matters required by statute.[97]

2. SIGNATURE OF CORONER AND JURORS. The inquisition should be signed by the coroner and all the jurors;[98] and they should sign their full names unless they are set out at length in the caption or body of the inquisition;[99] and if any do sign with their marks, such marks should be verified by an attestation.[1]

3. SEAL. It appears that there is no express authority requiring the inquisition to be sealed,[2] but the practice of sealing is well-nigh universal and would better not be departed from.[3]

4. QUASHING INQUISITION. If the inquisition or return is defective by reason of a failure to state any one or more of the requisite particulars it may be quashed;[4] and the court may quash an inquisition in which the facts of the case are stated if the verdict found is not warranted by those facts;[5] but the

92. Reg. *v.* Winegarner, 17 Ont. 208.

93. Rex *v.* Evett, 6 B. & C. 247, 9 D. & R. 237, 5 L. J. M. C. O. S. 36, 13 E. C. L. 122.

94. Reg. *v.* Winegarner, 17 Ont. 208.

95. Reg. *v.* Winegarner, 17 Ont. 208.

96. *In re* Metzger's Inquest, 8 Pa. Dist. 573; *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; *In re* Reitlinger's Inquest, 2 Kulp (Pa.) 127; *In re* Coroner's Inquest, 1 Pa. Co. Ct. 677; *In re* Coroner's Inquest, 2 Del. Co. (Pa.) 446. In such case the court is not confined to an inspection of the return of the inquest, but will receive extrinsic evidence, and withhold approval, if in fact the justice was not authorized to act. *In re* Reitlinger's Inquest, 2 Kulp (Pa.) 127.

97. Thus a return "that there was strong suspicion of violence, such as to make an inquest necessary," is not sufficient under a statute requiring that the return shall show the necessity of holding the inquest. *In re* Smith, 4 Lanc. L. Rev. 302. See also *In re* Evans' Inquest, 4 C. Pl. (Pa.) 89.

98. Rex *v.* Norfolk Justices, 1 East P. C. 383.

For form of an inquisition signed by the coroner and jurors see U. S. L. Ins. Co. *v.* Cocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65.

99. Rex *v.* Bennett, 6 C. & P. 179, 25 E. C. L. 382; Rex *v.* Bowen, 3 C. & P. 602, 14 E. C. L. 737. See also Rex *v.* Nicholas, 7 C. & P. 538, 32 E. C. L. 747.

The full christian names of the coroner and jurors, and not their initials alone, should appear in the return, otherwise the inquisition may be quashed. *In re* Crosby's Inquest, 3 Pittsb. (Pa.) 425.

1. Rex *v.* Bowen, 3 C. & P. 602, 14 E. C. L. 737; Reg. *v.* Stockdale, etc., R. Co., 8 Dowl. P. C. 516. See also Lewen's Case, 2 Lewin C. C. 125.

Where the jurors sign the inquisition by making their cross marks, the coroner's certificate of their signatures is sufficient, inasmuch as he is a sworn officer. State *v.* Evans, 27 La. Ann. 297.

2. In Reg. *v.* Winegarner, 17 Ont. 208, it was expressly held that the inquisition need not be under seal.

3. Boys Coroners (2d ed.) p. 151; Jervis Coroners (4th ed.) p. 260.

4. Reg. *v.* Great Western R. Co., 20 Q. B. D. 410, 16 Cox C. C. 410, 52 J. P. 772, 57 L. J. M. C. 31, 58 L. T. Rep. N. S. 765, 36 Wkly. Rep. 506; Reg. *v.* Brownlow, 11 A. & E. 119, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87; Matter of Six-Mile-Bridge Inquisition, 6 Cox C. C. 122; Reg. *v.* Midland R. Co., 2 Cox C. C. 1; Reg. *v.* Mallet, 1 Cox C. C. 336; Rex *v.* Philips, 1 Str. 261.

An inquisition may be quashed in part for uncertainty and stand good for the residue. *Ex p.* Carruthers, 2 M. & R. 397. Or it may be quashed as to one party accused and stand good as to another. Reg. *v.* Mallet, 1 Cox C. C. 336. *Compare Ex p.* Scratchley, 2 D. & L. 29.

The court may refuse to quash an inquisition on the ground that evidence was received not upon oath, where there was no bad faith and the jury found their verdict upon other evidence. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257; Reg. *v.* Staffordshire, 10 L. T. Rep. N. S. 650; Reg. *v.* Sanderson, 15 Ont. 106. Where the jury found that a boy had committed suicide, and further expressed the opinion that the boy's master had not done justice to him in the matter of clothing and the labor to be performed, the court refused to quash the inquisition on account of the latter finding. Matter of Miller's Inquest, 15 U. C. Q. B. 244. For an analogous case see Reg. *v.* Farley, 24 U. C. Q. B. 384.

5. Matter of Cully, 5 B. & Ad. 230, 2 L. J. M. C. 102, 2 N. & M. 61, 27 E. C. L. 104.

court will not receive extrinsic evidence for the purpose of ascertaining whether the evidence was sufficient to support the verdict of the jury;[6] for the court will not quash an inquisition unless it appears bad on the face of it or fraud is shown.[7] It is not every defect, however, that will warrant the quashing of the inquisition, for minor defects may be cured by amendment;[8] but where the defect is one of substance the inquisition cannot be amended and should be quashed.[9]

K. Return of Evidence. At common law the coroner is not bound to put in writing the effect of the evidence given upon an inquest, unless the offense be found to be murder or manslaughter;[10] but in a case of murder or manslaughter it is his duty to read over to every witness examined on the inquest the evidence he has given, and then procure his signature to the same and return it with the inquisition in order that the deposition may be used in the prosecution of the offender.[11] Where the statute requires the coroner to make a return of the testimony with the inquisition, he should certify that the witnesses named were sworn before him and that their testimony is correctly stated.[12]

L. Disposition of Property. The disposition of the property of a decedent by the coroner is generally a statutory proceeding which must be strictly pursued in order to avoid personal liability. If money or other property be found on the body, it is the obvious duty of the coroner to make an inventory of the same and take it into his possession, after which he must turn it over to the public officer appointed by law to be the custodian thereof.[13]

M. Disposition of Body. Ordinarily, when the coroner holds an inquest upon the body of a stranger or a pauper, and no friend or relative appears to claim the body for burial, he should cause the same to be plainly and decently buried at the expense of the county wherein the body was found.[14]

N. Fees and Mileage of Jurors and Witnesses. In the absence of a statute authorizing their payment, the jurors and witnesses at a coroner's inquest are not entitled to fees or mileage;[15] but in many cases these are allowed by

6. *In re* Mitchelstown Inquisition, L. R. 22 Ir. 279.

7. Reg. *v.* McIntosh, 7 Wkly. Rep. 52. In Reg. *v.* Brownlow, 11 A. & E. 119, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87, it was said that although the court would sometimes quash an inquisition on motion for palpable defects, the most convenient course was to put the party contesting it to demur.

8. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257.

9. Rex *v.* Evett, 6 B. & C. 247, 9 D. & R. 237, 5 L. J. O. S. M. C. 36, 13 E. C. L. 122. See also Reg. *v.* Great Western R. Co., 20 Q. B. D. 410, 16 Cox C. C. 410, 52 J. P. 772, 57 L. J. M. C. 31, 58 L. T. Rep. N. S. 765, 36 Wkly. Rep. 506.

10. U. S. *v.* Faw, 25 Fed. Cas. No. 15,077, 1 Cranch C. C. 456. The testimony taken before the coroner should not be returned with the inquisition. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14.

It has been held, however, that the proper practice in returning an inquisition is for the coroner to file the return of the evidence with the clerk of the court, with the fees of the coroner and jurors indorsed upon it, and the time the jurors were engaged, certified by the coroner. *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

The evidence at a coroner's inquest need not be reduced to writing for the purpose of preserving it. Weaver *v.* County, 2 Lehigh Val. Rep. (Pa.) 408.

11. Reg. *v.* Plummer, 1 C. & K. 600, 8 Jur. 921, 47 E. C. L. 600. Lord Hale observed: "I do conceive the coroner's inquest ought in all cases to hear the evidence upon oath, as well that which maketh for, as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition." 2 Hale P. C. 62.

Under the Indiana statute this is the rule. — Woods *v.* State, 63 Ind. 353.

12. People *v.* White, 22 Wend. (N. Y.) 167. See also People *v.* Collins, 20 How. Pr. (N. Y.) 111.

13. Oh Chow *v.* Brockway, 21 Oreg. 440, 28 Pac. 384; Galloway *v.* Shelby County, 7 Lea (Tenn.) 121.

Delivery to true owner. — After the coroner has rightfully taken possession of property found on the body, it is his duty to deliver the same to the true owner upon reasonable demand and proof of ownership. Smiley *v.* Allen, 13 Allen (Mass.) 465.

14. Oh Chow *v.* Brockway, 21 Oreg. 440, 28 Pac. 384.

15. Kennedy *v.* Seamans, 60 Ga. 612; Green *v.* Wynne, 66 N. C. 530.

statute;[16] and where this is true they may be allowed their fees, although the case in which they were summoned was strictly not one for a coroner's view and the coroner himself would be entitled to none.[17] Where, however, an inquest is held over several dead bodies at the same time they are entitled to fees as in one case only.[18]

O. Liability For Costs and Expenses. Unless otherwise provided by statute, the county, and not the estate of the deceased, is liable for the lawful costs and expenses of a coroner's inquest, including the fees of the coroner, constable, jurors, and witnesses;[19] but in some jurisdictions by statute the county is liable for such expenses only in case the estate of the deceased is insufficient to pay them.[20]

P. Arrest and Detention of Persons Implicated. In England the finding of a coroner's jury is equivalent to a bill of indictment, and persons implicated may be tried on the inquisition;[21] but in the United States the rule is otherwise,[22] and a coroner's inquest is no part of a criminal prosecution, although it may result in the discovery of facts which will lead to one,[23] for the coroner has the power to have arrested and held for trial in the proper court persons who are by the inquest implicated in the crime of murder or manslaughter;[24] but he issues his process for the apprehension of the accused, when not in custody, solely upon the

16. Hawkins *v.* Duncan, 103 Ala. 398, 15 So. 828; Ireland *v.* Arapahoe County, 6 Colo. 280; St. Clair County *v.* Bollman, 15 Ill. App. 279.

In Pennsylvania the jurors are allowed fees (*In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14), but are not entitled to mileage (*In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10). But the witnesses at the inquest are not entitled to either fees or mileage. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

17. Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 17 L. ed. 851.

18. St. Clair County *v.* Bollman, 15 Ill. App. 279; Weaver *v.* County, 2 Lehigh Val. Rep. (Pa.) 408; *In re* Askin, 13 U. C. Q. B. 498.

19. Houts *v.* McCluney, 102 Mo. 13, 14 S. W. 766; Galloway *v.* Shelby County, 7 Lea (Tenn.) 121.

In Michigan the statute provides for the allowance by the circuit court of the expenses of an inquisition upon the dead body of a stranger, not belonging to the state, prior to their payment by the state. Turner *v.* Smith, 101 Mich. 212, 59 N. W. 398.

Carriage hire.—**In Pennsylvania the coroner** is not entitled to an allowance for carriage hire. *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

Constable's fees.—In Pennsylvania no allowance can be made for constable's fees. *In re* Coroner's Inquests, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

Services of a clerk.—In Pennsylvania no allowance can be made for the services of a clerk. Weaver *v.* County, 2 Lehigh Val. Rep. (Pa.) 408.

For stenographers.—In New York the statute authorizes the payment of compensation to the stenographer appointed by the board of coroners for transcripts furnished the district attorney by order of such board. Baker *v.* New York, 56 N. Y. App. Div. 350, 67 N. Y. Suppl. 814. And in Michigan where a stenographer takes the testimony at the request of the county attorney, and his services are necessary to assist the officers, his fees should be allowed. Turner *v.* Smith, 101 Mich. 212, 59 N. W. 398. In Pennsylvania it has been held that no allowance can be made for the services of a stenographer. *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10.

20. Bartholomew County *v.* Bryan, 22 Ind. 397.

In Alabama the surgeon who is called to make a *post mortem* examination shall be allowed a fee of five dollars to be collected out of the estate of the deceased if solvent, and if not solvent, then out of the county treasury. Naftel *v.* Montgomery County, 127 Ala. 563, 29 So. 29.

Where no money or other valuables are found on the body of the deceased, and he leaves an estate of less value than the widow's statutory allowance, her claim is superior to that of the county for the payment of the expenses of the inquest. Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874.

21. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257; Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470.

22. People *v.* Budge, 4 Park. Crim. (N. Y.) 519.

23. Galloway *v.* Shelby County, 7 Lea (Tenn.) 121.

24. Bass *v.* State, 29 Ark. 142; *In re* Collins, 11 Abb. Pr. (N. Y.) 406; People *v.* Beigler, 3 Park. Crim. (N. Y.) 316; Galloway *v.* Shelby County, 7 Lea (Tenn.) 121; Wormeley *v.* Com., 10 Gratt. (Va.) 658.

inquisition, and also his mittimus for sending him to prison to await the action of the grand jury.[25]

Q. Admissibility of Record in Evidence. In a civil action[26] the record of a coroner's inquest upon a dead body is competent, although not conclusive, evidence of the cause of death;[27] but the rule applies only where an inquest has been duly held according to law. A report made by the coroner without holding an inquest stands on another footing and is not admissible in evidence.[28] It has been held that even the verdict of the coroner's jury is not admissible in evidence to establish the cause of death, where such cause is a controverted question.[29] And it has been further held that the verdict of a coroner's jury imputing negligence to a party cannot be received in evidence against him in an action to recover damages for injuries resulting in death.[30]

IX. COMPENSATION AND FEES OF CORONER.

A. At Common Law. At common law coroners were entitled to no compensation for their services; nor was it supposed that they would condescend to accept any, inasmuch as they were required to be knights or men of sufficient estate to be made knights.[31]

B. By Statute. By statute, however, coroners were for a time allowed fees for their attendance;[32] and now, in England, the fee system is abolished by statute and coroners are paid by salary.[33] In the United States this matter is regulated by statute; in some cases, allowing the coroner fees and mileage for his attendance, in others, allowing him a fixed salary in lieu of all fees.[34]

25. People *v.* Collins, 20 How. Pr. (N. Y.) 111.

26. As to admissibility in criminal prosecutions see, generally, HOMICIDE.

27. Grand Lodge I. O. M. A. *v.* Weiting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65. See also Walther *v.* New York Mut. L. Ins. Co., 65 Cal. 417, 4 Pac. 413.

Affecting burden of proof.—In a civil action the finding of a coroner's jury throws the burden of proof upon the party alleging the contrary. Prince of Wales, etc., Assoc. Co. *v.* Palmer, 25 Beav. 605.

In an action by the coroner against the county to recover his fees, the record of the inquest is admissible on the part of the plaintiff. Lancaster County *v.* Mishler, 100 Pa. St. 624, 45 Am. Rep. 402.

28. National Gross Lodge *v.* Jung, 65 Ill. App. 313. In National Union *v.* Thomas, 10 App. Cas. (D. C.) 277, it appeared that the coroner had made an investigation and did not think an inquest necessary, but had recorded his report of the cause of death, and the court held that there was no error in excluding such report.

29. Mutual L. Ins. Co. *v.* Schmidt, 6 Ohio Dec. (Reprint) 901, 8 Am. L. Rec. 630.

To prove suicide.— Thus in a contest with a life-insurance company, it has been held that the verdict of a coroner's jury is not admissible on the part of the defendant to prove that the deceased committed suicide. Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

30. Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15; Lake Shore, etc., R. Co. *v.* Taylor, 46 Ill. App. 506; Chicago, etc., R. Co. *v.* Staff, 46 Ill. App. 499.

31. 1 Bl. Comm. 347; 2 Inst. 216.

And by the Statute of Westminster I, 3 Edw. I, c. 10, they were expressly forbidden to take a reward under pain of a great forfeiture to the king, and this is said to be in affirmance of the common law. 2 Bacon Abr. tit. Coroners (G); 2 Inst. 176.

32. 25 Geo. II, c. 29; 3 Hen. VII, c. I.

This was a matter of much regret to those who would have maintained the ancient dignity of the office. See Sir Edward Coke's Remarks, 2 Inst. 216.

And Blackstone complained that through the culpable neglect of gentlemen of property, this office had been suffered to fall into disrepute, and get into the hands of those who desired to be chosen only for the sake of the perquisites. 1 Bl. Comm. 348.

Under 25 Geo. II, c. 29, § 1, a coroner was not entitled to mileage for returning to his usual place of abode. Rex *v.* Oxfordshire Justices, 2 B. & Ald. 203.

33. 23 & 24 Vict. c. 116. Under this statute the coroner's salary was fixed at not less than the average amount of the fees, mileage, and allowances received during the five preceding years, and is subject to readjustment in like manner from time to time. *Ex p.* Driffield, L. R. 7 Q. B. 207, 20 Wkly. Rep. 240; Baxter *v.* London County Council, 55 J. P. 391, 63 L. T. Rep. N. S. 767.

34. See, generally, the statutory provisions of the several states.

In Georgia the coroner is entitled to ten

C. Inquest Must Have Been Necessary. A coroner is not entitled to fees unless there was reasonable ground for holding the inquest for which they are claimed.[35] And his claim should be rejected where it does not appear that any ground existed for suspecting that the death inquired of was not a natural one,[36] or where it is obviously impossible to ascertain who the deceased was, how long since death ensued, or in what manner it was caused.[37] And the presumption that the coroner acted in good faith and upon sufficient cause is not conclusive, but may be rebutted by evidence that he acted in bad faith and without sufficient cause or reason;[38] but a coroner acts and ought to act upon information, not upon conclusive evidence. The inquest itself is an inquiry into the cause of death, and

dollars for each inquest, unless he has already received more than fifteen hundred dollars during the year in which the inquest is taken. Davis *v.* Bibb County, (Ga. 1902) 42 S. E. 403.

Ind. Rev. Stat. (1881), § 5892, relating to the payment of fees for holding inquests was repealed by the fee and salary act of March 12, 1875, and should not have been included in the revision of 1881. Dubois County *v.* Wertz, 112 Ind. 268, 13 N. E. 874; Pfaff *v.* State, 94 Ind. 529.

In Oregon the statute does not fix the amount of the coroner's compensation; that is left to the discretion of the county court. Cook *v.* Multnomah County, 8 Oreg. 170.

In Pennsylvania the coroner is to be paid the amount of salary assigned him only when the net receipts of his office shall reach that amount. Bleiler *v.* Muldoon, 16 Pa. Super. Ct. 553. There are cases holding that a coroner is not entitled to mileage. *In re* Coroner's Inquests, 1 Pa. Co. Ct. 677; *In re* Coroner's Inquests, 2 Del. Co. (Pa.) 446. But now in some counties at least they are allowed mileage from the court-house to the place of view. Echard *v.* Fayette County, 5 Pa. Dist. 371, 26 Pittsb. Leg. J. N. S. 461; *In re* Bucks County Coroner's Inquisition, 17 Pa. Co. Ct. 553.

A coroner is not entitled to extra fees for taking minutes of the testimony at the inquest (People *v.* Niagara County, 15 N. Y. Suppl. 680, 38 N. Y. St. 964), or for doing the writing required by the statute (Sanford *v.* Lee County, 49 Iowa 148).

Where a coroner is compensated by salary he must account for and pay into the treasury all fees collected by him. People *v.* Myers, 131 N. Y. 644, 30 N. E. 864, 43 N. Y. St. 962 [*affirming* 61 Hun (N. Y.) 500, 16 N. Y. Suppl. 332, 41 N. Y. St. 150]. Where the coroner is compensated by salary a deputy coroner is not entitled to fees. Com. *v.* Grier, 9 Pa. Co. Ct. 444.

Where an act reducing the salary of the coroner of a county provided that it should not affect the salary of the incumbent then in office, and the incumbent died before the expiration of his term, it was held that the exception in favor of the incumbent did not apply to his successor during the remainder of the unexpired term. People *v.* Hale, 27 Cal. 148.

35. Clark County *v.* Calloway, 52 Ark. 361, 12 S. W. 756; *In re* Metzger's Inquest, 8 Pa. Dist. 573; Watson *v.* Beaver County, 9 Pa. Co. Ct. 495, 27 Wkly. Notes Cas. (Pa.) 469; Pfout's Case, 7 Pa. Co. Ct. 265; Burns' Case, 5 Pa. Co. Ct. 549; Rex *v.* Kent Justices, 11 East 229, 10 R. R. 484; Reg. *v.* Gloucestershire, 7 E. & B. 805, 3 Jur. N. S. 980, 27 L. J. M. C. 15, 5 Wkly. Rep. 655, 90 E. C. L. 805. In 1 East P. C. 382, the author states that the court on two several occasions within his own memory blamed the coroners of Norfolk and Anglesea for holding repeated and unnecessary inquests, for the sake of enhancing their fees, on bodies and parts of bodies of persons unknown who were cast upon the seashores, without the smallest probability or suspicion of the deaths having been in any other manner than by the unfortunate perils of the sea.

Under the Missouri statute providing that no coroner's fees shall be allowed unless it appears to the court that the coroner had reasonable cause to believe that the body was that of a person who had come to his death by violence or casualty, such allowance is discretionary with the county court, and for a refusal mandamus will not lie. State *v.* Marshall, 82 Mo. 484. But see Boisliniere *v.* St. Louis County, 32 Mo. 375, where it is said that the coroner is the sole judge of the propriety of holding an inquest.

Where the coroner's fees were not fixed by statute, it was held that the county court might fix the amount at discretion and that the order was not reviewable by the supreme court. Cook *v.* Multnomah County, 8 Oreg. 170.

36. Clark County *v.* Calloway, 52 Ark. 361, 12 S. W. 756.

A coroner has no vested right to hold an inquest over the body of a person found dead in his county, and to charge the county therefor, in a case where the law does not require him to hold the inquest. Fryer *v.* Central R., etc., Co., 50 Ga. 581.

37. So held where the coroner held an inquest over "a lot of bones bleached by time," constituting parts of a human skeleton casually found upon the bank of a creek; and after interring the bones in a "soap box without expense to anyone," claimed his fees from the county. Meads *v.* Dougherty County, 98 Ga. 697, 25 S. E. 915.

38. Lancaster County *v.* Mishler, 100 Pa. St. 624, 45 Am. Rep. 402; *In re* Fayette County Coroner's Returns, 24 Pa. Co. Ct. 498.

it is not necessary that the coroner should be certain of such cause before he ventures to hold his inquest.[39]

D. Inquest Must Have Been Duly Held. The due taking of an inquisition by a coroner is a condition precedent to his being entitled to compensation under a statute allowing him fees.[40] Consequently fees cannot be allowed a coroner for a preliminary examination to determine whether an inquest is necessary, where it is found that an inquest is not necessary;[41] and he is not entitled to any fees for the inspection and examination of the body of a person found dead in his county, unless he impanels a jury, as the word "viewing" means an inquiry by a coroner and a jury.[42]

E. Inquest Upon Several Bodies at One Time. One inquisition may be taken on the bodies of several persons who were killed by the same cause and died at the same time;[43] but in such case the coroner is entitled to mileage as in only one case.[44] It has been held, however, that where a coroner holds separate inquests over the bodies of several persons who were killed by the same cause, and qualifies the jury separately in each case, he is entitled to the regular fees in each case.[45]

X. REMOVAL FROM OFFICE.

By the ancient law of England the lord chancellor had jurisdiction over coroners, and it was his duty to listen to any complaint that might be made against them in the discharge of their duty;[46] and now it is provided by statute that it shall be lawful for the lord chancellor, if he shall think fit, to remove any coroner for inability or misbehavior in his office.[47] Upon an order for the removal of a coroner from office it was the old practice, which still prevails, to issue writs de corona tore exonerando and de coronatore eligendo at the same time.[48]

XI. CORONER'S PHYSICIANS.

By statute a coroner may be authorized to appoint a physician known as

39. Reg. *v.* Stephenson, 13 Q. B. D. 331, 15 Cox C. C. 679, 49 J. P. 486, 53 L. J. M. C. 176, 52 L. T. Rep. N. S. 267, 33 Wkly. Rep. 44.

40. Reg. *v.* Carmarthenshire, 10 Q. B. 796, 11 Jur. 819, 16 L. J. M. C. 167, 2 New Sess. Cas. 679, 59 E. C. L. 796. A coroner was not entitled to fees under 25 Geo. II, c. 29, unless the inquisition was signed by all the jurors. Rex *v.* Norfolk Justices, 1 Nolan 141. A coroner is entitled to his fees from the county for holding an inquest, although the inquest was held in an arsenal which was technically without the coroner's jurisdiction. Allegheny County *v.* McClung, 53 Pa. St. 482.

41. Troutman *v.* Chambers, 9 Pa. Dist. 533; Witmore's Case, 3 Pa. Dist. 699; *In re* Fayette County Coroner's Returns, 24 Pa. Co. Ct. 498; Watson *v.* Beaver County, 9 Pa. Co. Ct. 495, 27 Wkly. Notes Cas. (Pa.) 469; Burnett *v.* Lackawanna County, 9 Pa. Co. Ct. 95.

42. Lancaster County *v.* Holyoke, 37 Nebr. 328, 55 N. W. 950, 21 L. R. A. 394; People *v.* Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276.

43. Reg. *v.* West, 1 Q. B. 826, 1 G. & D. 481, 5 Jur. 484, 2 R. & Can. Cas. 613, 41 E. C. L. 796.

44. *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10; Rambo *v.* Chester County, 1 Chest. Co. Rep. (Pa.) 416; Rex *v.* Warwick, 5 B. & C. 430, 8 D. & R. 147, 4 L. J. K. B. O. S. 206, 29 Rev. Rep. 281, 11 E. C. L. 527. The fact that a coroner on the same day makes two separate examinations of two different dead bodies, or holds an inquest on one body and makes an examination of the other, does not entitle him to anything more than his statutory allowance of five dollars a day for the time actually spent. Kistler *v.* Hennepin County, 65 Minn. 262, 68 N. W. 26.

45. Fayette County *v.* Batton, 108 Pa. St. 591; *In re* Marvin Shaft Inquest, 3 Pa. Co. Ct. 10; Rambo *v.* Chester County, 1 Chest. Co. Rep. (Pa.) 416; Weaver *v.* County, 2 Lehigh Val. Rep. (Pa.) 408. But see Francis *v.* Tioga County, 8 Pa. Co. Ct. 163.

46. Anonymous, 3 Atk. 184, 26 Eng. Reprint 908; Matter of Ward, 3 De G. F. & J. 700, 7 Jur. N. S. 853, 30 L. J. Ch. 775, 4 L. T. Rep. N. S. 458, 9 Wkly. Rep. 843, 64 Eng. Ch. 546; *Ex p.* Pasley, 3 Dr. & War. 34; *Ex p.* Parnell, 1 Jac. & W. 451.

47. 23 & 24 Vict. c. 116, § 6.

48. Matter of Ward, 3 De G. F. & J. 700, 7 Jur. N. S. 853, 30 L. J. Ch. 775, 4 L. T. Rep. N. S. 458, 9 Wkly. Rep. 843, 64 Eng. Ch. 546.

"the coroner's physician" to hold office during his pleasure, or that of a board of coroners, in case there is such.[49]

CORPORAL. Relating to the body; bodily.[1] Also a fine linen cloth, used to cover the sacred elements in the eucharist, or in which the sacrament is put.[2]

CORPORALE SACRAMENTUM. A CORPORAL OATH, *q. v.*[3]

CORPORAL IMBECILITY. See DIVORCE.

CORPORALIS INJURIA NON RECIPIT ÆSTIMATIONEM DE FUTURO. A maxim meaning "A personal injury does not receive satisfaction from a future course of proceeding, [is not left for its satisfaction to a future course of proceeding]."[4]

CORPORAL OATH. A solemn oath, so called from the ancient usage of touching the corporale, or cloth that covered the consecrated elements;[5] an oath taken by the party laying his hand upon the gospels while the oath is administered to him;[6] more generally, a solemn oath.[7] (See, generally, OATHS AND AFFIRMATIONS; PERJURY.)

CORPORAL PUNISHMENT. In its primary and restricted meaning, punishment upon the body, such as whipping, rather than punishment of the body, such as imprisonment.[8] In its enlarged meaning, all kinds of punishment of, or inflicted upon, the body, including imprisonment.[9] (Corporal Punishment: For Fine, see CRIMINAL LAW. Of Apprentice, see APPRENTICES. Of Pupil, see SCHOOLS AND SCHOOL DISTRICTS. Of Seaman, see SEAMEN; SHIPPING.)

CORPORAL TOUCH. Bodily touch; actual physical contact; manual apprehension.[10]

49. By Charter of New York City, § 1769, it is provided that each coroner of said city shall, on assuming office, appoint a qualified physician who shall be a resident in said city, and shall be known as a "coroner's physician." Any vacancy in the office of coroner's physician shall be filled by the board of coroners. The board of coroners, for cause, may remove the physician appointed by them. This is adopted from the N. Y. Laws (1878), c. 256, § 3. Under this statute it has been held that the tenure of a coroner's physician continues subject to removal during the term. People *v.* Zucca, 36 Misc. (N. Y.) 260, 73 N. Y. Suppl. 311.

But one coroner cannot remove an incumbent officer, although he appointed him; that must be done by the board of coroners. People *v.* Zucca, 36 Misc. (N. Y.) 260, 73 N. Y. Suppl. 311.

1. Abbott L. Dict.

2. Webster Dict. [*quoted* in Jackson *v.* State, 1 Ind. 184, 185].

3. Burrill L. Dict.

4. Black L. Dict. [*citing* Broom Leg. Max.].

5. Webster Dict. [*quoted* in Jackson *v.* State, 1 Ind. 184, 185].

6. Abbott L. Dict.

7. Black L. Dict.

"'Corporal oath' and 'solemn oath' are equivalent, and either is sustained by proof of swearing with uplifted hands." 2 Wharton Crim. L. §§ 2205–2206 [*quoted* in Com. *v.* Jarboe, 89 Ky. 143, 146, 12 S. W. 138, 11 Ky. L. Rep. 344]. "However it may have been in somewhat olden time, in Europe, we think that now, at least, in our state, 'corporal oath' and 'solemn oath' are used synonymously, and that an oath taken with the uplifted hand, may be properly described by either term." Jackson *v.* State, 1 Ind. 184, 185 [*quoted* in Com. *v.* Jarboe, 89 Ky. 143, 146, 12 S. W. 138, 11 Ky. L. Rep. 344]. See also Com. *v.* Jarboe, 89 Ky. 143, 145, 12 S. W. 138, 11 Ky. L. Rep. 344, where it is said: "What is termed a corporal oath was anciently administered by touching the cloth that covered the consecrated elements, or, as some suppose, from the fact that the party taking it was required to lay his hand upon the Bible; but a corporal oath, as latterly understood, means merely a solemn oath, although the name is derived from the ancient usage just mentioned."

8. Ritchey *v.* People, 22 Colo. 251, 255, 43 Pac. 1026, interpreting the term as used in a Colorado statute.

"Corporal punishment in the public schools or in the family is usually understood to imply some process by which pain is inflicted upon the body of the offender." Ritchey *v.* People, 22 Colo. 251, 255, 43 Pac. 1026.

9. Ritchey *v.* People, 22 Colo. 251, 255, 43 Pac. 1026. See also People *v.* Winchell, 7 Cow. (N. Y.) 525, note *b*, where it is said: "Corporal punishment seems to mean any kind of corporal privation or suffering, which is inflicted by the sentence, directly by way of penalty for the offence; and in this sense, of course, includes imprisonment, as well as of the pillory. It is set in contradistinction to a fine; which latter may, in the discretion of the court, be awarded in the absence of the defendant."

10. Black L. Dict.

CORPORATE. Belonging to a corporation, as a corporate name; incorporated, as a corporate body.[11] (See, generally, CORPORATIONS.)

CORPORATE PAPER. COMPANY'S PAPER,[12] *q. v.*

CORPORATION COURT. See COURTS.

11. Burrill L. Dict.

12. Taylor *v.* Coon, 79 Wis. 76, 83, 48 N. W. 123, where the terms "company's paper" and "corporate paper" were used synonymously in an agreement between certain stockholders of a company.